UPPER VALLEY WASTE MANAGEMENT AGENCY

**AGREEMENT NO. 2018-\_\_**

**AMENDED AND RESTATED**

**SOLID WASTE HANDLING**

**FRANCHISE AGREEMENT**

 **THIS AMENDED AND RESTATED SOLID WASTE HANDLING FRANCHISE AGREEMENT, UPPER VALLEY WASTE MANAGEMENT AGENCY AGREEMENT NO. 2018-\_\_** (“AGREEMENT”), which amends, restates, replaces, and supersedes in its entirety Upper Valley Waste Management Agency Agreement #95-09, as previously amended**,** is made and entered into this day of , 2018, by and between the UPPER VALLEY WASTE MANAGEMENT AGENCY, a joint powers authority organized under the Joint Exercise of Powers Act, California Government Code sections 6500 et seq., (“AGENCY”) and UPPER VALLEY DISPOSAL SERVICE, a California corporation whose street address is 1285 Whitehall Lane, St. Helena, California 94574 and whose mailing address is P.O. Box 382, St. Helena, California 94574 (“CONTRACTOR”). AGENCY and CONTRACTOR shall be referred to from time to time in this AGREEMENT individually as “Party” and collectively as “Parties.”

 **WHEREAS**, by entering into a Joint Powers Formation Agreement (Napa County Agreement #3265) dated September 29, 1992 (the "JPA AGREEMENT”), the governing bodies of Napa County, Town of Yountville, and Cities of Calistoga and St. Helena ("MEMBERS") formed the AGENCY as a joint powers authority for the purpose of providing economical coordination and provision of regional solid waste management services within the northern portion of Napa County in an area defined as the “SERVICE AREA” by Exhibit A, which is attached hereto and incorporated herein by this reference; and

 **WHEREAS**, through the JPA AGREEMENT, as amended, the MEMBERS empowered the AGENCY to act as a consolidated franchisor for solid waste handling services throughout the SERVICE AREA and to set rates for those solid waste handling services; and

 **WHEREAS**, on or about September 25, 1995, the AGENCY and CONTRACTOR entered into a Solid Waste Handling Franchise Agreement, AGENCY Agreement #95-09 (the “Original Agreement”), to set forth the terms, conditions and requirements for provision of solid waste handling and collection services by CONTRACTOR; and

 **WHEREAS,** the Original Agreement established a methodology for the setting by the AGENCY of rates to be charged by CONTRACTOR to customers for solid waste collection and handling services, which methodology was designed to compensate CONTRACTOR fully for the costs it incurs, to reward efficiencies achieved by CONTRACTOR, and to compensate CONTRACTOR with a reasonable margin of profit for its provision of such services; and

 **WHEREAS**, the Original Agreement was amended nine times to make modifications with respect to, *inter alia*, provisions relating to the rate-setting methodology, the duration and term of the Original Agreement, the implementation of a Construction and Demolition Debris (“C&D”) recycling program, the schedule of actual rates imposed, and the cost sharing terms and process for moving the CONTRACTOR’s C&D recycling facility at the Clover Flat Landfill to the gatehouse area of the Landfill facility, which prior amendments were reflected cumulatively in the ninth and most recent amendment to the Original Agreement; and

 **WHEREAS**, the Parties desire to amend, restate and replace the Original Agreement, as amended, in its entirety, in order to update its terms and provisions in a way that captures current best industry practices, terminology, and legal and regulatory restrictions and requirements; and

 **WHEREAS**, this AGREEMENT is negotiated and executed by the Parties hereto pursuant to the authority conferred on local agencies by Public Resources Code sections 40059 et seq., to provide for solid waste handling services on an exclusive or non-exclusive basis and with or without competitive bidding, which authority was delegated to the AGENCY by the MEMBERS under the JPA AGREEMENT pursuant to Government Code sections 6500 et seq.,

 **TERMS**

 **NOW, THEREFORE,** based on the foregoing Recitals, and for good and valuable consideration, the adequacy of which is hereby acknowledged, the Parties agree as follows:

 1. The foregoing Recitals are true, correct, and incorporated herein by this reference.

 2. Except as otherwise specifically provided in this AGREEMENT, AGENCY grants CONTRACTOR an exclusive franchise to provide, and CONTRACTOR agrees to provide, all solid waste handling services required by the AGENCY within the SERVICE AREA for all SOLID WASTE (as defined and described in Exhibit A hereto) in a manner consistent with best practices in the solid waste collection and handling industry, and as required by and subject to the terms, conditions, restrictions and requirements set forth below and in Exhibit A, the Rate Methodology provisions of Exhibit B and its attachments, and the most recent Rate Resolution adopted by the AGENCY Board of Directors which is to be deemed incorporated into this AGREEMENT as Exhibit C, all of which exhibits and attachments are attached hereto and incorporated herein by this reference. CONTRACTOR’S obligations under this AGREEMENT include but are not limited to the obligations to: (a) perform those actions and fulfill the obligations described by Exhibit D, which is attached hereto and incorporated herein by this reference, which if not performed or fulfilled by CONTRACTOR constitute Defaults that trigger the AGENCY’s right to impose Liquidated Damages; and (b) refrain from, and/or take necessary steps to avoid, the actions, events and occurrences listed in Section 6.3(g) of Exhibit A hereto, which would trigger the AGENCY’s right to terminate this AGREEMENT.

 3. This AGREEMENT amends, restates, replaces and supersedes in its entirety the Original Agreement and all nine amendments thereto, as well as any and all franchise agreements that may have been entered into between any of the MEMBERS and CONTRACTOR for solid waste handling services. However, the Original Agreement as amended remains binding and effective for purposes of determining the Parties’ rights, obligations, performance, and compliance with its terms and provisions, as to all applicable periods of time prior to execution of this AGREEMENT.

 **IN WITNESS WHEREOF**, this AGREEMENT is executed by the Parties hereto as of the date first above written.

**UPPER VALLEY WASTE UPPER VALLEY DISPOSAL SERVICE**

**MANAGEMENT AGENCY**

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| BY: |  |  | BY: |  |
| MARGIE MOHLER, Chair of the Board of Directors  |  | Title: |
|  |  | BY: |  |
| **"AGENCY"** |  | Title:**“CONTRACTOR"**APPROVED AS TO FORM: |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| BY: |  |  | BY: |  |
| ATTEST:STEVEN LEDERER, Agency Manager |  | JEFFREY M. RICHARD, Agency Legal Counsel |

**EXHIBIT A**

**TERMS, CONDITIONS AND REQUIREMENTS**

**APPLICABLE TO CONTRACTOR’S**

**SOLID WASTE HANDLING SERVICES**

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**SECTION 1. DEFINITIONS**

The following Definitions apply to the entire AGREEMENT, including all Exhibits:

"ACT" means the California Integrated Waste Management Act of 1989 (California Public Resources Code Sections 40000 et seq.) and all regulations adopted under that legislation, as that legislation and those regulations may be amended from time to time.

"AGREEMENT" means the Upper Valley Waste Management Agreement No. 2018-\_\_ and its exhibits and amendments, as it may be amended from time to time.

"AGENCY" means the Upper Valley Waste Management Agency, a joint exercise of powers authority created by the MEMBERS.

“AGENCY Approved CDP Depreciable Assets” means only those assets approved by the AGENCY, purchased by the CONTRACTOR and valued at up to $964,285.

“C&D” means construction and demolition debris.

“CHANGE IN LAW” means the following events or conditions which have a substantial, material and adverse effect on the performance by the Parties of their respective obligations under the AGREEMENT (except for performance of remittance obligations):

1. Enactment, adoption, promulgation, issuance, modification, or written change in administrative or judicial interpretation of any applicable law on or after the effective date of the AGREEMENT; or
2. Any order or judgment of any judicial or governmental officer or body, on or after the effective date of the AGREEMENT, to the extent such order or judgment is not the result of any willful or negligent action, error, omission, or lack of reasonable diligence on the part of the Party who is asserting the order or judgment as a CHANGE IN LAW.

“CHANGE IN SCOPE” means a significant change in the type or level of SOLID WASTE HANDLING SERVICES for which CONTRACTOR may be compensated as provided in Section 8.2, including, but not limited to, frequency of collections, means of collection and transportation, delivery point, level of service, , nature, location and extent of providing SOLID WASTE HANDLING SERVICES.

“CLEAR AND CONVINCING EVIDENCE” means evidence of such convincing force that demonstrates, in contrast to the opposing evidence, a high probability of truth of the facts for which it is offered as proof. Such evidence requires a higher standard of proof than proof by a preponderance of the evidence.

“Construction and Demolition Debris Program” or “CDP” means the debris recycling program located at CFL as described in Section 18 of this Exhibit to the AGREEMENT.

“CLOVER FLAT LANDFILL” or “CFL” means generally the business and location of the Clover Flat Landfill, owned and operated by a third party, Clover Flat Land Fill Inc., a California corporation, which is used by CONTRACTOR for disposal of its waste and for certain other recycling and diversion activities.

"CONTRACTOR" means Upper Valley Disposal Service, a California corporation.

"CUSTOMER" or "CUSTOMERS" means any or all accounts of CONTRACTOR for provision of SOLID WASTE HANDLING SERVICES, including all residential, commercial and industrial accounts.

"DIVERSION" means any technique for diverting SOLID WASTE from landfill disposal, including source reduction, recycling, reuse, reprocessing, and composting.

"DIVERTIBLE MATERIAL" or “DIVERTIBLE MATERIALS” means discarded material processed for disposition other than disposal at a landfill. DIVERTIBLE MATERIALS, as listed herein, may change from time to time with the approval of AGENCY by resolution.

"FACILITY" or "FACILITIES" means the land and all those improvements necessary to carry out the SOLID WASTE HANDLING SERVICES described in this Exhibit A to the AGREEMENT, excluding the LANDFILL which is subject to a separate franchise agreement between the AGENCY and Clover Flat Land Fill Inc., a California corporation.

“FRANCHISE FEES” means any and all fees payable by CONTRACTOR to AGENCY or any Member of the AGENCY for the franchise granted under the Agreement.

"HOUSEHOLD HAZARDOUS WASTE ELEMENT" or "HHWE" means the element prepared by a jurisdiction pursuant to the ACT, which identifies a program for the safe collection, recycling, treatment and disposal of hazardous wastes which are generated by households within the jurisdiction and which should be separated from the SOLID WASTE stream.

“IOCR” or “Intentionally Over Collected Revenues” means ninety-nine per cent (99%) of the amount of CONTRACTOR’s projected revenue in the Rate Methodology that exceeds the revenue that would otherwise be allowable under the Rate Methodology to CONTRACTOR.

"JPA AGREEMENT" means Napa County Agreement No. 3265, as amended.

"LANDFILL" means the Clover Flat Landfill, including any accessory FACILITIES related thereto.

“LANDFILL FRANCHISE AGREEMENT” means the separate agreement entered into between the AGENCY and Clover Flat Land Fill Inc., a California corporation, AGENCY Agreement #95-06, as amended.

The “LANDFILL OWNER” means Clover Flat Land Fill Inc., a California corporation.

“LDN” means a Liquidated Damages Notice.

“LDs” mean Liquidated Damages.

"MANAGER" means the person, entity, or firm hired or contracted by AGENCY Board of Directors as AGENCY's administrative officer to manage the affairs of the AGENCY and to carry out the policies of the AGENCY.

"MEMBER" or “MEMBERS” means and refers to the governing bodies of the public entities that are signatories to the JPA AGREEMENT.

"ZONE THREE" means that area defined as NAPA COUNTY SOLID WASTE SERVICE ZONE THREE in the JPA AGREEMENT, as amended, consisting of the area legally described by Exhibit “E” to the AGREEMENT, and depicted by the map attached as Exhibit “G” to the AGREEMENT.

"ZONE FOUR" means that area defined as NAPA COUNTY SOLID WASTE SERVICE ZONE FOUR in the JPA AGREEMENT, as amended, consisting of the area legally described by Exhibit “F” to the AGREEMENT, and depicted by the map attached as Exhibit “H” to the AGREEMENT.

"NON-DISPOSAL FACILITY ELEMENT" or "NDFE" means the element prepared by a jurisdiction pursuant to the ACT that describes new facilities and the expansion of existing facilities, which will be needed to implement the jurisdiction's SRRE.

“ORGANICS” means and includes food waste, green waste and any other materials suitable for composting.

“RATE METHODOLOGY” means the system and terms applicable to the annual process of setting Rates that CONTRACTOR will apply and charge to customers for its SOLID WASTE HANDLING SERVICES, as set forth in Exhibit B to the AGREEMENT.

"SERVICE AREA" means those incorporated areas of the Cities of Calistoga, St. Helena, the Town of Yountville, and those unincorporated areas within ZONE THREE and ZONE FOUR.

"SOLID WASTE" means the type of materials commonly collected, including putrescible and nonputrescible solid, semisolid and liquid wastes, including garbage, trash, refuse, paper rubbish, ashes, industrial wastes, C&D, abandoned vehicles and parts thereof, discarded home and industrial appliances, manure, vegetable or animal solid and semisolid wastes, and other discarded solid and semisolid wastes. SOLID WASTE also includes source separated recyclable materials and Organics, and other DIVERTIBLE MATERIALS intended for collection as part of the AGREEMENT. SOLID WASTE does not include any wastes defined as "hazardous wastes" or "medical wastes" under federal or state laws or regulations.

"SOLID WASTE HANDLING SERVICE" or "SOLID WASTE HANDLING SERVICES" means any and all of those services to be provided by CONTRACTOR under the AGREEMENT, including, but not limited to, the obligation to collect, transport, segregate, sort, handle, and dispose of and/or DIVERT (as and if appropriate for the type of SOLID WASTE collected) all SOLID WASTE generated by CUSTOMERS in the SERVICE AREA, including, but not limited to, the provision of any and all equipment, vehicles and FACILITIES owned, operated or used by CONTRACTOR for the collection, transportation, processing, storage, transfer and/or disposal of SOLID WASTE generated in the SERVICE AREA.

"SOURCE REDUCTION AND RECYCLING ELEMENT" or "SRRE" means the element prepared by a jurisdiction pursuant to the ACT, which includes a program for management of SOLID WASTE generated within the jurisdiction, consistent with the California Integrated Waste Management Board's waste management hierarchy.

"WASTE" means those materials that are collected for disposal at the LANDFILL with no further processing intended other than burial and/or natural decomposition.

“WORKING DAY” means a day when the office of the AGENCY MANAGER is open for business. Weekends, Napa County holidays as well as days when the MANAGER’s office is closed for regular business due to a declared or posted emergency do not constitute Working Days.

**SECTION 2. GENERAL SCOPE AND PURPOSE OF AGREEMENT AND SERVICES PROVIDED**

2.1 General. While the franchise granted in the AGREEMENT to CONTRACTOR to provide SOLID WASTE HANDLING SERVICES is exclusive as to CONTRACTOR’S right to provide such SOLID WASTE HANDLING SERVICES within the SERVICE AREA, subject to Section 2.2 below, nothing in the AGREEMENT shall affect or limit any of the following: (a) the right of any person to donate to a charitable organization qualifying under Section 501(c)(3) of the Internal Revenue Code of 1986, as amended, or sell for a net amount to CONTRACTOR or to any other recycling contractor lawfully doing business within the SERVICE AREA in lieu of depositing such commodity in an authorized location for receipt by CONTRACTOR under the AGREEMENT, any DIVERTIBLE MATERIAL or other valuable commodity generated by such person in the SERVICE AREA; (b) the right of any person to self-haul the WASTE generated by such person in the SERVICE AREA to a licensed transfer station or landfill; (c) the right of any gardening, landscaping or tree trimming contractor lawfully doing business in the SERVICE AREA to transport green waste generated in the SERVICE AREA, as an incidental part of a comprehensive service offered by that contractor rather than as a hauling service, and for no additional or separate fee, to a licensed processing, recycling or materials recovery facility; or (d) the right of any construction or demolition contractor lawfully doing business in the SERVICE AREA to transport C&D generated in the SERVICE AREA, as an incidental part of a comprehensive service offered by that contractor rather than as a hauling service, and for no additional or separate fee, to a licensed processing, recycling or materials recovery facility. CONTRACTOR hereby agrees, for and during the term of the AGREEMENT, to furnish all labor, equipment, FACILITIES and services necessary to provide those SOLID WASTE HANDLING SERVICES described herein, at the times, in the manner as stated herein, and at the Rates set forth in Exhibit C, developed in accordance with the methodologies set forth in Exhibit B.

2.2 Limitations; Enforcement.

1. Limitations. Any person or contractor collecting, handling, transporting and disposing of and/or DIVERTING any materials pursuant to Section 2.1(a), (b), (c) or (d) above shall do so himself, herself or itself (or through his, her or its employees), and shall use only his, her or its own equipment and vehicles (including a pickup truck, trailer or dump truck, but not a debris box).
2. Enforcement. To the extent permitted by applicable law, AGENCY shall take such steps as are reasonably necessary to work with the Local Enforcement Agency (LEA) to protect CONTRACTOR's exclusive rights to provide SOLID WASTE HANDLING SERVICES in accordance with the terms hereof; provided, however, that nothing herein shall prevent CONTRACTOR from taking any lawful action to protect its rights hereunder. AGENCY’s steps may include amending applicable ordinances or adopting rules and regulations to provide for notices, graduated financial penalties and confiscation of equipment for persons or contractors that violate CONTRACTOR’s exclusive rights under the Agreement.

