CITY OF EL PASO, TEXAS
AGENDA ITEM
DEPARTMENT HEAD'S SUMMARY FORM

DEPARTMENT: Environmental Services

AGENDA DATE: August 2, 2011 – Introduction
August 9, 2011 – Public Hearing

CONTACT PERSON NAME AND PHONE NUMBER: Ellen A. Smyth, P.E., Director (915) 621-6719

DISTRICT(S) AFFECTED: All Districts

SUBJECT:

An Ordinance granting a non-exclusive franchise to Heist Disposal, Inc., to operate and maintain a solid waste collection and hauler service within the City of El Paso subject to the terms and conditions described herein; The penalty as provided in Section 9.04.630 of the El Paso City Code.

BACKGROUND / DISCUSSION:

Section 9.04.390 of the El Paso City Code requires that all haulers of municipal solid waste enter into a franchise agreement with the City. The Solid Waste Franchise Agreement is an non-exclusive franchise to operate and maintain a solid waste collection service using the City's rights-of-way for a term of forty (40) months. Revisions to Title 9.04 requiring the franchise agreement were approved by Council on August 24, 2010.The effective date for a Hauler franchise agreement shall take effect on September 1, 2011.

PRIOR COUNCIL ACTION:
N/A

AMOUNT AND SOURCE OF FUNDING:
N/A

BOARD / COMMISSION ACTION:
N/A

**********REQUIRED AUTHORIZATION**********

DEPARTMENT HEAD: _____
(If Department Head Summary Form is initiated by Purchasing, client department should sign also)

Information copy to appropriate Deputy City Manager

ORDINANCE NO. _____

AN ORDINANCE GRANTING A NON-EXCLUSIVE FRANCHISE TO HEIST DISPOSAL, INC., TO OPERATE AND MAINTAIN A SOLID WASTE COLLECTION AND HAULER SERVICE WITHIN THE CITY OF EL PASO SUBJECT TO THE TERMS AND CONDITIONS DESCRIBED HEREIN; THE PENALTY AS PROVIDED IN SECTION 9.04.630 OF THE EL PASO CITY CODE

WHEREAS, pursuant to Section 3.18 of the El Paso City Charter the right of control, ownership and use of streets and alleys is declared to be inalienable except as provided by ordinance passed by the Council; and,

WHEREAS, the City of El Paso is authorized by Section 7.13 of the El Paso City Charter to levy and collect franchise fees in accordance with the laws of the state of Texas; and,

WHEREAS, in addition to the authority granted by the City Charter, the attached franchise agreement is a valid exercise of the City's broad police powers and based upon the City's statutory regulatory authority, including but not limited to, Texas Local Government Code Chapters 51 and 52, and the Texas Health and Safety Code Chapter 363; and,

WHEREAS, the City of El Paso requires in City Code Section 9.04, that all haulers of municipal solid waste are required to enter into a franchise agreement with the City; and,

WHEREAS, Heist Disposal, Inc. is engaged in the business of collection and transportation of solid waste within the City and has requested a franchise to use the City's rights-of-way; and,

WHEREAS, Heist Disposal, Inc. has agreed to the terms of the Solid Waste Franchise Agreement with the City of El Paso, granting to Heist Disposal, Inc. a non-exclusive franchise to operate and maintain a solid waste collection service using the City's rights-of-way; and,

WHEREAS, the City Council of the City of El Paso is of the opinion that the granting of the franchise on the terms and conditions set forth in this Ordinance and its Exhibit "A" are in furtherance of the public interest, for the good government, peace, order, trade and commerce of the City and necessary and proper for carrying out the power granted by law to the City.

NOW THEREFORE, BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF EL PASO, TEXAS:

Section 1. FINDINGS OF FACT

All of the above premises are hereby found to be true and correct legislative and factual findings of the City Council, and are hereby approved and incorporated into the body of this ordinance as if copied in their entirety.

Section 2. The City Manager is authorized to sign a non-exclusive Solid Waste Franchise Agreement by and between the City of El Paso and Heist Disposal, Inc., for the franchisee to operate and maintain a Solid Waste Collection Service, in, over, along and across the

Public Rights-of-Way in the Authorized Area, for a forty (40) month term, as set forth and defined in the document labeled Exhibit "A", attached and incorporated by reference for all purposes.