2.3 Individual MEMBER services. MEMBERS may obtain the following additional services from CONTRACTOR:

1. Service as a consideration of granting this franchise. CONTRACTOR previously provided each MEMBER with an agreed-upon credit for, and allocation of SOLID WASTE HANDLING SERVICES over, the term of the AGREEMENT. Current credit balances for each MEMBER were as follows as of December 31, 2016 (subject to increases per Section 4 below pertaining to additional services to be provided by CONTRACTOR to MEMBERS for each fiscal year by which the AGREEMENT is automatically extended):

 Calistoga $ 49,134.59

 Napa County 63,232.82

 St. Helena 50,068.51

 Yountville 22,836.63

 Total $ 185,272.55

 A maximum of ten thousand dollars ($10,000) of these services shall be available for use by each MEMBER during each fiscal year, unless a larger amount is mutually agreed to by CONTRACTOR and the MEMBER.

 The cost to CONTRACTOR of these services will be considered Non-Recoverable expenses for purposes of the Rate Methodology.

 (b) Additional Services. Any of the MEMBER(S) may individually or jointly enter into contracts having maximum terms of three (3) years with CONTRACTOR for additional SOLID WASTE HANDLING SERVICES not covered by the AGREEMENT or any other contract between AGENCY and CONTRACTOR, as long as the MEMBER(S) and CONTRACTOR agree that AGENCY shall set the Rates to be charged for such additional services, in order to maintain rate uniformity and consistency throughout the SERVICE AREA. The MEMBER shall initiate the rate setting process with the AGENCY, which shall be coordinated with the regular rate setting process.

**SECTION 3. RATES**

3.1 Rate Setting.

 CONTRACTOR shall submit a rate application to the AGENCY on an annual basis by May 1 of each year, and shall propose Rates each year according to the provisions of this Section below and in accordance with the Rate Methodology set forth in Exhibit B to the AGREEMENT. Each year, no later than June 30, the AGENCY shall process, evaluate, and consider for adoption and/or modification the proposed Rates set forth in CONTRACTOR’s application, pursuant to the Rate Methodology. AGENCY shall establish and may unilaterally amend at any time by resolution (“Rate Resolution”) all Rates, tolls, other fees, rentals (including toter rentals) and other charges for those SOLID WASTE HANDLING SERVICES provided by CONTRACTOR as described herein, but only in accordance with the Rate Methodology. The annual Rate Resolutions adopted by the AGENCY Board of Directors, on an ongoing basis, shall be deemed to be automatically incorporated into the AGREEMENT as modifications and/or updates to Exhibit C, with the currently-effective Rates being those specified in the Rate Resolution bearing the latest date. This automatic incorporation into, and amendment of Exhibit C to the AGREEMENT each year, shall occur and be effective without the need for any express agreement or approval of CONTRACTOR and is an exception to the general rule and requirement in Section 5.4 below of a signed written agreement in order to modify or amend the AGREEMENT. No such changes in Rates by the AGENCY shall be effective until a certified copy of the Rate Resolution adopting such changes has been delivered or otherwise sent to CONTRACTOR as provided in Section 5.9 (Notices). Rates may also be adjusted in accordance with Article VI of Exhibit B to the AGREEMENT.

3.2 Concurrent Changes in Customer Rates. All new or revised rate(s), tolls, tipping fees, rentals and other fees and charges set in accordance with Section 3.1 shall be passed on to CUSTOMERS through a corresponding addition or revision in the Rates charged by CONTRACTOR to those CUSTOMERS receiving the affected SOLID WASTE HANDLING SERVICES, and such new or revised rate(s), tolls, tipping fees, rentals and other fees and charges shall be effective concurrently with the effective date of the changes approved under Section 3.1.

3.3 Increases in Expenses Resulting from the AGREEMENT. In the AGREEMENT there are Paragraphs requiring CONTRACTOR to perform services, acquire property or equipment, or purchase services at the expense of CONTRACTOR. Reimbursement of all such additional expenses shall be evaluated according to the provisions of the Rate Methodology. In the case of conflict between the AGREEMENT and the Rate Methodology, the Rate Methodology shall prevail over the AGREEMENT.

**SECTION 4. TERM**

The term of the Original Agreement commenced on September 25, 1995 and the end date of the Original Agreement was extended by the ninth amendment to the Original Agreement from July 1, 2025 up to and including July 1, 2031. That term and end date are hereby incorporated and made applicable to the AGREEMENT. On July 1 of each year, beginning on July 1, 2018, the remaining term of the AGREEMENT shall be automatically extended by an additional one fiscal year, so that the term of the AGREEMENT shall be extended each year by one year beyond the then existing expiration date of the AGREEMENT without further action or agreement of the Parties. This automatic extension and amendment of the end date and term of the AGREEMENT is an exception to the general rule and requirement in Section 5.4 below of a signed written agreement to modify or amend the AGREEMENT. For each fiscal year the AGREEMENT is extended (including the initial extension of 6 years that was effected by the ninth amendment to the Original Agreement), the CONTRACTOR shall provide each MEMBER an additional $5,000 per fiscal year of SOLID WASTE HANDLING SERVICES. Each fiscal year that additional SOLID WASTE HANDLING SERVICES are to be provided as per the previous sentence, the $5,000 per year value of such additional services to be provided by CONTRACTOR to each MEMBER shall be subject to increase or decrease by the same percentage as the change in CONTRACTOR Rates as adopted by the AGENCY Board of Directors for that year.

This provision for automatic, rolling, one-year extensions of the AGREEMENT’s term shall be subject to either Party’s right to give ninety (90) days’ written notice to the other Party that the Party giving the notice has elected either that (a) the automatic one-year extension shall not occur for that particular year, or (b) that this provision for rolling, automatic one-year extensions of the AGREEMENT’s term shall terminate and be of no further force and effect, in which case the AGREEMENT shall terminate upon the expiration of the then-remaining term of the AGREEMENT, as extended pursuant to this provision prior to the provision’s termination.

Should the AGENCY choose to terminate the provision for automatic one-year extensions as provided for above, the AGENCY retains the right to extend the AGREEMENT for succeeding ten (10) year terms by written notice to the CONTRACTOR at least thirty-six (36) months prior to the termination date. Regardless of whether the rolling one-year extensions are terminated or not, the termination provisions and requirements set forth in Section 6 below shall remain in force.

**SECTION 5. GENERAL PROVISIONS**

5.1 Independent Contractor. CONTRACTOR shall perform its obligations under the AGREEMENT as an independent contractor. CONTRACTOR and the officers, agents and employees of CONTRACTOR are not, and shall not be deemed, AGENCY employees for any purpose, including, but not limited to, workers' compensation. CONTRACTOR shall, at its own risk and expense, determine the method and manner by which duties imposed on CONTRACTOR by the AGREEMENT shall be performed; provided, however that the AGENCY may monitor the work performed by CONTRACTOR. CONTRACTOR shall be entitled to none of the benefits accorded to an AGENCY employee. The AGENCY shall not deduct or withhold any amounts whatsoever from the compensation paid to CONTRACTOR, including, but not limited to, amounts required to be withheld for state and federal taxes. CONTRACTOR alone shall be responsible for all such payments.

5.2 Specific Performance. Because the services to be performed by CONTRACTOR under the terms of the AGREEMENT relate to preservation of the health and safety of persons residing, working, and visiting Napa County and, if not provided in a timely and proper manner, could result in immediate hazard to such persons and to the economy of Napa County as a whole, which cannot be reasonably or adequately compensated in damages in an action of law, in addition to any other rights or remedies which AGENCY may possess, shall be entitled to injunctive and other equitable relief through arbitration under Section 7 herein to prevent a breach of the AGREEMENT by CONTRACTOR.

5.3 No Waiver. The waiver by either Party of any breach or violation of any requirement of the AGREEMENT shall not be deemed to be a waiver of any such breach in the future, or of the breach of any other requirement of the AGREEMENT.

5.4 Amendment. Except as specifically provided herein, the AGREEMENT may be modified or amended only in writing and with the prior written consent of both Parties.

5.5 Interpretation. The headings used herein are for reference. The terms of the AGREEMENT are set out in the text under the headings. The AGREEMENT shall be governed by the law of the State of California.

5.6 Severability. If any provision of the AGREEMENT, or any portion thereof, is found by any court of competent jurisdiction to be unenforceable or invalid for any reason, such provision shall be severable and shall not in any way impair the enforceability of any other provision of the AGREEMENT.

5.7 Law Compliance. In providing the SOLID WASTE HANDLING SERVICES required by the AGREEMENT, CONTRACTOR shall observe and comply with all applicable federal, state and local laws, regulations and codes regarding the provision of the SOLID WASTE HANDLING SERVICES described herein, as such may be amended from time to time, and shall adhere to best industry practices for SOLID WASTE HANDLING SERVICES.

5.8 [Reserved]

5.9 Notices. All notices which CONTRACTOR or AGENCY may wish to give in connection with the AGREEMENT shall be in writing and shall be served by personal delivery or email to the Party’s then-current email address in use, during usual business hours at the principal office of CONTRACTOR or AGENCY, to an officer or person apparently in charge of that office, or by depositing the same in the United States mail, postage prepaid, and addressed to CONTRACTOR or AGENCY at its principal office, or to such other address as AGENCY or CONTRACTOR may designate from time to time by written notice given to CONTRACTOR in the manner specified in this Section. Service of notice pursuant to this Section shall be deemed complete on the day of service by personal delivery or email to the Party’s then-current email address in use (if received during normal business hours, or the next business day if received after normal business hours), or three (3) days after mailing if deposited in the United States mail. Until changed by written notice to AGENCY and CONTRACTOR, notice shall be delivered as follows:

 **AGENCY:** Upper Valley Waste Management Agency­­­

 c/o Public Works Department

 Attn: AGENCY MANAGER

 1195 Third Street, Room 101

 Napa, CA 94559

 **CONTRACTOR:** Upper Valley Disposal Service

 Attn: General Manager

 1285 Whitehall Lane

 P.O. Box 382

 St. Helena, CA 94574

5.10 Indemnification. CONTRACTOR, for itself, and its successors in interest, if any, agrees to indemnify, defend, with counsel reasonably acceptable to AGENCY, and hold harmless AGENCY, its officers, employees, and agents, from claim, suit, liability including, without limitation, those for personal injury (including death) or damage to property, or action made or brought against AGENCY, its officers, employees, and agents, for any injuries or damages resulting from or caused by the acts of CONTRACTOR, or its officers, employees, and agents, in the performance of any work and the rendering of any service provided for under the AGREEMENT. Indemnification under this Section shall include all attorneys' fees and other expenses reasonably incurred by AGENCY, its officers, employees, and agents, in the course of the defense of any such claim, suit, or action.

5.11 Entirety of AGREEMENT. With the exception of the LANDFILL FRANCHISE AGREEMENT, which is cross-referenced by various provisions of the AGREEMENT, the AGREEMENT constitutes the entire agreement between the Parties relating to the subject of the AGREEMENT and supersedes the Original Agreement and all previous agreements, amendments, promises, representations, understandings and negotiations, whether written or oral, among the Parties with respect to the subject matter hereof.

5.12 Assignments. A material consideration of the AGREEMENT for the AGENCY is the past record, experience, and local knowledge of the needs of the SERVICE AREA by CONTRACTOR and its present owners; therefore, CONTRACTOR shall not assign any interest in the AGREEMENT, allow any sale or assignment of a controlling interest in CONTRACTOR, or subcontract any of the services CONTRACTOR is to perform hereunder without the prior written consent of AGENCY. AGENCY may not unreasonably withhold its consent to such an assignment of the AGREEMENT, sale or assignment of a controlling interest in CONTRACTOR, or subcontract, as long as the assignee, new owner(s) of the CONTRACTOR or subcontractor is or are possessed of similar or greater experience and financial responsibility in comparison to CONTRACTOR and its present owners.

5.13 Payment of Subcontractors and Agents. Unless a reasonable dispute exists concerning payment, CONTRACTOR shall promptly pay all subcontractors, suppliers, or laborers engaged for purposes of the AGREEMENT in accordance with the contract or agreement between that person and CONTRACTOR

5.14 Taxes and Fees. CONTRACTOR shall be responsible and liable for payment of all federal, state and local taxes and fees, and surcharges of every kind, that apply to any and all persons, property, income, equipment, materials, supplies, structures, or activities that are involved in the performance of the AGREEMENT, including, but not limited to, any income taxes, real property, excise, sales and use taxes, surcharges imposed under the ACT by the AGENCY, business and occupation taxes and fees that arise in connection with the AGREEMENT. Nothing in this Section 5.14 shall limit the right of CONTRACTOR to adjust the amount of Intentionally Over Collected Revenues (IOCR) as provided in Section 18.3(m) of this Exhibit A to the AGREEMENT.

5.15 Non-Discrimination. CONTRACTOR and its officers, employees, agents and subcontractors shall neither deny the benefits of the AGREEMENT to any person, nor discriminate unlawfully against any employee or applicant for employment, on the basis of race, religion, color, national origin, breastfeeding, pregnancy, childbirth, ancestry, genetic characteristics, medical condition, veteran status, political affiliation, marital status, age, sex, sexual orientation, gender identity, gender expression, or physical, mental or emotional handicap or disability. CONTRACTOR shall ensure that the evaluation and treatment of employees and applicants for employment are free of such discrimination.

5.16 Fair Employment and Housing Act. CONTRACTOR shall comply with the provisions of the Fair Employment and Housing Act (Government Code Section 12900, et seq.), the regulations promulgated thereunder (Title 2, California Code of Regulations, Section 7285.0, et seq.), the provisions of Article 9.5, Chapter 1, Part 1, Division 3, Title 2 of the Government Code (Sections 11135-11139.5) and any state or local regulations adopted to implement any of the foregoing, as such may be amended from time to time.

**SECTION 6. SECURITY FOR PERFORMANCE; PERFORMANCE REVIEWS; DEFAULTS; AND TERMINATION**

6.1 Performance Bond.

 CONTRACTOR shall obtain, maintain, and provide to the AGENCY proof of obtaining a performance bond or an acceptable equivalent form of security as specified below (“Security for Performance”) – throughout the term of the AGREEMENT, and at CONTRACTOR’S sole expense – in the amount of not less than one-hundred thousand dollars ($100,000), securing full and faithful performance by CONTRACTOR of all of its obligations under the AGREEMENT, including payment of any and all liquidated damages assessed by AGENCY for any violations or breaches by CONTRCTOR of the AGREEMENT under Section 6.9 of this Exhibit A. The form of said Security for Performance shall be subject to the prior approval of AGENCY, which approval shall not be unreasonably withheld, and may be in the form of a performance bond issued by a corporate surety entitled to do business in the State of California, an irrevocable letter of credit, or a cash deposit established in a local bank in an interest-bearing account payable to the order of AGENCY as trustee for CONTRACTOR (but with all interest to be distributed to the CONTRACTOR). Said Security for Performance shall remain in force throughout the effective period and life of the AGREEMENT. If the Security for Performance is subject to lapse or expiration, CONTRACTOR shall renew it annually. Evidence of each renewal shall be furnished to AGENCY prior to the expiration of the effective period of the Security for Performance then in effect. The AGENCY’s recourse to the Performance Bond or other Security for Performance given by CONTRACTOR is not the exclusive remedy and is cumulative of AGENCY’s other remedies.

6.2 Performance Reviews.

 The AGENCY may, in its sole discretion, elect to conduct or cause to be conducted a Performance Review (“Review”) of the CONTRACTOR’s performance and services under the AGREEMENT no more frequently than once every five (5) years during the Term of the AGREEMENT, upon giving CONTRACTOR at least ninety (90) days’ written Notice to CONTRACTOR of the AGENCY’s election to do so.

1. Handling of Reviews and Responsibility for Costs of Reviews.
2. Reviews shall be performed by the AGENCY’s MANAGER and/or the Napa County Auditor-Controller (“Auditor”) and their staff, and/or by a qualified firm under contract with the AGENCY and supervised in their work by the MANAGER and/or Auditor. If such an outside firm is to be engaged to conduct the Review, the AGENCY may select the firm but must seek input from the CONTRACTOR and must give reasonable consideration to any objections that CONTRACTOR raises regarding the firm proposed to conduct the Review.
3. The costs and fees charged to the AGENCY for the Review (including staff time charged by the MANAGER and MANAGER’s staff, staff time charged by the Auditor and Auditor’s staff, and/or fees and costs charged by an outside firm) shall be borne in equal fifty-percent shares by the AGENCY and CONTRACTOR, with the CONTRACTOR’s share to be no more than $30,000 per Review, subject to an annual adjustment of that maximum share effective February 1 of each year, to be determined according to the Adjusted CPI Index as defined and applied in Exhibit B to the Agreement, which is incorporated herein by this reference.
4. If the Review does not result in any finding of a material breach or default in the CONTRACTOR’s performance, then CONTRACTOR’s paid share of AGENCY’s costs and fees for the Review, as well as CONTRACTOR’s costs and fees for the Review, shall be included as a Major Recoverable Expense (with no Operating Ratio allowed thereon) in the Rate Methodology and determination of Rates to be charged to CUSTOMERS for the next fiscal year.
5. If the Review results in a finding of a material breach or default in the CONTRACTOR’s performance under the AGREEMENT, CONTRACTOR shall not be entitled to receive credit in the rate-setting process for its share of the Review costs and shall promptly reimburse the AGENCY for the total cost of the Review.
6. Scope and Focus of Reviews.

 The Reviews shall address all appropriate areas of concern to the AGENCY, and shall provide specific recommendations, as appropriate, for improvement in each area, including, but not limited to, the following:

* + 1. Compliance with the terms of the AGREEMENT and applicable laws;
		2. Staffing practices, including the deployment of management and supervisory personnel;
		3. Financial management practices, including the CONTRACTOR's billing and collection system;
		4. Personnel management practices, including the resolution of employee grievances;
		5. Employee job and safety training, including, but not limited to, training in management of hazardous waste;
		6. Procedures for receiving and resolving CUSTOMER complaints and concerns;
		7. Procedures for the acquisition, maintenance, safety check, and replacement of equipment;
		8. Utilization and management of FACILITIES, equipment and personnel;
		9. Comparison of CONTRACTOR’s practices with any generally recognized best practices of businesses in the SOLID WASTE HANDLING SERVICES industry;
		10. Overall organizational structure and management systems and procedures; and
		11. Efficiency of SOLID WASTE collection operations, including an analysis of routes and schedules.
1. CONTRACTOR and AGENCY Cooperation.

 CONTRACTOR shall cooperate fully with the Review, and provide within thirty (30) days of request, all operational, financial and other information deemed reasonable or convenient by AGENCY or the firm selected by the AGENCY for purposes of conducting the Review.

 The AGENCY and CONTRACTOR agree to use good faith efforts to ensure that any Review is conducted in as cost-effective a manner as possible, so as to minimize unnecessary costs or administrative oversight. To this end, the AGENCY and the CONTRACTOR shall confer prior to any Review to establish the scope and budget of the review, in a manner designed to meet the AGENCY’s concerns and needs.

1. Results and Consequences of Review.

 As the result of the findings of a Review, the AGENCY reserves the right, subject to appropriate adjustment in the Rates pursuant to the Rate Methodology, to require reasonable changes to the CONTRACTOR's operations (i.e., a CHANGE IN SCOPE), which the AGENCY reasonably determines to be necessary or appropriate to carrying out the intent of the terms and conditions of the AGREEMENT; and CONTRACTOR agrees to cooperate with AGENCY in documenting any amendment to the AGREEMENT that is reasonably called for and necessary to effectuate and implement such required changes in its operations.

 If, as a result of a Review, the AGENCY identifies one or more areas of CONTRACTOR breach or default under the AGREEMENT, the provisions of Section 6.3 below shall apply.

6.3 Defaults, Breaches, and Remedies.

 (a) Underlying Premise of Agreement.

 The Parties acknowledge and agree that provision of consistent, reliable SOLID WASTE HANDLING SERVICES is of utmost importance to the MEMBERS of the AGENCY and to their residents and businesses, and that the AGENCY has considered and relied on CONTRACTOR’s ability and commitment to quality of service in awarding the AGREEMENT. In the event that CONTRACTOR fails to perform any of its obligations under the AGREEMENT or commits any of the actions and omission described below or in Exhibit D, each such failure, action, or omission shall constitute a breach and default (“Default”) under the AGREEMENT.

 (b) Notice of Default and/or Termination; Opportunity to Cure a Default.

 Upon the occurrence of any Default by CONTRACTOR, AGENCY shall give written Notice of Default to CONTRACTOR as soon as reasonably practicable following AGENCY’s knowledge of such Default. The Notice of Default by AGENCY to CONTRACTOR shall include a brief description of the Default and shall state whether the AGENCY is (1) terminating the AGREEMENT by reason of the Default’s falling into a category of Default as set forth in Section 6.3(g) below, provided that the decision to terminate must be approved in advance by the AGENCY Board of Directors; or (2) allowing the AGREEMENT to remain in effect but demanding that CONTRACTOR cure the Default, as provided below.

 If AGENCY elects in the Notice of Default to include Notice of Termination of the Agreement because the Default falls within a category of Default that triggers the AGENCY’s right to terminate, then the Notice of Termination shall be effective five (5) Working Days after the CONTRACTOR’s receipt of the Notice, unless there exists a compelling reason or emergency circumstances calling for immediate termination, which, if they exist, will be described in the Notice of Termination. Upon CONTRACTOR’s receipt of a Notice of Termination, CONTRACTOR shall promptly provide AGENCY with any or all records kept by CONTRACTOR regarding its SOLID WASTE HANDLING SERVICES.

 Upon receipt of a Notice of Default and/or Termination, CONTRACTOR may request the opportunity to review (and copy at its own expense) all information in the possession of AGENCY relating to the event(s) of Default. CONTRACTOR may, within three (3) Working Days after receiving the Notice, request a meeting with AGENCY MANAGER. At that meeting, CONTRACTOR may present evidence in writing and through testimony of its employees and others relevant to the event(s) of Default. AGENCY MANAGER shall provide CONTRACTOR with a brief written explanation of its determination on each challenge to a Notice of Default. The decision of AGENCY MANAGER may be appealed by CONTRACTOR to the AGENCY Board of Directors within ten (10) days after its receipt of AGENCY MANAGER’s decision. The decision of the AGENCY Board of Directors on CONTRACTOR’s appeal shall be final, subject only to challenge by CONTRACTOR through arbitration proceedings, which CONTRACTOR must initiate no later than thirty calendar (30) days after its receipt of the AGENCY Board of Directors’ determination. If the AGENCY gives Notice of Termination, the effect of the Termination shall be tolled and deferred until resolution of the meeting of CONTRACTOR with the AGENCY MANAGER (if requested by CONTRACTOR), until resolution of any appeal to the AGENCY Board of Directors, until resolution of any arbitration proceedings and until expiration of the applicable cure period without a cure.

 If a Default by CONTRACTOR can be cured and does not qualify for or result in immediate termination of the AGREEMENT by AGENCY as provided below, and if the AGENCY’s Notice of Default includes a demand for a cure, CONTRACTOR shall begin cure of any Default as follows:

1. Immediately, if the Default is such that AGENCY determines and states in its Notice of Default, in the AGENCY’s exercise of reasonable judgment and discretion, that the Default poses a risk to the health, welfare or safety of the public; or
2. Otherwise within thirty (30) calendar days of the CONTRACTOR’s receipt of the Notice from the AGENCY; provided that if the nature of the Default is such that it will reasonably require more than thirty (30) days to cure, CONTRACTOR shall not be in default so long as CONTRACTOR promptly commences to cure such Default, contacts AGENCY promptly (but no later than ten (10) calendar days after receiving the AGENCY’s Notice of Default) to request written consent of the AGENCY to an extension for a specifically defined longer period of time to cure, provides AGENCY weekly written status reports of progress in curing such Default, and diligently proceeds to complete the steps needed to cure the Default. The thirty (30) day cure period may only be extended upon CONTRACTOR’s receipt of written consent from AGENCY, which consent shall not be unreasonably withheld.

 A Default shall be considered remedied and/or cured only when both the CONTRACTOR and AGENCY have signed a written acknowledgement describing the Default with specificity and stating that the Default has been cured.

1. Liquidated Damages.

 The Parties recognize that some quantified standards of performance are necessary and appropriate to ensure consistent and reliable service and performance, and to serve as a specific measure of successful performance under the AGREEMENT. The Parties further recognize that if CONTRACTOR fails to perform its obligations, AGENCY, its MEMBERS, and residents of the MEMBERS will suffer damages that are and will be extremely difficult and impractical to ascertain, quantify and determine. The Parties agree that the schedule of Liquidated Damages (“LDs”), which is attached to the AGREEMENT as Exhibit D and incorporated into this Exhibit to the AGREEMENT by this reference, describes events, actions and omissions that constitute Defaults under the AGREEMENT, and sets forth reasonable amounts of LDs that are based on reasonable, good faith estimates of the amount of damages that would arise from the specified Defaults.

1. Notice of Imposition of LDs.

 Separate from any Notice of Default that may be given by AGENCY, as to the specific types of Defaults that are listed in Exhibit D to the AGREEMENT, AGENCY shall give CONTRACTOR a Liquidated Damages Notice (“LDN”) in writing. The imposition of LDs is a right of the AGENCY that is in addition to any other available remedies AGENCY may have or invoke due to a Default. The LDN shall include a brief description of the Default and the basis for calculation of the amount of LDs imposed. CONTRACTOR may review (and copy at its own expense) all information in the possession of AGENCY relating to the assessment of LDs.

1. Opportunity to Challenge Imposition of LDs.

 CONTRACTOR may, within ten (10) Working Days after receiving the LDN, request a meeting with AGENCY MANAGER. At the meeting, CONTRACTOR may present evidence in writing and through testimony of its employees and others relevant to the incident or nonperformance. AGENCY MANAGER shall provide CONTRACTOR with a brief written explanation of their determination on each challenge to imposition of LDs prior to authorizing the assessment of LDs. The decision of AGENCY MANAGER may be appealed by CONTRACTOR to the AGENCY Board of Directors within ten (10) days after its receipt of AGENCY MANAGER’s decision. The decision of the AGENCY Board of Directors on CONTRACTOR’s appeal shall be final, subject only to challenge by CONTRACTOR through arbitration proceedings, which CONTRACTOR must initiate no later than thirty calendar (30) days after its receipt of the AGENCY Board of Directors’ determination.

1. Payment of LDs.

 No later than sixty (60) calendar days after the CONTRACTOR’s receipt of an LDN if the imposition of LDs is not challenged, or no later than sixty (60) calendar days after the completion of any unsuccessful challenge by CONTRACTOR to imposition of LDs, CONTRACTOR shall, at its own expense, remit to the AGENCY payment of the sum of LDs imposed in the LDN. CONTRACTOR shall not be entitled to receive credit in the rate-setting process for its payment of any LDs.

1. Events of Default Triggering Right to Terminate AGREEMENT.

 Without limitation, each of the following shall trigger AGENCY’s right, in the exercise of its sole discretion, to terminate the AGREEMENT:

* + - 1. Any Default by CONTRACTOR, unless cured by CONTRACTOR within ten (10) days after receipt of AGENCY’s written Notice of Default, that (A) results in a significant public health and safety risk, or (B) results in, or creates a significant risk of, a substantial civil or criminal liability on the part of the AGENCY that cannot be defended or indemnified by CONTRACTOR;
			2. Any Default by CONTRACTOR in performing its obligations under the AGREEMENT that is not promptly and timely cured pursuant to Section 6.3(b) above;
			3. A pattern, accumulation or repetition of Defaults over time such that in combination they constitute a significant failure by CONTRACTOR to perform its obligations, even if each individual Default is cured;
			4. Any representation, disclosure, assurance, or warranty made to AGENCY by CONTRACTOR in connection with, or as an inducement to entering into or performing, the AGREEMENT or the Original Agreement, as amended, or any future amendment to the AGREEMENT, or that is a condition to the effectiveness of the AGREEMENT, that proves to be false or misleading in any material respect as of the time the representation, disclosure, assurance, or warranty was/is made;
			5. A seizure or attachment (other than a prejudgment attachment) of, or levy affecting possession of, all or a substantial part of the operating equipment of CONTRACTOR, including, without limitation, its vehicles, maintenance equipment or facilities, and/or office facilities, of such proportion as to impair CONTRACTOR’s ability to perform under the AGREEMENT and which cannot be released, bonded, or otherwise lifted within forty-eight (48) hours excluding weekends and holidays;
			6. CONTRACTOR files a voluntary petition for debt relief under any applicable bankruptcy, insolvency, debtor relief, or other similar law now or hereafter in effect, or consents to the appointment of, or taking of possession by, a receiver, liquidator, assignee (other than as a part of a transfer of equipment no longer useful to CONTRACTOR or necessary for the AGREEMENT), trustee (other than as security for an obligation under a deed of trust), custodian, sequestrator (or similar official) of CONTRACTOR for a substantial part of CONTRACTOR’s operating assets or a substantial part of CONTRACTOR’s property, or CONTRACTOR makes any general assignment for the benefit of CONTRACTOR’s creditors, or shall become insolvent and unable to pay its debts generally as they become due;
			7. A court, in the exercise of proper jurisdiction, issues or enters a decree or order giving CONTRACTOR relief in any involuntary case brought under any bankruptcy, insolvency, debtor relief, or similar law now or hereafter in effect, or CONTRACTOR consents to or fails to oppose any such proceeding, or any such court enters a decree or order appointing a receiver, liquidator, assignee, custodian, trustee, sequestrator (or similar official) of CONTRACTOR or for a substantial part of CONTRACTOR’s operating equipment or assets, or orders the winding up or liquidating the business affairs of CONTRACTOR;
			8. Any act or omission by CONTRACTOR that materially violates the ACT, and which is not corrected or remedied within the time set forth in any written notice of the violation received by CONTRACTOR or AGENCY from CalRecycle, provided that CONTRACTOR may, if a good faith basis exists, contest any such alleged violation by appropriate proceedings before CalRecycle (or successor agency), in which case no Default shall be deemed to have occurred until the challenge before CalRecycle is fully resolved;
			9. CONTRACTOR or any of its officers or Directors who are in position to supervise or influence CONTRACTOR’s actions under the AGREEMENT are “found guilty” of a felony that relates to CONTRACTOR’s Solid Waste Handling Services, or that constitutes a crime of moral turpitude. The term “found guilty” includes any judicial determination that CONTRACTOR or any of such officers or Directors is guilty of such a felony or a crime of moral turpitude, and any admission of guilt by CONTRACTOR or any of such officers or Directors to such a felony or a crime of moral turpitude, including, but not limited to, the pleas of “guilty,” “nolo contendere,” “no contest,” or “guilty to a lesser felony” entered as part of any plea bargain. Such felonious conduct includes, but is not limited to, any activities related to or carried out for: (i) price fixing, (ii) illegal transport or disposal of hazardous or toxic materials, (iii) bribery of public officials, or (iv) fraud or tampering. If AGENCY exercises its option and right to declare a Default but to allow the AGREEMENT to remain in effect, CONTRACTOR shall dismiss or remove any and all such officers or Directors found guilty of such felonious behavior and take all action necessary and appropriate to remedy such Default;
			10. CONTRACTOR assigns the AGREEMENT in violation of the AGREEMENT; and
			11. Upon assessment (after all appeals and challenges are fully resolved) by AGENCY against CONTRACTOR of cumulative LDs totaling more than $30,000 in any twelve (12) month period, or $50,000 in any twenty-four (24) month period. CONTRACTOR acknowledges that if cumulative LDs exceed either of these thresholds, it waives all rights to contest termination
			12. CONTRACTOR fails to provide assurances of performance upon AGENCY’s reasonable request, pursuant to Section 6 .5 below.

 (h) AGENCY’s Right to Perform SOLID WASTE HANDLING SERVICES Upon CONTRACTOR’s Failure to Do So.

 (1) Notification by AGENCY to CONTRACTOR invoking right.

 In addition to any and all other legal or equitable remedies, in the event that CONTRACTOR, for any reason whatsoever, fails, refuses or is unable to provide its SOLID WASTE HANDLING SERVICES in any part of the SERVICE AREA for a period of more than seventy-two (72) hours, and if, as a result thereof, SOLID WASTE accumulates in that portion of the SERVICE AREA to such an extent, in such a manner, or for such a time that AGENCY determines that such accumulation causes a significant public health and safety risk, then AGENCY shall have the right, but not the obligation, upon twenty-four (24) hours’ prior notification to CONTRACTOR during the period of such emergency as determined by AGENCY:

1. to perform, or cause to be performed, such services itself with its own or other contracted personnel, and/or
2. to take temporary possession (for up to six (6) months or, if sooner, until other suitable arrangements can be made for providing SOLID WASTE HANDLING SERVICES) of any or all of CONTRACTOR’s land, facilities, equipment, vehicles and other property used or useful in providing SOLID WASTE HANDLING SERVICES and to use such property to provide any such SERVICES, subject to AGENCY’s payment of fair market value to CONTRACTOR for such use and further subject to the continued shared use as prior to such Default of such land, facilities, equipment, vehicles and other property by affiliates of CONTRACTOR that are engaged in providing similar services outside the SERVICE AREA.

 Notification of CONTRACTOR’s failure, refusal or neglect to provide such services, and of AGENCY’s election as described above may be given orally by telephone to CONTRACTOR and shall be effective immediately. Written confirmation (including email) of such oral notification shall be sent to CONTRACTOR within twenty-four (24) hours of the oral notification.

1. AGENCY’s invocation of right does not create liability.

 AGENCY’s exercise of its rights to take possession of the Property does not constitute a taking of private property for which compensation must be paid (except as described above), and will not create any contract, tort, or common count liability on the part of AGENCY to CONTRACTOR.

 (4) CONTRACTOR’s duty to cooperate.

 CONTRACTOR must fully cooperate with AGENCY to effect the transfer of possession to AGENCY for its use of any and all of CONTRACTOR’s land, facilities, equipment, vehicles and other property (collectively “Property”) used or useful in providing SOLID WASTE HANDLING SERVICES. CONTRACTOR must, if AGENCY so requests, and to the extent feasible, keep in good repair and condition all of such Property, provide all motor vehicles with fuel, oil and other service, and provide such other service as may be necessary to maintain said Property in operational condition.