Section 3. REPEALER

All ordinances or parts of ordinances in force when the provisions of this ordinance become effective that are inconsistent or in conflict with the terms and provisions contained in this ordinance are hereby repealed only to the extent of any such conflict.

Section 4. EFFECTIVE DATE

This ordinance shall take effect on September 1, 2011.

PASSED and APPROVED this _____ day of _____, 2011.

THE CITY OF EL PASO

_____
John F. Cook
Mayor

ATTEST

_____
Richarda Duffy Momsen
City Clerk

APPROVED AS TO FORM:

_____
Josette Flores
Assistant City Attorney

APPROVED AS TO CONTENT:

_____
Ellen A. Smyth, P.E., Director
Environmental Services Department

EXHIBIT "A"

SOLID WASTE FRANCHISE AGREEMENT

BY AND BETWEEN

CITY OF EL PASO, TEXAS

AND

HEIST DISPOSAL, INC.

EFFECTIVE DATE: _____, 2011

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STATE OF TEXAS)
)
COUNTY OF EL PASO)

SOLID WASTE FRANCHISE AGREEMENT

THIS Solid Waste Franchise Agreement ("Agreement") is entered into this _____ day of _____, 2011, (the "Effective Date") by and between the CITY OF EL PASO, a Texas home rule municipality, hereinafter referred to as the "CITY", and HEIST DISPOSAL, INC., hereinafter referred to as "Franchisee".

RECITALS

WHEREAS, pursuant to Section 3.18 of the El Paso City Charter the right of control, ownership and use of streets and alleys is declared to be inalienable except as provided by Agreement passed by the Council; and,

WHEREAS, the City of El Paso is authorized by Section 7.13 of the El Paso City Charter to levy and collect franchise fees in accordance with the laws of the state of Texas; and,

WHEREAS, in addition to the authority granted by the City Charter, this franchise agreement is a valid exercise of the City's broad police powers and based upon the City's statutory regulatory authority, including but not limited to including but not limited to, Texas Local Government Code Chapters 51 and 52, and the Texas Health and Safety Code Chapter 363; and,

WHEREAS, the City desires to exercise the authority provided to it by ordinance, charter and state law to grant a franchise for the collection, transportation, hauling and disposal of Solid Waste as further defined herein, within the corporate limits of the City and under the terms of this Agreement as set out below; and,

WHEREAS, Franchisee desires to obtain a franchise to provide for the collection, transportation, hauling and disposal of Solid Waste from the City of El Paso, and agrees to comply with the terms and conditions of this Agreement; and,

WHEREAS, the City Council of the City of El Paso is of the opinion that the granting of the franchise on the terms and conditions set forth in this Agreement are in furtherance of the public interest, for the good government, peace, order, trade and commerce of the City and necessary and proper for carrying out the power granted by law to the City.

NOW, THEREFORE, in consideration of the mutual covenants contained in this Agreement, the parties agree as follows:

WITNESSETH:

SECTION I. PREAMBLE

That the declarations contained in the preamble to this Agreement are material and incorporated herein as a part of this Agreement as though they were fully set forth in this Agreement in their entirety.

SECTION II. DEFINITIONS

For the purpose of this Agreement the following terms, phrases, words and their derivations shall have the meaning given in this Agreement. When not inconsistent with the context, words used in the present tense include the future tense; words in the plural number include the singular number; words in the singular number include the plural number; and the use of any gender shall be applicable to all genders whenever the tense requires. The word "shall" is mandatory and not merely directory. The word "may" is not mandatory and is merely permissive. The word "day" means a calendar day and not a business day. Words defined elsewhere in this Agreement shall be accorded that meaning throughout this Agreement. Words not defined shall be given their common and ordinary meaning.

a. **Affiliate** and **Affiliated** means any entity controlling, controlled by or under common control with the Franchisee.

b. **Agreement** shall mean this document.

c. **Authorized Area** means the entire area within the corporate limits of the City of El Paso, including any territory annexed into the City limits after the Effective Date of this Agreement.

d. **City** means the City of El Paso, a home rule municipal corporation, a political subdivision of the State of Texas.

e. **City Charter** means the City's organic law, equivalent to a constitution, which defines the City's existence and prescribes the powers, duties, and organization of the City's governmental structure.

f. **City Code** shall mean the ordinances of the City codified into the EL PASO CITY CODE, as amended from time to time.

g. **City Manager** shall mean the City Manager or the City Manager's designated representative.

h. **Container** shall mean any receptacle for waste as defined by Title 9.04 to include Dumpsters, Containers, Carts, Roll-Offs and Compactors.

i. **Control** (and its variants) shall mean actual working control, by whatever means exercised. Without limiting the generality of the foregoing, for the purposes hereof, a change in control shall be deemed to have occurred at any point in time when there is: (i) a change in working or effective voting control, in whatever manner effectuated, of the Franchisee; (ii) an agreement of the holders of voting stock or rights of the Franchisee which effectively vests or assigns policy decision-making in any person or entity other than the Franchisee; (iii) a sale, assignment or transfer of any shares or interest in the Franchisee which results in a change in the Control of the Franchisee.

j. **Council** shall mean the governing body of the City of El Paso. This section does not authorize delegation of any decision or function that is required by the City Charter or State law to be made by the Council. Unless otherwise stated in this Agreement or prohibited by the City Charter or State law, the Council may delegate to the City Manager or the Director the exercise of any and all of the powers conferred upon the City by its Charter or by general law relating to the administration and enforcement of this Agreement and to the Franchisee's exercise of the rights and privileges conferred in this Agreement.

k. **Director** means the Director of the Environmental Services Department of the City, or any successor department, or any Director as designated by the City Manager, or the Director's designated representative.

l. **Effective Date** means the date Council approves and enacts this Agreement with the Franchisee.

m. **Franchise** means the grant of the non-exclusive permission and privilege to use Public Rights-of-Way under this Agreement, and all of the incidental rights and obligations as described by this Agreement.

n. **Franchisee** shall mean HEIST DISPOSAL, INC. hereinafter referred to as "Franchisee", the grantee of rights under this Agreement; or the successor, transferee, or assignee of this Agreement, including the officers, employees, agents, contractors, and subcontractors.

o. **Public Rights-of-Way** shall mean all dedicated rights-of-way, streets, highways, and alleys for use by the general public and easements dedicated and accepted by the City as a public right-of-way. "Public Rights-of-Way" shall not include property of the City which is not a dedicated public way, street, highway, or alley or available for use by the general public or easements not dedicated or accepted by the City as a public right-of-way.

p. **Solid Waste Collection Service** shall mean the collection and transportation of Solid Waste as that term is defined herein within the Authorized Area, for processing or disposal at a Designated or Authorized Municipal Solid Waste Facility as defined in chapter 9.04 of the City Code or as may be subsequently amended from time to time.

q. **Solid Waste** shall mean that term as defined in Title 30 of the Texas Administrative Code § 330.3, or as may subsequently be amended from time to time, excluding Excluded Waste as defined in section 9.04.020 of the City Code, as may subsequently be amended from time to

time. Solid Waste does not include any municipal solid waste and program recyclable materials generated at residential properties in which the City is the exclusive hauler as set forth in chapter 9.04 (Solid Waste Management) of the City Code.

SECTION III. GRANTING OF FRANCHISE

Subject to all the terms and conditions contained in this Agreement, the Constitution of the United States of America or of the State of Texas, the City Charter, the City Code, other City ordinances as from time to time may be in effect, and applicable federal or state law, the City hereby grants the Franchisee non-exclusive permission and privilege solely for the purpose of operating and maintaining a Solid Waste Collection Service in, over, along and across the Public Rights-of-Way in the Authorized Area. This grant is subject to the following additional conditions:

a. Non-Exclusive.

Nothing herein contained shall be construed as granting an exclusive use or right to the Franchisee to the Public Rights-of-Way, and the City may grant an additional franchise, lease or special privilege to any other applicant in its discretion for the same Public Rights-of-Way described herein. The Franchisee accepts the grant set forth above and agrees to operate and maintain the Solid Waste Collection Service in the Authorized Area in accordance with the terms and provisions of this Agreement.

b. Designated or Authorized Municipal Solid Waste Facility.

Franchisee shall deposit all Solid Waste only at a Designated or Authorized Municipal Solid Waste Facility in accordance with the City Code, as may be amended from time to time.

c. Other Services.