 CONTRACTOR shall provide all necessary billing information to the AGENCY. AGENCY shall determine how to bill, in what amounts, and the distribution of amounts received.

1. Duration of AGENCY’s Possession.

 AGENCY has no obligation to maintain possession of CONTRACTOR’s Property and/or continue its use in providing any SOLID WASTE HANDLING SERVICES for any specific period of time and may, at any time, in its sole discretion, relinquish possession to CONTRACTOR before the time limit on such use expires. AGENCY’s right to retain temporary possession of CONTRACTOR’s Property, and to provide one or more SOLID WASTE HANDLING SERVICES, may, if the right is invoked by AGENCY, continue until CONTRACTOR can demonstrate to AGENCY’s satisfaction that it is ready, willing, and able to resume all required services, subject to the time limit above.

 (i) AGENCY’s Other Remedies.

 In addition to the AGENCY’s rights, options and remedies upon any Default by CONTRACTOR as described above, upon CONTRACTOR’s failure to cure a Default where AGENCY does not initially terminate the AGREEMENT, AGENCY shall have the following rights:

1. The AGENCY may choose to waive the Default; however, waiver by AGENCY of any Default by CONTRACTOR shall not be deemed to be a waiver of any other Default by CONTRACTOR, including as to other instances of Default with respect to the same obligations, or types of actions or omissions.
2. The AGENCY may seek specific performance by CONTRACTOR of its obligations under the AGREEMENT.
3. The AGENCY may seek to recover actual damages for Defaults that are not governed by the LDs specified in Exhibit D to the AGREEMENT.
4. The AGENCY may terminate the AGREEMENT and continue to pursue recovery of actual damages or LDs, as applicable.
5. The AGENCY may pursue, in addition to, or in lieu of the other rights and remedies described in the AGREEMENT, all other remedies as to CONTRACTOR in accordance with law and in equity, according to proof.
6. AGENCY shall have the right to seek performance and/or payment of damages by any surety under the performance bond or seek recovery under any Security for Performance provided by CONTRACTOR, and to make a claim on any insurance policy or policies of CONTRACTOR.

6.4 Excuse from Performance.

* + - * 1. Grounds for Excuse from Performance.

 The Parties shall be excused from performing their respective obligations under the AGREEMENT in the event they are prevented from so performing by reason of floods, moderate to severe earthquakes, tsunamis, other “acts of God,” war, civil insurrection, riots, and other similar catastrophic events which are beyond the control of and not the fault of the Party claiming excuse from performance thereunder.

 (b) Non-Excuse from Performance.

 Labor unrest conducted by CONTRACTOR’s employees or directed at CONTRACTOR, including, but not limited to strike, work stoppage or slowdown, sickout, picketing or other concerted job action, is not an excuse from performance, and CONTRACTOR shall be obligated to continue to provide service notwithstanding the occurrence of any or all of such events. In the case of labor unrest or job action directed at a third party over whom CONTRACTOR has no control, the inability of CONTRACTOR to make collections due to the unwillingness or failure of the third party to provide reasonable assurance of the safety of CONTRACTOR’s employees while making collections or to make reasonable accommodations with respect to container placement and point of delivery, time of collection, or other operating circumstances to minimize any confrontation with pickets or the number of persons necessary to make collections, shall, to that limited extent, excuse performance. The foregoing excuse shall be conditioned on CONTRACTOR’s cooperation in making collection at different times and in different locations.

 In addition, none of the following are to be considered an excuse from performance: (i) general economic conditions, interest or inflation rates, or currency fluctuation or changes in the cost or availability of fuel, commodities, supplies or equipment; (ii) changes in transport or disposal costs, disposal facility locations, and/or other related circumstances; (iii) changes in the financial condition of CONTRACTOR or any of its subcontractors affecting their ability to perform their obligations; (iv) the consequences of errors, neglect or omissions by CONTRACTOR, or any subcontractor; (v) any failure of any subcontractor or supplier to furnish labor, materials, service or equipment for any reason; (vi) equipment failure; or (vii) changes in market prices for (but not the unavailability of markets for) the sale or purchase of Divertible Materials.

 (c) Notice.

 The Party claiming excuse from performance shall, within two (2) calendar days after such Party learns of such cause, give the other Party notice of the facts constituting such cause and asserting its claim to excuse under this Section 6.4. Notwithstanding such excuse, CONTRACTOR, in the event of a declared disaster, shall comply with the contingency and emergency plans of the CONTRACTOR, consistent with the emergency plans of AGENCY.

1. Excusable Interruption or Discontinuance of Service Not a Default.

 The partial or complete interruption or discontinuance of CONTRACTOR’s services, if caused by one or more of the events described in Section 6.4(a) above that provide an excuse from performance, shall not constitute a Default by CONTRACTOR under the AGREEMENT. Notwithstanding the foregoing, however, (i) the existence of an excuse from performance shall not affect AGENCY’s right to perform services under Section 6.3(h) above, and (ii) if CONTRACTOR is excused from performing its obligations for any of the causes listed in this Section 6.4 for a period of thirty (30) days or more, other than as the result of third-party labor disputes under which SOLID WASTE HANDLING SERVICES cannot be provided for reasons described earlier in this Section, AGENCY shall nevertheless have the right, in its sole discretion, to terminate the AGREEMENT by giving ten (10) calendar days’ notice.

6.5 AGENCY’s Right to Demand Assurances of Performance.

 If CONTRACTOR is the target or subject of any labor unrest, including work stoppage or slowdown, sickout, picketing or other concerted job action, or appears in the reasonable judgment of AGENCY to be unable to regularly pay its bills as they become due, or is the subject of a civil or criminal investigation, charge, or judgment or order entered by a court or federal, state, regional or local agency for violation of a law relating to the types of services called for under the AGREEMENT, and AGENCY believes in good faith that CONTRACTOR’s ability to perform under the AGREEMENT has thereby been placed in substantial jeopardy, AGENCY may, at its option and in addition to all other remedies it may have, demand from CONTRACTOR reasonable assurances of timely and proper performance of the AGREEMENT, in such form and substance as AGENCY believes in good faith is reasonably necessary in the circumstances to evidence continued ability to perform under the AGREEMENT. If CONTRACTOR fails or refuses to provide satisfactory assurances of timely and proper performance in the form and by the date required by AGENCY, such failure or refusal shall be a Default that triggers the right of AGENCY to terminate the AGREEMENT.

6.6 Termination of JPA; Member Withdrawal. Upon withdrawal from AGENCY, the withdrawing Member(s), or upon termination of AGENCY, all Members, shall succeed as franchisor(s) under the Agreement for that portion of the franchise operative within their respective jurisdictional boundaries for the remaining Term of the franchise.

**SECTION 7. ARBITRATION**

7.1 Resolution of Disputes and Claims by Arbitration. Any matter arising out of or relating to the AGREEMENT, other than claims for personal injury or property damage or hold harmless/indemnification for such claims, shall be resolved by arbitration conducted in compliance with the provisions of the California Arbitration Act, commencing with Section 1280 of the California Code of Civil Procedure. Notwithstanding any other provision in the Agreement, neither Party shall commence arbitration regarding a dispute until the Parties have met and attempted to resolve the dispute and, at CONTRACTOR’s election, the dispute has been appealed to the AGENCY Board of Directors.

7.2 Panel. Each arbitration shall be conducted by a panel of three (3) impartial arbitrators. Arbitrators shall be required to have a minimum or five (5) years’ experience with solid waste collection services and the recycling industry. One arbitrator shall be appointed by CONTRACTOR; one arbitrator shall be appointed by AGENCY; and the third arbitrator, who shall be the chairperson of the panel, shall be appointed by the other two arbitrators. If the other two arbitrators are unable to agree upon an appointment, the third arbitrator shall be appointed by the Presiding Judge of the Napa County Superior Court. The chairperson of the arbitration panel shall be an attorney licensed to practice before the courts of the State of California. No member of the panel shall be an officer, employee, agent or attorney of CONTRACTOR or AGENCY or of any affiliate of CONTRACTOR or AGENCY.

7.3 Appointments. CONTRACTOR and AGENCY shall each appoint its arbitrator and mail notice to the other of its selection not later than fifteen (15) calendar days following filing of a notice of appeal to arbitration or mailing of the initiation of arbitration. The third arbitrator shall be appointed not later than thirty (30) calendar days following filing of the notice of appeal to arbitration or mailing of the initiation of arbitration.

7.4 Meetings. The chairperson of the arbitration panel shall select the site of the hearing, retain a stenographic reporter (or recording mechanism authorized at the time of the arbitration to officially record proceedings in the Napa County Courts) to report the hearing, and, in consultation with the other members of the panel and the Parties, schedule the hearing. The hearing shall be scheduled to commence no later than seventy-five (75) calendar days following filing of the notice of appeal to arbitration or mailing of the initiation of arbitration. The chairperson of the panel shall mail written notice of the time, date and place of the hearing to the other two arbitrators, AGENCY and CONTRACTOR not later than thirty (30) calendar days in advance of the hearing.

7.5 Non-Chairperson Compensation and Expenses. Subject to the last sentence in Section 7.8 below: the compensation and expenses of the arbitrator appointed by CONTRACTOR shall be borne and paid solely by CONTRACTOR; the compensation and expenses of the arbitrator appointed by AGENCY shall be borne and paid solely by AGENCY, CONTRACTOR and AGENCY shall each bear and solely pay its own costs and attorney's fees, expert and other witness fees and other expenses incurred in the preparing and prosecuting their respective cases; and in proceedings where the record of a public hearing of the AGENCY Board of Directors exists and is requested by the arbitration panel, the costs of transcribing, typing and copying the record shall be borne and paid equally by CONTRACTOR and AGENCY.

7.6 Chairperson Compensation and Expenses. Subject to the last sentence in Section 7.8 below, the compensation and expenses of the chairperson of the arbitration panel, the cost of rental, if any, for the place of the hearing, per diem costs of the stenographic reporter (or other authorized recording system), costs of transcribing, and all other costs of the arbitration proceeding not otherwise identified in the AGREEMENT shall be divided equally between, borne and paid by CONTRACTOR and AGENCY.

7.7 Award. The arbitration award and decision shall be determined by a majority of the members of the arbitration panel, and shall be set forth in writing. If it is necessary for the panel to make determinations of fact and/or conclusions of law, it shall include findings of fact and conclusions of law, as applicable, in its written award and decision. The award and decision shall be issued and mailed to the Parties not later than sixty (60) calendar days following the close of the arbitration hearing.

7.8 Powers. The arbitration panel shall have no authority to add to, delete or alter any provisions of the AGREEMENT, but shall limit its analysis to, and base its decision and award on, interpretation of the express terms of the AGREEMENT. The arbitration panel shall have the power to make an award to the prevailing Party, to be paid by the other Party, of the following: (a) a monetary sum to compensate the prevailing Party for actual damages, if any were incurred by the prevailing Party as a result of any breaches of the AGREEMENT by the other Party, which breaches are not covered by a provision for LDs in the AGREEMENT; and (b) any and all LDs to which the Prevailing Party is entitled under the AGREEMENT for breaches that are covered by a LDs provision. The arbitration panel shall award to the prevailing Party, to be paid by the other Party, the prevailing Party's full costs incurred in connection with the arbitration, including the prevailing Party's share of the panel and hearing expenses, reasonable attorney's fees, expert witness fees, and other reasonable and necessary costs that were incurred by the prevailing Party.

7.9 Enforcement of Award. The arbitration award may be judicially confirmed and enforced, shall be final, binding and conclusive upon the Parties, and shall not be subject to judicial review, correction, or vacation except on one or more of the grounds set forth in Sections 1286.2 and 1286.6 of the Code of Civil Procedure.

**SECTION 8. RESERVATION OF RIGHTS**

8.1 Flow Control. All SOLID WASTE which is not diverted shall be removed and deposited by CONTRACTOR at the LANDFILL pursuant to the terms of the AGREEMENT and/or pursuant the terms of the LANDFILL FRANCHISE AGREEMENT. As the independent contracting agent of the AGENCY, CONTRACTOR agrees to abide by the terms of the LANDFILL FRANCHISE AGREEMENT in CONTRACTOR’S use of and access to the LANDFILL. In the event that the LANDFILL is unable to accept all of part or the SOLID WASTE for reasons beyond the control of the AGENCY, AGENCY reserves the right to manage flow control of AGENCY's SOLID WASTE stream, including the right to direct deliveries to designated processing facilities, transfer stations or disposal sites, subject in each case to appropriate adjustment in the Rates pursuant to the Rate Methodology.

8.2 Change in Scope. AGENCY may require a CHANGE IN SCOPE, consisting of changes in, or modifications to existing Collection Services, or a request that CONTRACTOR provide new services; or may consider a CONTRACTOR request for a CHANGE IN SCOPE.

1. Should the CHANGE IN SCOPE result in documented increases in CONTRACTOR’s operating or capital expenses, the AGENCY shall increase Rates as provided in the Rate Methodology as necessary to compensate CONTRACTOR for the additional documented expenses, including an Operating Ratio on the portion of increased expenses that are Allowable Expenses.
2. Should the CHANGE IN SCOPE result in documented decreases in CONTRACTOR’s operating or capital expenses, the AGENCY shall decrease Rates as provided in the Rate Methodology as necessary to reflect such documented decreases in expenses, including a decrease for the Operating Ratio on the portion of decreased expenses that are Allowable Expenses.
3. In the event of a CHANGE IN SCOPE, the Parties agree to negotiate in good faith to determine the applicable distribution for the reasonable costs of reviewing the proposed CHANGE IN SCOPE, and for the resulting increase or decrease in Rates. CONTRACTOR shall promptly provide any documentation reasonably requested by AGENCY as necessary to identify and quantify any added or reduced expenses related to the CHANGE IN SCOPE. Either Party may, at its own cost, seek independent third-party assistance in determining the nature of any costs or savings. All determinations of added or reduced expenses shall be based on reasonable industry standards and averages for providing such services. If a CHANGE IN SCOPE results in a reduction or shift in equipment needs, to minimize capital expenditures, CONTRACTOR, including a parent or any affiliates, shall make commercially reasonable efforts to redeploy or sell vehicles, containers, equipment, and materials that are not fully amortized.

8.3 Other Activities. CONTRACTOR reserves the right to conduct other activities at the FACILITIES which are either regulated or not regulated by the AGENCY, provided that such activities do not interfere with CONTRACTOR's performance of its duties under the AGREEMENT and provided that such activities are lawful under federal, state and local laws and regulations. Political mailers and other inserts not directly associated with CONTRACTOR’s duties herein shall not be included with billing statements sent to customers without the approval of the AGENCY Board of Directors.

**SECTION 9. ACCIDENTS AND COMPLAINTS**

9.1 Accident Notification. CONTRACTOR shall be responsible for all injuries, accidents and other mishaps associated with its operations. CONTRACTOR shall report any accidents resulting from the performance of the AGREEMENT to AGENCY as soon as practicable by telephone, messenger, or email to the AGENCY manager’s then-current email address. For purposes of this Section, "accident" shall include the death of any person, any personal injury resulting in in-patient hospitalization or out-patient treatment by a physician, or damage to any real or personal property exceeding ten thousand dollars ($10,000). CONTRACTOR shall report, in writing, to AGENCY, within seven (7) days of knowledge that the accident exceeds ten thousand dollars ($10,000), complete details of the accident, including witness statements.

9.2 Legal Action Response. CONTRACTOR shall respond in a reasonable manner to legal actions, complaints, charges and allegations related to CONTRACTOR's performance under the AGREEMENT within thirty (30) days of receipt of that legal action, complaint, charge, or allegation, including, but not limited to, those legal actions filed or brought by citizens, citizen groups and public agencies. In the event any legal action is filed against CONTRACTOR, CONTRACTOR shall report, in writing, to AGENCY, within seven (7) days of the legal action filing, complete details of the action, including the nature of the response.

9.3 Other Complaints. CONTRACTOR shall keep a log of customer complaints. If AGENCY requires activities which result in a rate increase which causes excessive complaints, CONTRACTOR shall be excused from logging complaints relative to those activities for a period of three (3) months from the effective date of the increase, but shall refer complainants to the MANAGER. CONTRACTOR shall not be required to keep a log of the filing and/or service of any legal actions. If complaints are deemed reasonable, CONTRACTOR shall take whatever action it deems necessary to respond to such complaint.

**SECTION 10. FACILITIES**

10.1 Acquisition. As reasonably required by AGENCY, CONTRACTOR agrees to acquire and maintain in good repair all FACILITIES, vehicles, and all other equipment necessary to meet its obligations under the AGREEMENT, including, but not limited to, administrative offices, as well as buildings and other improvements for storage and maintenance of vehicles and equipment, for the DIVERSION of SOLID WASTE, including, but not limited to Organics, and for the transfer of SOLID WASTE and/or DIVERTIBLE MATERIALS if necessary. CONTRACTOR agrees to promptly remove or have removed any liens or encumbrances that, because of any act or default of CONTRACTOR, its officers, employees, or agents, or of CONTRACTOR's subcontractors or sub-subcontractors, or material suppliers, or equipment owners are filed against any FACILITY. CONTRACTOR reserves the right to contest liens prior to their payment.

10.2 Use. The FACILITIES may be used for activities unrelated to the AGREEMENT including, but not limited to, other contracts or franchises with other governmental agencies, private agencies, other businesses related to the SOLID WASTE business and businesses unrelated to the SOLID WASTE business, provided that such other uses do not prevent, hamper or delay uses of the FACILITIES reasonably necessary for performance by CONTRACTOR of its obligations under the AGREEMENT.

**SECTION 11. QUALITY OF PERFORMANCE**

 CONTRACTOR shall coordinate and schedule in an orderly manner and manage all work done by CONTRACTOR's officers, employees, and subcontractors. CONTRACTOR and subcontractors shall perform every act or service under the AGREEMENT in a skillful and competent manner in accordance with the standards of the SOLID WASTE HANDLING SERVICES industries. All workers and subcontractors shall be skilled in their trades. All operators shall be licensed or otherwise qualified as required by law.

**SECTION 12. CONTRACTOR REPRESENTATIONS AND WARRANTIES**

 CONTRACTOR makes the following representations and warranties to and for the benefit of AGENCY:

 (a) CONTRACTOR is duly organized and validly existing as a corporation in good standing under the laws of the State of California and is duly qualified to do business in the State of California.

 (b) CONTRACTOR has full legal right, power and authority to execute the AGREEMENT, and to perform its obligations and deliver the services required by the AGREEMENT; and CONTRACTOR has duly authorized the execution of the AGREEMENT by the signatory(ies) who executed the AGREEMENT on its behalf, and has duly authorized delivery of the AGREEMENT to the AGENCY. The AGREEMENT has been duly executed and delivered by CONTRACTOR and constitutes a legal, valid and binding obligation of CONTRACTOR enforceable against CONTRACTOR in accordance with its terms.

 (c) Neither the execution nor delivery by CONTRACTOR of the AGREEMENT, the performance by CONTRACTOR of its obligations thereunder, nor the fulfillment by CONTRACTOR of the terms and conditions hereof:

 (i) conflicts with, violates or results in a breach of any applicable law; or

 (ii) conflicts with, violates or results in a breach of any term or condition of any judgment, order or decree of any court, administrative agency or other governmental authority, or to the best of CONTRACTOR's knowledge, any agreement or instrument, to which CONTRACTOR is a party or by which CONTRACTOR or any of its properties or assets are bound, or constitutes a default thereunder.

 (d) No approval, authorization, license, permit, order or consent of, or declaration, registration or filing with, any governmental or administrative authority, commission, board, agency or instrumentality is required for the valid execution and delivery of the AGREEMENT by CONTRACTOR, except such as has been duly obtained or made or such as CONTRACTOR has given AGENCY adequate assurance will be obtained or made before the commencement of services by CONTRACTOR under the AGREEMENT.

 (e) Except as herein stated, CONTRACTOR holds, or is expressly licensed to use, all patents, rights, licenses, and franchises necessary or appropriate to operate and maintain all FACILITIES and vehicles pursuant to and in accordance with the terms of the AGREEMENT.

**SECTION 13. PERMITS, LICENSES, ETC**

 CONTRACTOR shall obtain, maintain and pay for, at CONTRACTOR's sole expense, all permits, licenses and approvals required by federal and state law for its operations and activities under the AGREEMENT. CONTRACTOR shall file with AGENCY a list of all such permits, licenses and approvals designating the issuing agency, the dates of issuance, the expiration of those permits, and shall file a copy of all current permits. CONTRACTOR shall be solely liable for all fines or civil penalties that may be imposed by any regulatory agency for CONTRACTOR-caused violations of permits, laws, or regulations; AGENCY shall not be liable for and shall not reimburse CONTRACTOR for payment of those fines or civil penalties. CONTRACTOR’s payment or incurring of such fines or penalties shall not be included for reimbursement as part of the Rate Methodology. CONTRACTOR reserves the right to contest any fine in an administrative proceeding or in court prior to its payment. CONTRACTOR's failure to obtain permits from the Bay Area Air Management District which may or may not be necessary shall not constitute a breach of the AGREEMENT.

**SECTION 14. INSURANCE**

 Insurance. CONTRACTOR shall obtain and maintain in full force and effect throughout the term of the AGREEMENT the following insurance coverage:

 (a) Workers' Compensation insurance. CONTRACTOR shall provide, to the extent required by law, workers' compensation insurance in the performance of any of CONTRACTOR's duties under the AGREEMENT, including, but not limited to, workers' compensation and disability, and shall provide AGENCY with certification of all such coverages upon request by AGENCY.

 (b) General Liability insurance. CONTRACTOR shall obtain and maintain in full force and effect during the term of the AGREEMENT commercial or comprehensive general liability insurance policy (bodily injury and property damage) of not less than Two Million Dollars ($2,000,000) combined single limit per occurrence, issued by a company duly and legally licensed to transact business in the State of California, covering liability for any personal injury, including death, to any person and/or damage to the property of any person arising from the acts or omissions of CONTRACTOR or any officer, agent, or employee of CONTRACTOR under the AGREEMENT.

 (c) Comprehensive Motor Vehicle Liability Insurance. CONTRACTOR shall obtain and maintain in full force and effect during the term of the AGREEMENT, a motor vehicle liability insurance policy (Bodily Injury and Property Damage) on owned, hired, leased and non-owned vehicles used in conjunction with CONTRACTOR's business of not less than Two Million Dollars ($2,000,000) combined single limit per occurrence.

 (d) Insurance Required by Statutes or Regulations. CONTRACTOR shall also obtain and maintain in full force and effect during all periods required by statutes or regulations any insurance coverage required by federal or state laws or regulations or as a condition of any local land use permits.

 (e) All insurance coverages referenced above in (b), (c) and (d) above shall be evidenced by a Certificate of Coverage which shall be filed with the MANAGER of AGENCY prior to commencement of performance of any of CONTRACTOR's duties, shall name AGENCY, its officers, employees, and agents as additional insureds, shall be kept current during the term of the AGREEMENT; shall provide that AGENCY shall be given no less than thirty (30) days prior written notice of any non-renewal, cancellation, other termination, or material change; shall provide that the insurance provided is primary coverage to AGENCY with respect to any insurance or self-insurance programs maintained by AGENCY; and shall provide that the inclusion of more than one insured shall not operate to impair the rights of one insured against another insured, the coverage afforded applying as though separate policies had been issued to each insured, but the inclusion of more than one insured shall not operate to increase the limits of the company's liability. Upon request of AGENCY, CONTRACTOR shall provide or arrange for the insurer to provide within thirty (30) days of the request, certified copies of the actual insurance policies.

 (f) Any deductibles or self-insured retentions shall be declared to, and be approved by, AGENCY. At the option of AGENCY, either the insurer shall reduce or eliminate such deductibles or self-insurance retentions as respects AGENCY, its officers, employees and volunteers or CONTRACTOR shall procure a bond guaranteeing payment of losses and related investigations, claims administration and defense expenses.

**SECTION 15. RECORDS AND REPORTS**

15.1 Accurate and Accessible Records. CONTRACTOR shall keep accurate records of all transactions connected with the AGREEMENT, including, but not limited to, all correspondence and invoices, transaction tickets, or receipts issued at all FACILITIES. CONTRACTOR shall at all times maintain an accounting system acceptable to AGENCY's Auditor-Controller that uses generally accepted accounting principles for all services rendered and materials supplied, including additional and deleted work, in connection with the AGREEMENT. The records of CONTRACTOR will be open to inspection at any reasonable time by a representative to be designated by AGENCY.

15.2 Route Analysis. CONTRACTOR shall conduct in a manner mutually agreed upon by AGENCY and CONTRACTOR, and submit to AGENCY in a format mutually agreed to by AGENCY and CONTRACTOR, the results of route audits for all of CONTRACTOR's routes

15.3 Monthly Reports. CONTRACTOR shall provide to AGENCY, on a monthly basis within fifteen (15) days after the end of each calendar month and in a manner and format mutually agreed upon by AGENCY and the CONTRACTOR, a report for such preceding calendar month summarizing routine and extraordinary activities during the such month, including information necessary to evaluate program effectiveness and comply with solid waste plans, laws and regulations, and plans and schedules for future activities. It is the intent of the AGENCY that the CONTRACTOR shall be responsible for collecting and compiling data pursuant to solid waste planning requirements and that such activities shall be included in the Rate Methodology set forth in Exhibit B.

**SECTION 16. THE ACT**

16.1 Compliance. The ACT requires that the MEMBERS or AGENCY adopt a SRRE, which will identify how the MEMBERS or AGENCY will reduce landfill disposal by source reduction, recycling, and/or composting. CONTRACTOR agrees to satisfactorily carry out its responsibilities stated in the SRRE and HHWE as identified in those documents, or as modified by the AGENCY. Further, CONTRACTOR agrees to use its best efforts to meet or exceed the ACT's requirements or such modified requirements as may be promulgated by the State of California in the future. CONTRACTOR shall submit a plan for complying with the implementation of the SRRE and HHWE.

16.2 Public Awareness Program. Within the first month of the effective date of the AGREEMENT, CONTRACTOR shall submit a report stating the Public Awareness efforts which have been completed within the last two years. CONTRACTOR shall annually submit, for approval by the AGENCY, a plan for a Public Awareness Program to seek and secure the mutual benefits to both Parties of a successful DIVERSION program through ongoing promotion and education. Upon approval by AGENCY of such plan and the costs thereof, CONTRACTOR will engage in and coordinate with AGENCY such public awareness activities as are contained in the plan. The Public Awareness Program shall include, but is not limited to, distribution of billing inserts or flyers; distribution of posters and flyers to schools, community centers, libraries, and other public facilities; speeches and slide shows to community schools; preparation of community service announcements; and displays at community festivals located in AGENCY's SERVICE AREA. As part of each year's plan for approval, CONTRACTOR shall submit a report stating the Public Awareness activities that were completed in the prior year.

**SECTION 17. SOLID WASTE HANDLING SERVICES**

17.1 Time of Collection. CONTRACTOR shall make systematic collections in such a manner that CUSTOMERS receiving the services can predict and generally rely on the day on which collection will be made. All materials collected shall be collected on the same day at the roadside. Charge for the costs of collection distances beyond the roadside will be provided in the Rates. If the day for collection falls on a holiday, CONTRACTOR may make the collection on the day preceding or the day following the regular collection day, if adequate advance notice is provided to the affected CUSTOMERS.

17.2 Disposal. All SOLID WASTE which is not diverted shall be removed and deposited at the LANDFILL. CONTRACTOR shall have the right to salvage materials prior to disposal, pursuant to the limitations of its solid waste facility permit. These salvaged materials then become DIVERTIBLE MATERIALS.

17.3 Residential Recycling Containers. CONTRACTOR shall provide and distribute to all single and all multi-unit (less than five units) residential CUSTOMERS at least one recycling container per residential living unit, and any number of additional recycling containers upon CUSTOMER request. CUSTOMERS will not be charged for such containers. The cost of supplying, repairing, and replacing such recycling containers shall be borne by CONTRACTOR and become a part of the rate review process. Ownership of the recycling containers purchased by CONTRACTOR under the AGREEMENT shall be and remain with CONTRACTOR.

17.4 Other Residential Recycling Containers. CONTRACTOR shall work in good faith with the owners and residents of residential multi-units with five or more living units, to provide recycling services in containers appropriately sized for the CUSTOMER. These may be individual containers for each living unit or centralized collection containers. The cost of supplying, repairing, and replacing such recycling containers shall be borne by CONTRACTOR and become a part of the rate review process. Ownership of the recycling containers purchased by CONTRACTOR under the AGREEMENT shall be and remain with CONTRACTOR.

17.5 Other Non-Residential Recycling Containers. CONTRACTOR shall provide recycling containers to industrial/commercial CUSTOMERS which are appropriately sized for the service to be provided, and at a rate set by the AGENCY. The cost of supplying, repairing, and replacing such recycling containers shall be reflected in the rate set by AGENCY for this service. Ownership of the recycling containers purchased by CONTRACTOR under the AGREEMENT shall be and remain with CONTRACTOR. Depending on the materials collected and the service provided, a collection rate may also be set.

17.6 Materials Collected. CONTRACTOR shall collect and remove on at least a weekly basis, regardless of weather conditions, the following SOLID WASTE from all CUSTOMERS:

 (a) WASTE;

 (b) DIVERTIBLE MATERIALS: DIVERSION services shall be made available to all CUSTOMERS. Those commingled materials that are segregated from WASTE and placed in or adjacent to recycling containers by CUSTOMERS, unless such collection presents substantial difficulties to CONTRACTOR and that determination by CONTRACTOR is approved by the AGENCY. The operational details of the program shall be approved by the AGENCY.

 (i) For all CUSTOMERS, these materials include:

 (1) Bundled or bagged newspaper;

 (2) Corrugated cardboard broken down and contained in a manner determined by CONTRACTOR;

 (3) Glass;

 (4) Aluminum and tin containers;

 (5) Plastic containers of #1, #2, #3, and #4; and

 (6) Ferrous metal cans and containers.

17.7 DIVERTIBLE MATERIALS.

 (a) CONTRACTOR Additions. CONTRACTOR, throughout the term of the AGREEMENT, shall negotiate in good faith to increase the scope of the DIVERSION efforts as new technologies and options become available. Such additions shall require rate adjustments pursuant to the Rate Methodology set forth in Exhibit B.

 (b) Other Additions or Deletions. MANAGER may direct CONTRACTOR to add or delete specific DIVERTIBLE MATERIALS, depending on new technology and market values. It is expected that the industry will change during the term of the AGREEMENT. CONTRACTOR may apply in writing with the MANAGER for AGENCY permission to allow CONTRACTOR to suspend DIVERSION of a particular item and to delete that item from the DIVERTIBLE MATERIALS list. The MANAGER will render its decision on such an application within thirty (30) calendar days of receipt of the application, and shall then promptly inform CONTRACTOR, MEMBERS and AGENCY Board of Directors of the decision.

 (c) DIVERSION. All DIVERTIBLE MATERIALS shall be recycled. CONTRACTOR may not dispose of segregated DIVERTIBLE MATERIALS at any landfill without approval of the MANAGER. Should CONTRACTOR breach this provision, no expenses related to the transportation to, delivery to, or disposal of DIVERTIBLE MATERIALS by landfill shall be allowed.

 (d) Sale of DIVERTIBLE MATERIALS. CONTRACTOR shall make every attempt to sell all DIVERTIBLE MATERIALS pursuant to the AGREEMENT at or above current fair market value. All revenues derived from the sale of DIVERTIBLE MATERIALS collected shall be accounted for and offset costs in determining the Rates.

17.8 Additional DIVERTIBLE MATERIALS.

 In addition to those items listed in Section 17.6(b)(i) above, DIVERTIBLE MATERIALS shall include the following:

 (a) For all single unit and all multi-unit residential CUSTOMERS, DIVERTIBLE MATERIALS also include:

 (i) Magazines;

 (ii) Chipboard;

 (iii) Motor oil; and

 (iv) Yard Waste and, at such time as CONTRACTOR acquires appropriate permits for collection of food waste from residential Customers, all Organics.

 (b) For industrial/commercial CUSTOMERS, DIVERTIBLE MATERIALS also include:

 (i) Magazines;

 (ii) Chipboard;

 (iii) Organics; and

 (iv) Office paper including computer, white and mixed paper.

17.9 Billing. CONTRACTOR shall conduct all billing activities for the SOLID WASTE HANDLING SERVICES authorized under the AGREEMENT in a uniform and regular manner and in conformance with the law and applicable industry best practices.

17.10 Additional Collection Center(s). Upon request of AGENCY, CONTRACTOR shall provide additional collection centers for the deposit of DIVERTIBLE MATERIALS and/or other materials. The location and operation of such additional centers shall be subject to AGENCY approval, at which time the costs associated with this service shall be determined and approved for inclusion in calculation of Rates under the Rate Methodology.

17.11 Household Hazardous Waste. CONTRACTOR shall cooperate with AGENCY and MEMBERS in the conduct of hazardous waste collection days and related Public Awareness programs.

**SECTION 18. CONSTRUCTION AND DEMOLITION DEBRIS PROGRAM**

18.1 Purpose. This Section 18 is intended to govern the implementation and operation of the CDP for handling and processing of C&D at the CFL by CONTRACTOR. AGENCY and CONTRACTOR agreed in the Original Agreement, as amended, and continue to agree as to the elements of the CDP that are prospectively applicable and required under the AGREEMENT, that CONTRACTOR was required to and shall continue to be required to develop and operate a CDP at CFL in accordance with the parameters provided in the Construction and Demolition Debris study approved by the AGENCY Board of Directors at their November 19, 2007 meeting in order to maximize the amount of diversion of such debris from the LANDFILL. Phase One of the CDP was required to be, and was, operational on or before September 1, 2008. The CDP program is sometimes referred to in this Section 18 as the “Program.”

18.2 (a) Joint Development with CFL. After obtaining AGENCY Manager's concurrence, and using funds designated for this purpose, the CONTRACTOR shall acquire all of the equipment necessary for the CDP and shall pay for 75% of the operating and capital costs of the CDP.

(b) Subject to the specific provisions of Section 18.5 below regarding funding of Phase Two of the CDP, CFL has agreed to pay for 25% of the operating and capital costs of the CDP from CFL revenues. The Parties may revisit the sharing of operating and capital costs between CONTRACTOR and CFL by mutual agreement. The CDP shall perform the services and shall be developed generally in accordance with the provisions of this Section.