By granting this Agreement, the City is not authorizing any non-Solid Waste Collection Service to be provided and does not waive and specifically retains any right to regulate and receive compensation as allowed by law for services offered by Franchisee which are not Solid Waste Collection Services. The Franchisee shall immediately notify the City if it provides any non-Solid Waste Collection Services within the Authorized Area.

d. No Priority.

This Agreement does not establish any priority for the use of the Public Rights-of-Way by the Franchisee or by any present or future recipients of franchise agreements, franchisees, permit holders, or other users of the Public Rights-of-Way. The Franchisee shall respect the rights and property of the City and other authorized users of the Public Rights-of-Way. In the event of any dispute as to the priority of use of the Public Rights-of-Way, the first priority shall be to the public generally, the second priority to City, the third priority to the State of Texas and its political subdivisions in the performance of their various functions, and thereafter, as between recipients of franchise agreements, franchisees and other state or local permit holders, as determined by the City Manager in the exercise of the City's powers, including the police power and other powers reserved to and conferred on it by the State of Texas.

e. City's Use of Public Rights-of-Way.

The Franchisee acknowledges that by this Agreement it obtains no rights to use or further use of the Public Rights-of-Way other than those expressly granted in this Agreement. The City reserves the right to use the surface or subsurface or airspace above the Public Rights-of-Way covered by this Agreement for any public purposes allowed by law and deemed necessary by the City and to do or permit to be done any work in connection therewith which may be deemed necessary or proper by the City on, across, along, under or over said Public Rights-of-Way. Further the City expressly reserves the right to install, repair, or reconstruct the Public Rights-of-Way used or occupied by Franchisee, any streets or alleys and all ancillary public uses, usual and customary in connection with streets and alleys, including but not limited to, drainage and utility facilities and structures.

The Franchisee acknowledges and accepts at its own risk, that the City may make use in the future of the Public Rights-of-Way as described above or as otherwise permitted by law, in which the Solid Waste Collection Service is located in a manner inconsistent with the Franchisee's use of such Public Rights-of-Way for the Solid Waste Collection Service, and in that event the Franchisee shall not be entitled to compensation or further remedy from the City unless compensation is available to all users of the Public Rights-of-Way which are affected in a similar manner.

f. Emergencies.

The City may temporarily suspend the operation of the Solid Waste Collection Service of Franchisee or close or otherwise restrict the use of Public Rights-of-Way in the event of a public emergency or calamity as determined in the City's sole discretion. In such event neither the City nor any agent, contractor, or employee of the City shall be liable to the Franchisee or its customers or third parties for any damages caused them or the Solid Waste Collection System. Where possible, prior notice shall be given to the Franchisee.

g. Compliance with Law and Standards of Operation.

The parties shall be subject to and comply with the Constitutions of the United States of America and the State of Texas, all applicable local, state, and federal laws, including the rules and regulations of any and all agencies thereof, whether presently in force or whether enacted or adopted at any time in the future.

h. Other Approvals and Authorizations.

This Agreement does not relieve the Franchisee of, and the Franchisee shall comply with, any obligation to obtain permits, licenses and other approvals from the City or other units of government, which are required for the operation and maintenance of the Solid Waste Collection Service.

i. City's Right of Eminent Domain Reserved.

Nothing in this Agreement shall limit any right the City may have to acquire by eminent domain any property of the Franchisee.

j. Taxes, Fees and Other Assessments.

Nothing in this Agreement shall be construed to limit the authority of the City to impose a tax, fee, or other assessment of any kind on any person, entity or individual. The Franchisee shall pay all fees necessary to obtain and maintain all applicable federal, state, and local licenses, permits, and authorizations required for the construction, installation, upgrading, maintenance, or operation of its Solid Waste Collection Service.

SECTION IV. SERVICE REQUIREMENTS

a. It is expressly understood and agreed that the Franchisee may collect and deliver for disposal all Solid Waste accumulated on premises within the Authorized Area where the individuals or companies contract with the Franchisee for those services, expressly excluding services for which the City is the exclusive hauler as defined in Chapter 9.04 of the City Code. The Franchisee shall, at its own expense, furnish personnel and equipment to collect Solid Waste and shall establish and maintain the contracted Solid Waste Collection Service in an efficient and businesslike manner, maintain a valid, current Hauler Permit issued by the City of El Paso, and shall comply with all requirements of the City Code, including but not limited to Chapter 9.04 of the City Code.

b. The Franchisee expressly agrees to assume liability and responsibility for all costs of repair to the Public Rights-of-Way and other facilities that are damaged as a result of the negligence, willful misconduct, or intentional acts of the Franchisee during the Franchisee's operations pursuant to this Agreement.

c. The Franchisee will comply with all rules, regulations, laws and agreements pertaining to the disposal of Solid Waste as directed by responsible governmental agencies having jurisdiction.

d. Waste Containers.

1. Graffiti.

Franchisee shall require in all contracts (entered into after the Effective Date) with each of its customers of their Solid Waste Collection Services to maintain the Container, as defined in Chapter 9.04 of the City Code or as amended from time to time, free from graffiti. Franchisee's Containers may display the name, address and/or phone number of the Franchisee, identification numbering or lettering assigned by the Franchisee, and any warnings, notices or instructions posted by Franchisee. If Franchisee's customers do not remove graffiti from the Franchisee's Containers, then Franchisee shall remove the graffiti and may bill its customer for the cost or replace the Container at the customer's expense.

If, after five days notice from the Director, the Franchisee or its customer has not removed the graffiti or replaced the Containers, then the City may cover or remove the graffiti or the Container.

2. Over-Capacity.

Franchisee shall require in all contracts (entered into after the Effective Date) with each of its customers of their Solid Waste Collection Services to maintain the area around the Container clean and free of rubbish, litter, Solid Waste, garbage, recyclables, or other unsightly material, regardless of the cause of the placement of the rubbish, litter, Solid Waste, garbage or recyclables around the Container. Franchisee shall monitor its customer's use of their Containers and ensure that the customer is not overfilling the Container beyond the acceptable capacity of the Container.

If the City observes that the lid of a Container is not securely closed as a result of overfilling the Container, or rubbish, Solid Waste, garbage, recyclables or unsightly material of any kind has accumulated or is being stored outside the Container, or is visible above the top level of the Container, then the City may: (1) notify the Franchisee or the customer of the violation and require immediate removal of the rubbish, Solid Waste, garbage, recyclables or unsightly materials; or (2) may remove the rubbish, Solid Waste, garbage, recyclables or unsightly materials and bill the Franchisee for its actual expense in cleaning the site around the Container.

If the City observes and records three or more instances of a violation of this section or violations of the City's ordinances by the Franchisee's customer, then it shall notify the Franchisee and the Franchisee shall require the customer to contract for additional Solid Waste services, additional Containers or a larger Container sufficient to satisfy its Solid Waste and recyclables needs, or take other steps to ensure compliance with the City's ordinances. Compliance with the provisions of this section by a Franchisee customer shall not waive the City's right to seek all remedies available under the law or this Agreement whether against the Franchisee or the Franchisee's customer.

3. Franchisee shall affix a label to each Container supplied to its customers by June 1, 2012, that reads "NO SCAVENGING/KEEP LIDS CLOSED." For roll-off Containers which are not equipped with lids, only "NO SCAVENGING" shall be required on the label. Label may be in the form of a decal or paint; letters shall be capitalized and either black or white in color, whichever more contrasts the paint color of the Container. The label may consist of either one or two lines, and should be clearly visible from a distance of 20 feet.

SECTION V. INDEMNITY AND INSURANCE

a. <u>INDEMNIFICATION OF CITY.</u>

1. THE FRANCHISEE SHALL, AT ITS SOLE COST AND EXPENSE, DEFEND, INDEMNIFY, AND HOLD HARMLESS THE CITY AND ITS RESPECTIVE OFFICERS, EMPLOYEES, AGENTS, SUCCESSORS, ASSIGNS, ATTORNEYS, CONTRACTORS AND SUBCONTRACTORS (HEREINAFTER REFERRED TO COLLECTIVELY AS "INDEMNITEES"), FROM AND AGAINST:

(A) ANY AND ALL CLAIMS, LAWSUITS, JUDGMENTS, COSTS, AND EXPENSES FOR PERSONAL INJURY (INCLUDING DEATH), PROPERTY DAMAGE, OR OTHER HARM FOR WHICH RECOVERY OF DAMAGES IS SOUGHT, OR FOR HARM SUFFERED OR ALLEGED TO HAVE BEEN SUFFERED BY ANY PERSON OR PERSONS (INCLUDING THIRD PARTIES, WHETHER INDIVIDUALS OR ENTITIES), THAT MAY ARISE OUT OF OR BE OCCASIONED BY (i) FRANCHISEE'S BREACH OF ANY OF THE TERMS OR PROVISIONS OF THIS FRANCHISE AGREEMENT, (ii) BY ANY ACT OR OMISSION CONSTITUTING NEGELIGENCE, GROSS NEGLIGENCE OR OTHER FAULT OF FRANCHISEE, ITS OFFICERS, DIRECTORS, PARTNERS, OWNERS OR OTHER PRINCIPALS, AGENTS, EMPLOYEES, CONTRACTORS, OR SUBCONTRACTORS, OR FOR WHICH THE FRANCHISEE, ITS OFFICERS, AGENTS, EMPLOYEES, CONTRACTORS, OR SUBCONTRACTORS (ALL COLLECTIVELY "FRANCHISEE PERSONS"), OR (iii) FOR WHICH THE FRANCHISEE OR FRANCHISEE PERSONS MAY BE STRICTLY LIABLE, IN THE OPERATION OR MAINTENANCE OF THE SOLID WASTE COLLECTION SERVICE, OR IN THE DISPOSAL, HANDLING, OR TRANSFER OF ANY SOLID WASTE COLLECTED THROUGH THE SOLID WASTE COLLECTION SERVICE; AND

(B) ANY AND ALL LIABILITY, OBLIGATION, DAMAGES, FINES, FEES, PENALTIES OR OTHER ASSESSMENTS, CLAIMS, SUITS, JUDGMENTS, ACTIONS, LIENS, AND LOSSES THAT MAY BE IMPOSED UPON, ASSERTED AGAINST, OR INCURRED OR SUFFERED BY ANY INDEMNITEES ARISING FROM OR RELATED TO ANY VIOLATION BY FRANCHISEE OR ANY FRANCHISEE PERSON OF ANY LOCAL, STATE OR FEDERAL LAW OR REGULATION GOVERNING THE SOLID WASTE COLLECTION SERVICE, OR RELATED TO THE COLLECTION, DISPOSAL, TRANSFER, OR HANDLING BY THE FRANCHISEE OR ANY FRANCHISEE PERSON, OF SOLID WASTE COLLECTED THROUGH THE SOLID WASTE COLLECTION SERVICE, REGARDLESS OF WHETHER OR NOT THE NEGLIGENCE, FAULT, OR OTHER WRONGFUL CONDUCT OF THE INDEMNITEES CONTRIBUTED TO ANY VIOLATION, INCLUDING ANY AND ALL COSTS, ATTORNEY'S FEES, AND EXPENSES AWARDED IN SUCH JUDGMENT AGAINST THE CITY OR ANY OTHER INDEMNITEE RELATED TO ANY SUCH CLAIM.

2. FRANCHISEE'S OBLIGATION TO INDEMNIFY INCLUDES INDEMNIFICATION FOR ANY ATTORNEY'S FEES, COSTS OF COURT OR EXPENSES OF ANY THIRD PARTY ASSESSED AGAINST THE CITY OR ANY OTHER INDEMNITEE; AND ANY ATTORNEY'S FEES, COSTS AND EXPENSES OF DEFENSE OR SETTLEMENT OR ATTEMPTED

SETTLEMENT (INCLUDING BUT NOT LIMITED TO INFORMAL SETTLEMENT DISCUSSIONS, MEDIATION, ARBITRATION, OR OTHER ATLTERNATIVE DISPUTE RESOLUTION METHODS) BY THE CITY OR ANY OTHER INDEMNITEES.

3. FRANCHISEE'S OBLIGATION TO DEFEND AND INDEMNIFY INDEMNITEES UNDER THIS SUBPARAGRAPH SHALL EXTEND TO ALL CLAIMS, LOSSES, AND OTHER MATTERS COVERED UNDER THIS SUBPARAGRAPH FOR WHICH ONE OR MORE INDEMNITEES MAY BE CONTRIBUTORILY LIABLE, PROVIDED, HOWEVER, THAT ANY INDEMNITY WILL BE REDUCED BY THE PROPORTIONATE AMOUNT WHICH THE INDEMNITEE CONTRIBUTED TO THE LIABILITY, AS PROVIDED UNDER TEXAS LAW; AND PROVIDED, FURTHER, THAT THIS APPLICATION OF PROPORTIONATE RESPONSIBILITY IS NOT A WAIVER OF ANY GOVERNMENTAL IMMUNITY FOR SUIT OR LIABILITY AVAILABLE TO CITY UNDER TEXAS LAW, AND FURTHER DOES NOT CONSTITUTE A WAIVER OF ANY OTHER DEFENSES AVAILABLE TO EITHER THE FRANCHISEE OR THE CITY UNDER TEXAS LAW.