(c) Subject to the specific provisions of Section 18.5 below regarding funding of Phase Two of the CDP, CONTRACTOR’s Seventy Five Percent (75%) share of the program shall be funded through the Rates as provided in Section 18.3 below. AGENCY may, for just cause (which could include, but not be limited to, financial, operational, or efficiency issues), cease providing for funding of the Program through the Rates after giving at least 12 months’ notice to CONTRACTOR provided that CONTRACTOR shall be allowed to continue recovering AGENCY Approved CDP Depreciation for the shorter of one year after CDP operations cease or the date on which the assets of the CDP are fully depreciated. In the event that the AGENCY elects to cease funding the CDP prior to CONTRACTOR’s realization of the full amount of AGENCY Approved CDP Depreciation, and CONTRACTOR elects to sell assets for which AGENCY Approved CDP Depreciation has been allowed, and the sale price for such assets is less than the remaining unrecovered AGENCY Approved CDP Depreciation for such assets, then CONTRACTOR shall be fully compensated in the Rates for such loss to the extent of the unrecovered AGENCY Approved CDP Depreciation. In the event that the sale price for such asset is greater than the remaining unrecovered AGENCY Approved CDP Depreciation, such additional revenue shall be included in Total Revenue in establishing Rates hereunder.

18.3 Special Rate Setting Provisions

 (a) Costs to be Included in Rate Methodology. The Parties agree that CONTRACTOR’s share of the capital and operating costs of the CDP, including a reasonable rental for occupancy pursuant to a written lease agreement with CFL as lessor, subject to approval of such lease by the AGENCY, shall be included in the rate setting model that is set forth in Exhibit B to the AGREEMENT (the “Rate Model”) subject to and in accordance with the terms of this Section.

(b) AGENCY may, from time to time, elect to establish the Rates as provided in Exhibit B hereto at a level that allows CONTRACTOR to collect funds in excess of the amounts that would otherwise be allowed under the Rate Methodology for the purpose of accumulating funds for investment in the CDP or such other purposes as to which CONTRACTOR and AGENCY may agree. In order to accomplish the collection of such funds, AGENCY may establish the Rates at a level that is projected to produce a particular amount of excess revenue, or IOCR. IOCR shall be established as a percentage of revenue, excluding materials revenue.

(c) To the extent that CONTRACTOR earns revenue that is greater than or less than the revenues projected, including IOCR, such excess revenues or revenue shortfalls shall not be included in the calculation of IOCR.

(d) IOCR is not part of Total Revenues defined in Exhibit B, Section III. Projected IOCR, if any, will be calculated at the time that Rates are set for an Operating Period (July 1 through June 30) under the Rate Methodology and CONTRACTOR shall deposit one fourth of such projected IOCR amount quarterly into an account to be held separately in accordance with Section 18.3(l). At the end of each annual Operating Period, CONTRACTOR shall calculate the actual amount of IOCR and increase or decrease the amount theretofore deposited into such account to reflect the actual IOCR for the operating period.

 (e) CONTRACTOR Interest Expense Limitation. CONTRACTOR shall not seek nor shall it receive reimbursement for any costs of borrowing associated with capital purchases funded by 2006 Over Collected Revenue[[1]](#footnote-2) or from IOCR in future years for the design and construction of the initial phase of the AGENCY Approved CDP Depreciable Assets.

 (f) CONTRACTOR Right to CDP Depreciation. CONTRACTOR has not received and shall not receive credit for interest associated with its investment of the 2006 Over Collected Revenue in the Program. CONTRACTOR shall be entitled to recover One Hundred Percent (100%) of the amount of the 2006 Over Collected Revenue invested in AGENCY Approved CDP Depreciable Assets over their useful lives. The depreciation shall be treated as Major Allowable Expenses under the Rate Methodology.

 (h) CONTRACTOR Expenses Allowable. CONTRACTOR’s 75% share of the revenue and expenses associated with the CDP shall be included in the Rates established by the Authority hereunder in accordance with the provisions of Exhibit B to the AGREEMENT and, in particular but not by way of limitation, Article V of Exhibit B.

 (i) Accounting. CONTRACTOR shall establish a separate cost center accounting and reporting system for the CDP, which will include accounting for all of the revenue, capital, and operational costs of the CDP. CONTRACTOR shall include data regarding the CDP in all of the reports required under the AGREEMENT and shall make data from the CDP available to the AGENCY at all reasonable times.

 (j) Reporting Requirements. Audited financial statements prepared in accordance with Generally Accepted Accounting Principles for CONTRACTOR shall include a supplemental schedule of CONTRACTOR’s portion of the CDP. Income from the sale of materials from the CDP shall be reported quarterly and credited 75% to CONTRACTOR and 25% to CFL. Incoming and outgoing volumes of materials shall be reported to the AGENCY monthly. CONTRACTOR shall report the amount of income received by itself and CFL from the sale of materials from the CDP. CONTRACTOR may sell materials processed through the CDP to related entities at Rates agreed to by the AGENCY.

 (k) Landfill Surcharge Fee. Material diverted to the CDP is still included in those materials for which the franchise landfill surcharge fee ($4.75/ton as of the adoption of this amendment) is required to be paid to the AGENCY irrespective of the final disposition of the materials.

(l) Interest on IOCR. Interest shall accrue on IOCR from the date it is deposited (one quarter in arrears) at the rate that is the lower of the actual amount earned by CONTRACTOR on the IOCR if deposited into a separate account or Napa County Treasurer’s “Weighted Average Yield to Maturity of Purchase” from the “Monthly Investment Report.”

 (m) The amount of IOCR to be segregated and maintained subject to the direction of AGENCY shall be reduced by Fourteen and Three Tenths Percent (14.3%) (the “Tax Adjustment”) to account for the federal and state taxes due with respect to such IOCR (estimated to be 40%) less the present value of the tax benefit to be derived from future tax depreciation. The depreciation referenced in this Section 18.3(m) is tax depreciation which is separate and distinct from depreciation as an element of the rate. In addition, the amount of IOCR shall be reduced by the taxes due with respect to earned interest on IOCR (the “Interest Tax Adjustment”). The Interest Tax Adjustment shall be 40%. Double tax free interest shall not be subject to the Interest Tax Adjustment.

 (n) CONTRACTOR shall recover the Tax Adjustment applicable to the 2006 Over Collected Revenue from IOCR to be collected from and after July 1, 2007.

 (o) Solid Waste Generated Outside Service Area. The calculation of the 5% limit of outside waste volume allowed under Section 8.2 of the CFL Agreement is based on the total volume of materials received at CFL prior to processing materials through the CDP (and not on the amount of residue that is disposed of as solid waste after processing).

18.4 Phase Two Capital Investment.

 Phase Two CDP. As stated in one or more prior amendments to the Original Agreement, the Parties have planned that CONTRACTOR will develop a second phase of the CDP project to relocate the initial phase CDP (which is a temporary facility located on property that will be required for LANDFILL expansion) to a permanent facility at CFL and to expand the capabilities of the CDP and further reduce disposal at CFL. The second phase of the CDP (“Phase Two”) shall not commence until the AGENCY and CONTRACTOR agree on the Phase Two plans and costs including all improvements necessary to mitigate the impacts of the development of the CDP on CFL. IOCR for the purpose of Phase Two CDP funding shall be placed within a segregated account by the CONTRACTOR that is acceptable to the AGENCY’S auditor and that is in compliance with Section 5.14 of the AGREEMENT.

18.5 Funding for Phase Two.

 (a) Context. AGENCY and CONTRACTOR agree to implement the CDP for the purpose of reducing the volume of material disposed of at CFL and agree that IOCR, if any, as may be approved by the AGENCY Board of Directors shall be used as directed by the AGENCY provided that the AGENCY shall in no event require CONTRACTOR to invest IOCR where CONTRACTOR will not be entitled to recover its tax depreciation from its investment.

1. No interest on CDP capital costs. CONTRACTOR agrees that, to the extent of its use of IOCR for the design, permitting, construction and equipping of the CDP, CONTRACTOR will not be entitled to recover interest on the amounts so loaned for the CDP.
2. CONTRACTOR and AGENCY agree that Phase Two of the CDP project shall be funded and carried out as follows:
	1. AGENCY shall be responsible for payment of a maximum of $300,000 for all Phase Two costs. Funds shall be provided at AGENCY discretion either via IOCR or by inclusion in CONTRACTOR Rates;
	2. CONTRACTOR shall be responsible for all other costs to complete Phase Two, including, but not limited to, the site work necessary to establish the C&D line at the Gatehouse.
	3. Prior to commencing work, CONTRACTOR shall provide to AGENCY for approval 1) a written description of the planned work, and the goals to be accomplished by the work; 2) a schedule for accomplishing Phase Two; and 3) design drawings for Phase Two.
	4. Phase Two shall be completed on the schedule approved by AGENCY to ensure the C&D line is moved in time to not impact the LANDFILL OWNER’S operation of the LANDFILL and the LANDFILL’s operational ability to provide services to CONTRACTOR and the public, but no later than the end of 2022, subject to extension to be requested by CONTRACTOR from AGENCY (whose consent will not be unreasonably withheld).
	5. It is acknowledged by the Parties as follows:
		1. The AGENCY previously entered into a Fourth Amendment of the LANDFILL FRANCHISE AGREEMENT (the “CFL Amendment”). The CFL Amendment implemented provisions and modifications to provisions of the LANDFILL FRANCHISE AGREEMENT that were dependent in whole or in part on the ability and performance of CONTRACTOR under the AGREEMENT to timely and fully perform and complete Phase Two of the CDP project;
		2. Accordingly, if CONTRACTOR does not complete Phase Two in compliance with the schedule described in Section 18.5(c)iv., above, such that the failure to complete limits the operational capabilities of the LANDFILL, the AGENCY has the right under the CFL Amendment to cancel the CFL Amendment 4, which includes, but is not limited to, extension of the term of the LANDFILL FRANCHISE AGREEMENT from 2025 to 2047.
		3. Thus, CONTRACTOR recognizes the importance of completing Phase Two in a full and timely manner due to the impacts that failure to do so will have on the AGENCY and on the LANDFILL OWNER.

18.6. Phase Two.

 Phase One of the C&D facility was the first phase of a phased C&D recycling program at CFL. Phase One operates on an approved 2.5 acre wet weather outdoor pad with a mobile processing line and outdoor grinding. CONTRACTOR must continue to develop and provide to the Agency for approval plans for Phase Two (Phase One location is limited in time because it is located on property that will be required for LANDFILL expansion). CONTRACTOR has selected select mobile processing equipment as part of Phase One that can be utilized in Phase Two.

 The design of Phases One and Two is intended to supplement and aggressively expand the existing source separation recycling program. CONTRACTOR plans to target the following waste types for diversion:

* Mixed construction and demolition (C&D) materials
* Self-haul waste rich with recyclables
* Dry commercial waste rich with recyclables (Phase Two only)
* Other appropriate recyclable materials

 The CDP program will be conducted by CONTRACTOR as a separate business with the proration of revenue and operating expenses being 75% CONTRACTOR and 25% CFL, which is based on the amount of tonnage received at the CFL gate using weight records. Proceeds from the sale of recovered materials from the CDP will be accounted for separately as part of Total Revenues to determine its cost to rate payers. CONTRACTOR will implement a marketing plan that is intended to achieve the highest use and sales value of recycled materials.

**EXHIBIT B**

**UPPER VALLEY DISPOSAL SERVICE**

**RATE METHODOLOGY**

**I. INTRODUCTION**

 The Rate Methodology contained in this Exhibit B to the AGREEMENT is intended to provide a consistent framework for establishing the Rates that the CONTRACTOR may charge to customers for CONTRACTOR’s SOLID WASTE HANDLING SERVICES. The AGENCY and the CONTRACTOR have agreed on a Rate Methodology which incorporates a review of CONTRACTOR’s Major Allowable Expenses and Major Recoverable Expenses and adjusting all Other Allowable Non-Fuel Expenses and Other Recoverable Expenses (as those terms are defined below) by the Adjusted CPI Index. Allowable Fuel Expenses will be adjusted using the Fuel Index. The CDP expenses will be included in the Rate Methodology contained herein. CONTRACTOR shall provide the CDP Performance Report (defined below) to AGENCY. This Rate Methodology has been developed by the AGENCY in consultation with its MEMBERS, recognizing the importance of uniform Rate review for the collection services on the overall costs of waste management for the ratepayers within the AGENCY's MEMBER jurisdictions.

**II. RATE SETTING PROCESS**

## **1. ADJUSTMENT OF RATES**

## **a. Annual Adjustment**.

## Subject to the terms herein and Article VI below, the Contractor is entitled to one Rate adjustment annually, beginning on July 1, 2018. Contractor's application and request for an adjustment shall be prepared in a format approved by the AGENCY MANAGER, and shall be submitted to the AGENCY by May 1st each year, beginning with May 1, 2018. In addition, a supplemental schedule of CONTRACTOR's portion of the CDP expenses and associated adjustments shall be submitted to the AGENCY by May 1st each year. Each adjustment is to be based on data from the previous twelve (12) month period as specified in this Article II, is to be approved by the AGENCY in June of each year, and will be effective on each subsequent July 1st. Each component shall be adjusted as specified in this Article II.

The AGENCY shall adjust the Rates up or down to reflect: 1) review and projection of Major Allowable Expenses limited to: Wages and Related Benefits (excluding officer’s salaries and benefits), Depreciation, and New Programs/Modifications 2) review and projection of Major Recoverable Expenses limited to: Landfill Fees, Interest, New Programs/Modifications and Development Expenses, 3) all Other Recoverable Expenses and Other Allowable Non-Fuel Expenses will be adjusted by the Adjusted CPI Index, 4) notwithstanding any other provision in the AGREEMENT, actual changes in any Pass-Through Costs will be incorporated into the Rates for a Member as of the effective dates of such changes established by the Board or City Council of such Member as specified below in the Pass-Through Costs definition, and 5) Allowable Fuel Expenses will be adjusted as specified below.

**b. Special Identification of CDP Expenses and Revenue.**

In each instance where there is CDP expense or CDP revenue, such CDP expense and CDP revenue (attributable to COMPANY’s 75% share of the CDP) shall be separately identified as a CDP expense or CDP revenue, as applicable, in all reports and rate setting requests and calculations submitted by COMPANY to AGENCY. By way of example, COMPANY shall, in seeking an Annual Adjustment and in its reporting to the AGENCY, identify “Wages and Related Benefits (excluding officer‘s salaries)” and “CDP – Wages and Related Benefits (excluding officer’s salaries)” and shall similarly specify CDP related expenses and revenues for all purposes in proceeding under this Exhibit B. The purpose of the separate identification of CDP revenue and expenses is to assure that the AGENCY will have accurate data with which to calculate the net cost to rate payers of the development and operation of the CDP. The CDP related expenses and revenues shall be included in all rate setting calculations subject to the same adjustments as are applicable to like non-CDP related expenses and revenue, if any, and subject to the special provision for adjustment of CDP related expenses at Section V (1) (a) of Exhibit B.

**c. Calculation of Adjustment to Other Allowable Non-Fuel Expenses and Other Recoverable Expenses**

Other Allowable Non-Fuel Expenses (OANFE) shall be adjusted as follows:

Adjusted OANFE = (Previous Year OANFE) x [[(current year February CPI/12-month previous year February CPI) - 1] x 0.93 + 1]

Example: Assume the following change in CPI:

1. Current year February CPI = 123

 2. Previous 12-month February CPI = 118

 3. Previous year OANFE = $1,000,000

Adjusted OANFE is calculated as follows:

 Adjusted OANFE = $1,000,000 x [[(123/118) – 1] x 0.93] + 1] = $1,039,407

 Other Recoverable Expenses are calculated similarly.

**d. Calculation of adjustment to Allowable Fuel Expenses**

Allowable Fuel Expenses (AFE) shall be adjusted as follows:

Adjusted AFE = (Previous Year AFE) x [(current year Fuel Index/ prior year Fuel Index )]

Example 1: Assume the following change in OPIS:

1. Current Year Fuel Index = 275

 2. Prior Year Fuel Index = 250

 3. Previous year AFE = $200,000

Adjusted AFE is calculated as follows:

 Adjusted AFE = $200,000 x [(275/250)] = $220,000

Example 2: Assume the following change in OPIS:

 1. Current Year Fuel Index = 240

 2. Prior Year Fuel Index = 250

 3. Previous year AFE = $200,000

Adjusted AFE is calculated as follows:

 Adjusted AFE = $200,000 x [(240/250)] = $192,000

Example 3: Calculation of Average Fuel Index:

 Average Monthly

 OPIS Index

 February 263

 March 268

 April 273

 May 278

 June 283

 July 288

 August 287

 September 282

 October 277

 November 272

 December 267

 January 262

 Subtotal 3,300

 Divided By Number of Months 12

 Average OPIS Index 275

For purposes of computing the Adjusted AFE for the 2013-2014 Operating Period, the previous year AFE is defined as follows:

 Fuel Related Expenses for CONTRACTOR Hauling $655,238

 Fuel Related Expenses for CDP Operations $ 54,963

**e. Change in the CPI or OPIS Index**

If the CPI or OPIS Index is discontinued or revised during the Term such other index or computation with which it is replaced shall be used in order to obtain substantially the same result as would be obtained if the CPI or OPIS Index had not been discontinued or revised.