4. FRANCHISEE'S OBLIGATION TO INDEMNIFY SHALL NOT APPLY TO ANY JUDGMENT OF LIABILITY AGAINST THE CITY RESULTING SOLELY FROM THE NEGLIGENCE OR WILLFUL MISCONDUCT OF THE CITY.

5. THIS SUBSECTION V.a. DOES NOT, AND SHALL NOT, BE CONSTRUED TO WAIVE ANY GOVERNMENTAL IMMUNITY FROM SUIT OR LIABILITY AVAILABLE TO THE CITY OR ANY INDEMNITEE UNDER TEXAS OR FEDERAL LAW, INCLUDING ANY INDIVIDUAL ABSOLUTE OR QUALIFIED IMMUNITY. THE PROVISIONS OF THIS SUBSECTION ARE SOLELY FOR THE BENEFIT OF THE CITY AND THE OTHER INDEMNITEES AND THE FRANCHISEE, AND ARE NOT INTENDED TO, AND SHALL NOT BE CONSTRUED TO, CREATE OR GRANT ANY RIGHTS, CONTRACTUAL OR OTHERWISE, TO ANY OTHER PERSON OR ENTITY.

b. <u>FRANCHISEE'S ASSUMPTION OF RISK.</u>

1. FRANCHISEE UNDERTAKES AND ASSUMES ALL RISK OF DANGEROUS CONDITIONS, IF ANY, ON OR ABOUT ANY CITY-OWNED OR CONTROLLED PROPERTY, INCLUDING THE PUBLIC RIGHTS-OF-WAY.

2. FRANCHISEE HEREBY AGREES TO INDEMNIFY AND HOLD HARMLESS THE CITY AND INDEMNITEES FROM AND AGAINST ANY CLAIM ASSERTED OR LIABILITY IMPOSED UPON THE INDEMNITEES FOR PERSONAL INJURY (INCLUDING DEATH) OR PROPERTY DAMAGE TO ANY PERSON ARISING OUT OF THE FRANCHISEE'S OPERATION, MAINTENANCE, OR CONDITION OF THE SOLID WASTE COLLECTION

SERVICE OR THE FRANCHISEE'S FAILURE TO COMPLY WITH ANY FEDERAL, STATE OR LOCAL STATUTE, AGREEMENT OR REGULATION.

c. Survival. **THE INDEMNIFICATION OBLIGATIONS DESCRIBED IN THIS SECTION V. SHALL SURVIVE THE TERMINATION OF THIS AGREEMENT FOR ANY ACTION, CLAIM, LAWSUIT OR OTHER PROCEEDING, OR JUDGMENT ARISING FROM EVENTS OCCURING DURING THE TERM OF THIS AGREEMENT.**

d. Defense of City and other Indemnitees.

In the event any action or proceeding shall be brought against any Indemnitees by reason of any matter for which the Indemnitees are indemnified hereunder, the Franchisee shall, upon notice from any of the Indemnitees, and at the Franchisee's sole cost and expense (including, without limitation, reasonable fees and expenses of attorneys, expert witnesses, and consultants), resist and defend the same with legal counsel selected by the Franchisee and consented to by the City, such consent not to be unreasonably withheld. The Franchisee shall not admit liability in any such matter on behalf of the Indemnitees without the City's and other Indemnitees' written consent. Further, the Indemnitees shall not admit liability for, nor enter into any compromise or settlement of, any claim for which they are indemnified herein without the prior written consent of the Franchisee.

e. Expenses of Defense; Participation by Indemnitees.