**2. dates for rate applications and RATE setting**

 Rate applications will be submitted May 1st of each year for review and adjustments to Rates will be applied to the following Rate Year beginning on July 1st.

An application submittal must include, but is not limited to the following:

 a. Audited financial statements prepared in accordance with Generally Accepted Accounting Principles for CONTRACTOR for the prior Financial Year including a separate schedule for CDP related expenses.

 b. Supplemental schedules for expenses that agree with the Rate Methodology with a schedule reconciling the Rate Methodology to the audited financial statements including a separate schedule for CDP related expenses.

 c. Supporting documentation, including an audited schedule, for transactions with affiliated companies.

 d. Supporting documentation (invoices) for purchases of fixed assets.

 e. A forecast of the next Financial Year's Major Allowable and Recoverable Expenses with supporting documentation.

 f. A list of all assets owned by CONTRACTOR and all assets leased or rented to CONTRACTOR by related parties, for which depreciation is claimed as an expense of operations in the Rate proposal. This list is to include asset descriptions, costs, dates of acquisitions, and current depreciation.

 g. Supporting information concerning the revenues and expenses of provision of diversion services and other special services provided by CONTRACTOR.

 h. A schedule of Current and Proposed Rates for each MEMBER.

 i. Any other information reasonably required by staff for the review of the application and its supporting documentation.

 Once a complete application has been submitted by CONTRACTOR, the AGENCY will begin the review process, request clarifications and any additional information, and the AGENCY will calculate the Adjusted Rates. It will then adjust Rates by the Cost of Service Factor for each MEMBER. The AGENCY will adopt new Rates as required by this Rate Methodology.

 If clarifications and responses for additional information are not completed in a timely manner, the effective dates for setting the Rates may change.

 It is not the intent of the AGENCY to include all types of expenses as recoverable through Rates. Non-Recoverable Expenses are excluded from any review and consideration. Increases in expenses due to CONTRACTOR inefficiencies should not be borne by the ratepayers.

**3. adjustments to rATE setting process**

 If either the AGENCY or CONTRACTOR wishes to propose any adjustment or amendment to the Rate Methodology set forth in this Exhibit B, a notice and written proposal of the requested amendment(s) shall be provided by the Party desiring the changes to the other Party pursuant to Section 5.9 of Exhibit A to the AGREEMENT (Notices). The receiving Party will review the proposed adjustments in a timely manner and notify the other Party as to its decision whether to adopt or not adopt the amendment to the Rate Methodology. The adoption process will follow that of the original Rate Methodology adoption process.

**4. Anticipated capital and debt expenses**

 The CONTRACTOR will prepare and submit a three year capital budget which forecasts debt or capital expenses greater than five thousand dollars ($5,000.00) related to development, expansion, and other capital improvements, including leases. Any change in the use of funds must be pre-approved by the AGENCY. To allow for delays in actual expenses and the approval of the expense by the AGENCY, half of the annual depreciation expense will be allowed for use in the first Rate Year that the expense is anticipated in, with the full annual depreciation expense being allowed in the following Rate Years based on the date of purchase.

 Employees of CONTRACTOR, as reviewed by the AGENCY, must substantiate these projected cost estimates. The term of the amortization of these expenses will be determined on a case by case basis, according to the depreciation schedules described herein, depending on the size and nature of each expense.

 All reasonable means must be employed to anticipate these capital costs in order to mitigate Rate shock. Large anticipated expenses could be captured through Rates several years in advance of their actual incurrence. If future expenses are Pre-funded with current collection fees, all such funds shall be deposited as collected monthly into third party trust accounts, in a manner acceptable to the AGENCY Auditor.

**III. DEFINITIONS AND PROVISIONS APPLICABLE TO DEFINED TERMS**

 In addition to the Definitions stated in Exhibit A, Section 1 to the AGREEMENT, which are incorporated herein by this reference, the following definitions and provisions apply to the following terms and phrases:

**2003 Base Year:** audited financial statements for 2003 that were used in the 2005 rate package approved by the AGENCY on December 12, 2005. For the initial year, the amounts will be determined by applying the Adjusted CPI Index to the 2003 Base Year amounts to arrive at the 2004, 2005 and 2006 amounts.

**Adjusted CPI Index:** the factor by which Other Recoverable Expenses and Other Allowable Non-Fuel Expenses are adjusted to address increasing costs of inflation. The Index is defined as 93% of the increase or decrease in the Consumer Price Index (CPI, the San Francisco-Oakland-San Jose Metropolitan Area Consumer Price Index All Items for All Urban Consumers) over the previous twelve (12) months from the February CPI, not to exceed 8% in any given Rate Year (and therefore Index not to exceed 7.44% per year, or 93% of 8%).

**Adjusted Allowable Fuel Expense:** Previous Year Allowable Fuel Expense times the current year Fuel Index divided by the prior year Fuel Index.

**AGENCY Approved CDP Depreciable Assets**: Assets that are not purchased with IOCR and for which depreciation shall be included in the rate as Major Allowable Expenses.

**Allowable Expenses:** all expenses found to be reasonable and necessary in providing quality service to the ratepayers represented by the AGENCY and over which CONTRACTOR has a strong degree of control. Allowable Expenses include Major Allowable Expenses and Other Allowable Non-Fuel Expenses. CONTRACTOR will receive an Operating Ratio on all Allowable Expenses. Allowable Expenses also include certain expenses which have been previously included for the purposes of recovering an Operating Ratio but which are capped (and for which additional expenses will be treated as Recoverable Expenses).

**CDP Non-Depreciable Assets**. CDP Non-Depreciable assets are assets acquired by CONTRACTOR with IOCR.

**CDP Performance Report.** The CDP Performance Report shall categorize all of CONTRACTOR’s share of expenses of the CDP in accordance with the categories set forth in this Exhibit B and shall report CONTRACTOR’s share of revenues from sales of materials. The CDP Performance Report shall also include a report on the throughput of the CDP and such other items as the AGENCY may reasonably request.

**Cost of Service Factors:** the factors (one for each MEMBER) by which the Rate is adjusted to reflect the differing costs associated with hauling from the different MEMBER's communities and as detailed in Attachment 1.

**CPI:** the San Francisco-Oakland-San Jose Metropolitan Area Consumer Price Index All Items for All Urban Consumers.

**Financial Year:** the financial period of time from January 1st through December 31st, defined as one (1) year.

**Fuel Index:** means the average of the twelve average monthly OPIS indexes beginning with February of the Financial Year and ending with January of the subsequent Financial Year as set forth by the OPIS Standard Diesel Rack Prices (CARB OPIS average for San Francisco), established on the web site (<http://opisnet.com>)

* **Current Year Fuel Index:** the Fuel Index beginning in February of the Financial Year that precedes the year the Rate Year begins.
* **Prior Year Fuel Index:** the Fuel Index that begins one year prior to the Current Year Fuel Index.

**Fuel Related Expenses:** all Fuel Related Expenses are to be adjusted using the Fuel Index. The initial Fuel Index for the 2007 Rate Year was based upon a one-time 2003 Base Year adjustment. For purposes of computing the Fuel Related Expenses for Operating Period of July 1, 2013 to June 30, 2014 the average of the twelve average monthly OPIS indexes will become effective.

**IOCR:** IOCR has the meaning set forth at Section 18.3(b) of the AGREEMENT

**Initial Year CDP Budget Expenses**: CONTRACTOR will provide a detailed proposed budget for the initial year of operations of the CDP. The AGENCY shall review and comment on the proposed initial CDP budget and the Parties shall agree on an Initial Year CDP Budget. The Budget will be adjusted as provided at Section V. (a) below.

**Major Allowable Expenses**: are limited to Wages and Related Benefits (excluding officer’s salaries and benefits), Depreciation, and New Programs/Modifications. Major Allowable Expenses include:

1. Wages and Related Benefits: salaries and benefits (including AGENCY approved "profit sharing" retirement plans not including Officer Salaries and Benefits) as paid to employees of CONTRACTOR and payroll taxes paid on such. Benefits include fees associated with group insurance and workman’s compensation.
2. Depreciation on CONTRACTOR Owned Assets: expenses related to depreciation of all owned assets of CONTRACTOR including AGENCY Approved CDP Depreciable Assets but excluding CDP Non-Depreciable Assets as calculated, using an actual or historical cost, on a straight-line depreciation basis. Vehicles shall be determined to have a useful life of five (5) years for depreciation purposes. All other assets owned by CONTRACTOR, excluding structures and leasehold improvements, shall have their useful life determined upon purchase or renovation, in accordance with generally accepted accounting principles. Structures and leasehold improvements shall be determined to have a useful life of thirty (30) years.
3. CDP-Special Provision Regarding AGENCY Approved CDP Depreciable Assets: The AGENCY may, for just cause (which could include, but not be limited to, financial, operational, or efficiency issues), cease funding of the program after giving at least 12 months' notice to the CONTRACTOR. The CONTRACTOR shall be allowed to continue recovering AGENCY Approved CDP Depreciation only up to one year after CDP operations cease.
4. New Programs/Modifications: include expenses for new programs and modifications to existing programs as approved by the AGENCY.

**Major Recoverable Expenses:**  are limited to Landfill Fees, Interest, and New Programs/Modifications and Performance Review costs. Major Recoverable Expenses include:

1. LANDFILL Fees: Landfill Fees are calculated as follows: audited amount adjusted for the approved change of rate at Clover Flat Landfill less adjusted Landfill Expenses (accounted for in Other Allowable Non-Fuel Expenses).
2. Interest Expenses on Debt.  (1) Debt is defined as money paid on loans with periodic payments of principal and/or interest based on a loan agreement (the loan agreement shall specify the amounts and dates of repayment on the loan) made by the CONTRACTOR.  For purposes of inclusion in the Rate Methodology, any debt incurred through Intercompany loans must be for loans longer than 90 days.  (2) CONTRACTOR may, however, participate in Intercompany loans of less than 90 days after requesting approval of the Agency Manager, providing the reason for the Intercompany loan (e.g., unexpected economic event), the estimated amount of the loan and the length of the loan.  The AGENCY Manager must respond in writing to the request within ten (10) Working Days. AGENCY Manager’s approval may not be unreasonably withheld.)  (3) Any Intercompany loans that exceed 90 days and include periodic payments of principal and/or interest will not require written approval from the AGENCY Manager, but will require written notification from the CONTRACTOR to the AGENCY Manager if they are simply replacing (or re-financing) an existing loan that was previously approved by the AGENCY.  Any loans for anticipated capital purchases must be proposed, as required in Section II, subsection 4, through the three year capital budget.  (4) Loan schedules must be included as part of the annual rate package for any debt that meets the definitions set forth in this section and that are being requested for consideration in the rate review process.
3. Bank Covenants: It is recognized that CONTRACTOR must comply with the financial covenants established by its banks and lending institutions. It is further recognized such compliance is effected by CONTRACTOR’s level of borrowing which fluctuates from time to time. Consequently, CONTRACTOR may include as a Major Recoverable Expense the amount needed to provide the additional necessary revenue to meet all of its bank covenants.
4. New Programs/Modifications: includes expenses for new programs and modifications to existing programs as approved by the AGENCY.
5. Performance Reviews: include expenses up to $30,000 per Review plus CPI.

**Non-Recoverable Expenses:** all expenses which are neither Allowable Expenses nor Recoverable Expenses, including, but not limited to, intercompany leases for personal property, intercompany loans and advances less than 90 days, officers’ salaries and benefits in excess of levels set for 2003 and adjusted annually using the Adjusted CPI Index, dues and subscriptions, fines and penalties, donations, non-MEMBER services and MEMBER non-uniform special services.

Expenses associated with MEMBER services described in Section 2.2(a) of Exhibit A of the AGREEMENT are Non-Recoverable expenses. For purposes of Section 2.2(a), expenses are defined as the direct cost of providing each MEMBER event or service as determined by a separate accounting.

Expenses and revenues associated with services provided for non-MEMBER Customers or non-uniform MEMBER services and for special services provided for MEMBER Agency(ies) must be accounted for separately. If similar resources (i.e., personnel, vehicles, etc.) are used for MEMBER uniform services and MEMBER special services or non-MEMBER services, accurate estimates of the percentage use of all of those resources must be developed by CONTRACTOR and approved by the AGENCY. Interest expense from credit cards, Federal or State income taxes, contributions, entertainment and promotional expenses are explicitly excluded.

**Operating Period**: the period of time from July 1st through June 30th, defined as one (1) year.

**Operating Ratio:** the ratio of Allowable Expenses divided by Total Revenues (based on Allowable Expenses). Operating Ratio means 88.5%.

**Other Allowable Non-Fuel Expenses:** all Allowable Expenses except Major Allowable Expenses and Fuel Related Expenses. Other Allowable Non-Fuel Expenses will be adjusted using the Adjusted CPI Index. The initial Adjusted CPI Index for the 2007 Rate Year will be based upon a one-time 2003 Base Year adjustment.

Other Allowable Non-Fuel Expenses include:

 a. Officers’ Salaries and Benefits: benefits shall be based on levels set for 2003 and adjusted annually using Adjusted CPI Index.

 b. Vehicle Operating Expenses: all expenses related to the normal route operation of vehicles owned or leased by CONTRACTOR except for Fuel Related Expenses and which are used to provide service to the ratepayers represented by AGENCY.

 c. Equipment Operating Expenses: all expenses related to the maintenance of equipment owned by CONTRACTOR and which is used to provide service, but not normally used on collection routes, to the ratepayers represented by AGENCY.

 d. Garage Expenses: all costs related to the maintenance and repair of vehicles owned or leased by CONTRACTOR. Garage expenses provided to affiliates of CONTRACTOR must be reimbursed by those affiliates.

 e. Administrative Expenses: all expenses related to the office operations and administration of CONTRACTOR including those expenses attributable to supplies, postage, office equipment maintenance, and other miscellaneous administrative expenses not covered in other categories. Administrative services provided to affiliates of CONTRACTOR must be documented and reimbursed by those affiliates.

 f. Leases

 i. Third Party Leases - All third-party leases (including real and personal property) are Allowable Expenses.

 ii. Intercompany Leases - Intercompany leases for real property are Allowable Expenses for any leases entered into prior to September 25, 1995 and will be adjusted according to the Adjusted CPI Index.

 iii. Intercompany real property leases will be adjusted one-time for the 2007 Rate Year based on the difference between the 2003 Base Year and the CONTRACTOR’s 2006 audited financial statements. After the one-time adjustment, all future adjustments will be based upon the Adjusted CPI Index.

(See Non-Recoverable Expenses for personal property leases).

 g. LANDFILL Expenses: expenses for LANDFILL disposal up to one million one hundred twenty thousand dollars ($1,120,000, as adjusted by the Adjusted CPI Index) will be Allowable Expenses. All expenses exceeding this limit will be Recoverable but not Allowable for the application of the Operating Ratio.

 h. Consultant Expenses: expenses for consultant services, including legal, accounting and other professional services as adjusted by the Adjusted CPI Index based on the 2003 Base Year.

1. Insurance Expenses: All insurance expenses, including liability, vehicle, and umbrella liability insurance (excluding the expenses of all insurance and benefits related to stockholders).
2. Hazardous Waste Clean-up and Extraordinary Expenses: Clean-up costs associated with hazardous wastes, household hazardous waste programs, or other extraordinary expenses imposed on CONTRACTOR by the AGENCY. All such expenses shall be deemed "Allowable" only up to such point that the expense becomes excessive, and any excess thereafter will be subject to review and approval by the AGENCY.
3. Operational Fees: includes all necessary licenses, permits and fees not specifically defined as Recoverable Expenses.

**Other Recoverable Expenses:** all Recoverable Expenses, except Major Recoverable Expenses. Other Recoverable Expenses will be adjusted using the Adjusted CPI Index. The initial Adjusted CPI Index for the 2007 Rate Year will be based upon a one-time 2003 Base Year adjustment. Other Recoverable Expenses include:

 a. Consultant Expenses: expenses for consultant services, including legal, accounting and other professional services as adjusted and not included in Other Allowable Non-Fuel Expenses.

 b. Federal and California State Taxes, Assurances and Fees: All such taxes, assurances and fees, including such items as State Superfund Requirements, State Department Requirements wage taxes and property taxes.

 c. County Taxes and Fees: All such taxes and fees including County environmental fees.

 d. Real Property Intercompany Leases: Lease agreements that are incurred after the effective date of this Amendment will be considered reasonable only if the lease payment is comparable to the cost of a third-party lease.

 e. Bad Debts

 f. Surety Bonds

**Pass-Through Costs:** include any FRANCHISE FEES that CONTRACTOR is permitted to include in the Rates with no Operating Ratio thereon. Revenue received by CONTRACTOR from, and expenses incurred by CONTRACTOR for, FRANCHISE FEES will be removed before calculating projected rates. For the avoidance of doubt: (a) when adjusting Rates in respect of the FRANCHISE FEES charged by a single Member, such FEES will be backed out of that Member’s Rates before the Rate adjustment is applied and subsequently added back to the adjusted Rates for that Member, and (b) when a single Member changes its FRANCHISE FEES, or imposes new FRANCHISE FEES, during a Rate Year, CONTRACTOR will incorporate the new or changed FRANCHISE FEES into the Rates for the customers within such Member’s geographical areas as of the effective date for the new or changed FRANCHISE FEES established by the Board or City Council of such Member through a properly noticed action of the Member’s governing body. A copy of the resolution, ordinance or minute order adopted by the Member’s governing body will be provided to CONTRACTOR and the AGENCY MANAGER thirty (30) days prior to the effective date of the new or changed FRANCHISE FEES.

**Pre-funded Expenses:** any expense where a Rate has been set one year in advance for an expense funded by the AGENCY.

**Rate(s):** Rates are defined as:

 a. Proposed Rates are those Rates proposed by the CONTRACTOR for the new Rate Year

 b. Adjusted Rates are those Rates adjusted by the AGENCY from Proposed Rates supplied by the CONTRACTOR

 c. Approved Rates are those Rates set and approved by the AGENCY to be applied for the Rate Year.

**Rate Methodology:** the method and steps set forth in this document, which shall be used to govern the calculation of Rates by the AGENCY.

**Rate Year:** a one year period beginning July 1 and ending the subsequent June 30 during which time a single Rate per type of service applies.

**Recoverable Expenses:** means Major Recoverable Expenses and Other Recoverable Expenses, all of which will be reimbursed to CONTRACTOR but upon which CONTRACTOR will not receive an Operating Ratio.

**Revenue Increase (Decrease) Required:** the difference between Total Revenues and Allowable Expenses grossed up for the Operating Ratio plus Recoverable Expenses.

**Total Revenues:** all revenues, except for Franchise Fees, recognized by CONTRACTOR less actual IOCR during one Rate Year, including, but not limited to, those revenues derived from Rates, interest income from Intercompany loans and advances that have periodic payments of interest and principal and a loan period of greater than 90 days, insurance refunds or dividends, gains and (losses) on sales of fixed assets, service charges assessed on delinquent accounts, diverted materials sale, CDP materials sale and other revenue, if any, and all other revenues related to CONTRACTOR's operating activities (intercompany revenues received from other affiliates for pooled costs are not includable in Total Revenue, but have been included in the 2003 base year amounts for Other Allowable Non-Fuel Expenses and are adjusted each year by the application of the Adjusted CPI Index to the prior year approved rate package amount for Other Allowable Non-Fuel Expenses). Revenues from materials sales attributed to the CDP operations shall be accounted for separately. Revenues from Franchise Fees shall be excluded in accordance with the definition of Pass-Through Costs.

**IV. RATE SETTING IMPLEMENTATION AND GUIDELINES**

**Annual Rate Calculation Steps (See Exhibit B, Attachment 2 for an Example of the Rate Calculation)**

1. CONTRACTOR will submit audited financial statements as described in Article II Part 2a.
2. Place the audited Major Allowable Expenses, Major Recoverable Expenses and Total Revenues from the audited financial statements in the “CPI & Audited FY xx/xx” column.
3. Obtain the Other Allowable Non-Fuel Expenses, Other Recoverable Expenses and Fuel Expense from the prior year approved rate package and place in the “CPI & Audited FY xx/xx” column. For the initial year the amounts will be determined by applying the Adjusted CPI Index to the 2003 Base Year amounts to arrive at the 2004, 2005 & 2006 amounts.
4. Place the amount for Development Expenses in the “CPI & Audited FY xx/xx” column. (This step will be discontinued after June 30, 2015.)
5. The projections for Major Allowable Expenses and Major Recoverable Expenses will be placed in the “Projected or CPI Adjustment” column. Supporting documentation and schedules will be provided for amounts used. Landfill Fees will be Calculated as follows:
	1. Audited Landfill Expenses times the approved change for Clover Flat Landfill Fees
	2. Less the amount of Landfill Expenses under Allowable expenses.
6. The projected depreciation and interest expense for new assets from the previous year’s Rate Methodology will be reviewed. The prior year’s projected fixed asset additions will be reviewed and confirmed. The depreciation and interest expense for any projected new asset from the prior year will be reversed and eliminated in the current year’s projected depreciation and projected debt if the new asset was not purchased in the prior year.
7. Adjusted CPI Index and OPIS Index will be used to calculate the change to Other Allowable Non-Fuel Expenses, Other Recoverable Expenses, and Fuel Expense which will be included in the “Projected or CPI Adjustment” column.
8. The totals of the “CPI & Audited FY xx/xx” column plus “Projected or CPI Adjustment” column will be placed in the “Projected FY xx/xx” column.
9. Calculation of Revenue Increase (Decrease) Required is as follows:
	1. Total Allowable Expenses divided by the Operating Ratio.
	2. Plus the Recoverable Expenses.
	3. Less the Total Audited Revenue net of IOCR.
10. Calculation of “Percentage Increase (Decrease) Required” is as follows:

Revenue Increase (Decrease) Required divided by total audited revenue net of IOCR.

1. Rate equals the approved rate times one plus the “Percentage Increase (Decrease) Required”.
2. Rates will be calculated for each MEMBER based on the Cost of Service Factors as shown in Attachment 1.

**V. Special Rules Pertaining to Including CDP in Rate Setting**

**1. General.** Subject to special adjustments, CONTRACTOR’s 75% share of the cost of operating the CDP shall be included in the rate setting process. CONTRACTOR and AGENCY shall include the Initial Year CDP Budget Expenses in the Rates.

**a. Initial Period and Second Year CDP Expenses and Revenue.** Each line item of the Initial Year CDP Budget shall be included in the appropriate category of expense and revenue as a separate line item in the Rate Methodology. For the initial year of operations of the CDP, AGENCY and CONTRACTOR shall rely on the Initial Budget to establish the line item amounts to be included in the Rate Methodology. After at least one full year of operations, the CONTRACTOR and the AGENCY shall review the expenses and revenues of the CDP and shall determine whether or not there should be any adjustments to the actual revenue and expenses of the CDP to reflect extraordinary circumstances during the initial year of operation. The first year actual expenses and revenue subject to adjustment by agreement of the Parties as provided in the preceding sentence shall be the basis for the Annual Adjustment, if any, after the second year of operation of the CDP.

**b. CDP Expenses and Revenue.** CONTRACTOR’s CDP relatedexpenses and revenues shall be separately identified as provided at Section II (1) (b) of this Exhibit B and shall be included in the Rate Methodology subject to the same provisions that apply to CONTRACTOR other revenue and expenses hereunder excepting only the special provisions that apply to AGENCY Approved CDP Depreciation and the provisions limiting the right of the CONTRACTOR to recover depreciation and interest on assets acquired with IOCR. All of CONTRACTOR’s share of the CDP expenses which would be included as expenses in establishing the rate under this Exhibit B, including but not limited to Fuel Related Expenses, Major Recoverable Expenses, Major Allowable Expenses, Allowable Expenses, Other Allowable Non-Fuel Expenses, Other Recoverable Expenses, Pre-funded Expenses, and Recoverable Expenses shall be included in calculating the rate to be allowed to CONTRACTOR hereunder in accordance with Exhibit B. Each such expense shall be separately identified as required under Section II (1) (b) of this Exhibit B.

**c. CONTRACTOR Share of CDP.** Notwithstanding any other provision of the AGREEMENT, only seventy five per cent of the expenses and revenues of the CDP Program shall be considered for rate setting purposes. CFL shall have the other 25% share of the expenses and revenues for the CDP.

**d. CDP Performance Report**. CONTRACTOR shall provide CDP Performance Reports to AGENCY no less frequently than annually. AGENCY shall use the CDP Performance Report as a basis for determining the continuing value and benefit of the CDP for the rate payers and for such other purposes as the AGENCY may deem suitable.

**VI. Special Rate Reviews.** Special Rate Reviews will be available in accordance with this Article VI and otherwise will follow the Rate Methodology in Articles I through V of this Exhibit B.

a. Eligible Items. Notwithstanding the schedule for annual Rate adjustments described in Article II above and subject to the terms herein, CONTRACTOR is entitled to apply to AGENCY for consideration of a special Rate review (a “Special Rate Review”), or AGENCY may initiate such a Review should one or more of the following occur:

1. A change in the cost of providing SOLID WASTE HANDLING SERVICES due to a change in State or local fees or surcharges at Disposal or processing sites or a CHANGE IN LAW.

2. A CHANGE IN SCOPE as provided in Section 6.2 or Section 8.2 of Exhibit A to the AGREEMENT.

3. A CHANGE IN LAW for which CONTRACTOR compliance is mandatory, and that results in a significant documented change in the specific cost of providing SOLID WASTE HANDLING SERVICES.

Special Rate Reviews are intended to be used to make legitimate Rate adjustments to reflect changes in Allowable Expenses, Recoverable Expenses and Pass-Through Costs. It is the responsibility of CONTRACTOR to identify any such eligible items as early as possible, and prior to their taking effect for any eligible item such as a CHANGE IN LAW that CONTRACTOR should reasonably have anticipated. Special Rate Reviews are not intended to provide retroactive compensation for past changes in the eligible items listed above, or to assist CONTRACTOR should CONTRACTOR have underestimated the cost of providing the services to an expanded SERVICE AREA.

* 1. **Ineligible Items.** Items for which Contractor will not be additionally compensated over the Term, except as resulting from a CHANGE IN SCOPE, include, but are not limited to:
1. Changes in fuel cost.
2. Increases in transportation time and/or costs related to provision of SOLID WASTE HANDLING SERVICES.
3. Changes in the number of Customers due to changes in population or housing/business development, or to annexation or de-annexation.
4. Shifts in the number of accounts between larger and smaller Cart sizes, large and smaller Bins, or more or less frequency of Bin pickup.
5. Incorrectly estimated number of accounts; tons of Solid Waste, Recyclables, Food Waste or Green Waste; or inaccuracies in any other assumptions or data at any time during the Term.

c. Review of Costs. Should either Party request a Special Rate Review, the AGENCY shall have the right to review any or all costs associated with CONTRACTOR's SOLID WASTE HANDLING SERVICES under the AGREEMENT.

**d. Submittal of Request.** Either Party must submit any request for a Special Rate Review, and reasonable supporting cost and operational data in a form and manner specified by the AGENCY at least three (3) months prior to the proposed effective date of any Rate adjustment, and shall make every effort to have any such increase coincide with a regular Rate adjustment as specified in Article II above.

**e. Burden of Justification.** The Party requesting a Special Rate Review shall bear the burden of justifying by Clear and Convincing Evidence any entitlement to a Rate adjustment under this Article VI. If either Party determines that the requesting Party has not met its burden, the requesting Party may request another hearing to produce additional evidence.

f. Grant of Request. Based on the evidence the requesting Party submits, the AGENCY Board of Directors may grant some, all or none of the Rate adjustment requested pursuant to this Article VI, and the requesting Party shall be entitled to submit any unfavorable decision to arbitration in accordance with Section 7 of Exhibit A to the AGREEMENT.

g. Cost of the Review. Each Party will be responsible for covering their costs of the Special Rate Review. Any costs of third party contractors retained by CONTRACTOR will be considered Major Recoverable Expenses for purposes of the Rate Methodology.

**EXHIBIT B, ATTACHMENT 1**

**COST OF SERVICE FACTORS**

The Cost of Service Factors are intended to adjust the Base Year Rate for differences in the cost of providing a consistent set of services to the ratepayers of the MEMBERS. While the Cost of Service Factors are based on observable criteria and on the evaluation of CONTRACTOR personnel of the cost and difficulty associated with collection in the different communities, they do not measure actual differences in the cost of providing service.

MEMBER Cost of Service Factor

 St. Helena 1.000

 Calistoga 1.239

 Yountville 0.968

 Napa County 1.398

**EXHIBIT B, ATTACHMENT 2**

**SAMPLE CALCULATION**

[See following page]

**EXHIBIT C**

 **RATES**

**(As set forth in the current Rate Resolution adopted by the AGENCY Board of Directors each year)**

**EXHIBIT D
LIQUIDATED DAMAGES**

The following schedule of Liquidated Damages is agreed upon by the Parties as a reasonable and good faith estimate of actual damages incurred by AGENCY and/or its MEMBERS for the stated events and agree that the listed actions or omissions constitute defaults under the AGREEMENT:

###### Provision of Service to Customers

|  |
| --- |
| 1. Failure to commence service to a new Customer within seven (7) days of receiving order: $100.00 per incident.
 |
| 1. Failure to provide carts, bins, or other collection containers to Customer within three Working Days of the Customer’s request for service: $200.00 per incident.
 |
| 1. For each occurrence in excess of ten (10) per calendar year to replace emptied Containers upright, with lids closed, and within 5 feet of the location from which the same were picked up by the CONTRACTOR’s employees: $100.00.
 |
| 1. Failure to repair or replace any Cart, Bin, Debris Box, Compactor or other Collection Container, when so required by the AGREEMENT within two (2) Working Days: $100.00 per occurrence.
 |
| 1. Failure to correct a missed pickup of a timely and properly placed Container within one 24-hour Working Day: $100.00 per occurrence; and $100 for each additional 24-hour Working Day.
 |
| 1. Failure to tag materials not collected due to contamination or inappropriate set out: $200.00 per occurrence.
 |
| 1. Failure to respond to a Customer complaint within a reasonably prompt period of time, no later than three Working Days after receipt of complaint: $100.00 per day per incident.
 |
| 1. Failure to record a response to a Customer complaint or request within 24 hours of resolution: $100.00 per occurrence.
 |
| 1. Failure to notify Customers of improper setouts: $100 per incident.
 |
| 1. Discourteous behavior by CONTRACTOR staff: $300.00 per incident.
 |
| 1. Failure to answer the telephone or answering machine during normal business hours: $200.00 per incident.
 |
| 1. Additional penalty when CONTRACTOR receives more than 25 valid service-related complaints in any 30-day period: $2,500.00.
 |

**Contractor Operations**

|  |
| --- |
| 1. Failure to complete at least ninety-five (95) percent of a scheduled route on the regular scheduled route day: $500.00 per uncompleted route.
 |
| 1. Making changes to routes or route days affecting five (5) percent or more of Customers without prior notice to Customers at least 72 hours in advance, except for holiday schedules: $100.00 per Customer per day.
 |
| 1. Failure to properly cover materials in collection vehicles: $300.00 per incident.
 |
| 1. Failure to promptly correct leakage of fluids from collection vehicle: $300.00 per incident.
 |
| 1. Failure to clean up spillage or litter occurring during collection: $100.00 per occurrence.
 |
| 1. Failure to have a vehicle properly licensed, registered and inspected: $100.00 per incident.
 |
| 1. Exceeding the weight limitations by the standard used by California Highway Patrol (CHP) (i.e. currently a maximum variance of 200 pounds is allowed by CHP) as set forth in the State of California Vehicle Code: $1,000 per incident.
 |
| 1. Failure to clean collection vehicles once per week: $100.00 per incident.
 |
| 1. For each occurrence over five (5) per calendar year of excessive noise: $300.00.
 |
| 1. Failure to maintain properties, facilities, and equipment in clean, safe, and sanitary manner, upon notice by County: $100.00 per day.
 |

###### **Segregation and delivery of Waste and Divertibles**

|  |
| --- |
| 1. Failure to keep Waste and Divertible Materials segregated once separated and put out for for collection by Customers: $1,000 per incident.
 |
| 1. Failure to deliver collected Solid Waste to the designated or appropriate disposal or transfer facility, and without AGENCY approval: $1,000 per incident.
 |
| 1. Delivery of Divertible Materials to a disposal facility, rather than to a designated recycling facility or delivery direct to market, and without County approval: $1,000.00 per incident.
 |

###### **Contractor Personnel and Liability**

|  |
| --- |
| 1. Failure to have a vehicle driver properly licensed: $100.00 per incident per day.
 |
| 1. Failure to perform DMV and criminal background check on each driver at time of hire: $100 per each driver
 |
| 1. Failure to repair damage to Customer property or other private property caused by or resulting from actions of the CONTRACTOR or its personnel within thirty (30) days of the date the damage was reported: $100.00 per incident per location.
 |

**Diversion Requirements**

|  |
| --- |
|  |
| 1. Failure to conduct Waste Audits and prepare Recycling Plans: $250 per commercial account per year.
 |

###### **Payment and Reporting Requirements**

|  |
| --- |
| 35. Failure to maintain a customer complaint log, or fraudulent record keeping or fraudulent information provided by the CONTRACTOR with regard to customer complaint logging, tracking and resolution: $10,000 per incident.  |
| 1. Failure to report or clean up any vehicle fluid spills to the County’s satisfaction. $1,000 per incident.
 |

###### **Other CONTRACTOR Obligations**

|  |
| --- |
| 37. Failure to provide detailed route maps and full customer lists to County staff upon request to assist the County in negotiating or procuring future collection services: $10,000 per occurrence. |
|  |

By initialing this Exhibit D below, representatives of each of the Parties confirm that they understand and agree with the amount of Liquidated Damages set forth above as reasonable and good faith estimates of actual damages that are difficult of being ascertained precisely, and that each Party has consulted legal counsel, and obtained adequate explanation of the Liquidated Damages prior to entering into the AGREEMENT.

FOR CONTRACTOR: FOR AGENCY:

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

1. CONTRACTOR’s operations for the year ending on December 31, 2006 produced net revenue, before adjustment for taxes, in excess of the amount of net revenue projected in the Rate Model.  CONTRACTOR agreed to invest $964,285 in the CDP from such revenues.  The $964,285, as adjusted per the Agreement, is sometimes referred to herein as “2006 Over Collected Revenue.” [↑](#footnote-ref-2)