The Indemnitees shall give the Franchisee prompt notice of any claim or the commencement of any action, suit or other proceeding covered by the provisions of this Section V. Nothing herein shall prevent the Indemnitees from participating in the defense of any litigation by their own counsel at their own expense. The Franchisee shall pay all expenses incurred by the Indemnitees in participating in their defense, provided that the participation has been requested or required by the Franchisee in conducting the defense of the action, suit, or other proceeding. These covered expenses include reasonable attorney's fees and expenses, out-of-pocket expenses reasonably and necessarily incurred, the reasonable value of any services rendered by the City's counsel and the actual expenses of the Indemnitees' agents, employees or expert witnesses, and disbursements and liabilities assumed or incurred by the Indemnitees in connection with such suits, actions or proceedings. Covered expenses shall not include attorney's fees for services that are unnecessarily duplicative of services provided the Indemnitees by the Franchisee.

f. Insurance Required.

Not later than the Effective Date, the Franchisee shall procure, pay for, and maintain insurance coverage in at least the minimum amounts and coverages described in Attachment "1", attached to and made a part of this Agreement. The insurance shall be written by a company(ies) approved by the State of Texas and acceptable to the City. The insurance shall be evidenced by delivery to the City of certificates of insurance executed by the insurer or its authorized agent stating coverages, limits, expiration dates and compliance with all applicable required provisions. The City shall be named a beneficiary and co-insured of such policy(ies). Upon request, the City shall be entitled to review copies of the policies and all endorsements at a site determined mutually by the City and the Franchisee.

THIS AGREEMENT SHALL NOT TAKE EFFECT UNTIL SUCH CERTIFICATE HAS BEEN DELIVERED TO THE CITY AND NO OFFICER OR EMPLOYEE SHALL HAVE AUTHORITY TO WAIVE THIS REQUIREMENT. If satisfactory evidence of the required insurance is not submitted within thirty (30) days after the date the City Council approves this Agreement, then this Agreement shall be considered null and void and shall have no force or effect. The Director may prevent the Franchisee from operating a Solid Waste Collection Service under this Franchise until satisfactory evidence of insurance coverage required under this subsection is presented to the Director. Evidence of current continuous insurance coverage shall be updated by the Franchisee and delivered in writing to the Director on at least an annual basis, no later than the anniversary date of this Agreement; and the Director shall have the right to request evidence of current insurance at any time. If the Franchisee fails to maintain insurance as required by this subsection, then the Franchisee shall forfeit any rights to contribution as defined in subsection V.a.3 above, and Franchisee shall be solely liable *in toto* for any judgment, award, claim or demand arising from the Franchisee's operation of a Solid Waste Collection Service, whether the City or any other Indemnitee is or may be contributorily liable under applicable law or not.

g. Adjustments to Insurance Requirements.

The Director reserves the right to review the insurance requirements stated herein during the term of this Agreement and to recommend to the City Council reasonable adjustments in the insurance requirements prior to any anniversary renewal of the insurance when deemed necessary or prudent by the City. Any adjustments recommended and approved by the City Council may be based upon changes in statutory law, applicable court decisions, the claims history of the industry as well as of the Franchisee, or a commercially reasonable determination by the City that existing coverage is inadequate for the risks associated with the services to be provided hereunder. When any insurance coverage limits are changed, the Franchisee shall pay any resulting increase in cost due to the changes. If Franchisee does not agree to an increase in coverage recommended by the City and approved by Council, the City may opt to pay the difference in premium that would be required for such increased coverage; but if the City declines to do so, the City shall have the right to terminate this Agreement as of the end of the current insurance term, or at the next contract year anniversary, whichever is sooner.

h. Liability of Franchisee.

Approval, disapproval, or failure to act by the City regarding any insurance supplied or not supplied by the Franchisee shall not relieve the Franchisee of full responsibility or liability for indemnity, damages and accidents as set forth in the Agreement. The bankruptcy, insolvency, receivership or denial of liability by any insurer of Franchisee shall not excuse the Franchisee from the responsibility for indemnity, liability of, or damages payable by the Franchisee as provided in this Agreement.

SECTION VI. FEES, PAYMENTS AND COMPENSATION.

a. Consideration.

Council finds and determines that Franchisee has incurred, or will incur, significant costs to upgrade its facilities as costs associated with performance under this Franchise Agreement.

Council finds that such expenditures as well as the promises contained in this Franchise Agreement are satisfactory consideration to support this Agreement.

b. Additional Consideration.

Upon notice from the City, Franchisee shall provide Solid Waste removal, collection, and transport, services to the City following natural disasters or Acts of God. The term "Acts of God" as used herein, shall include, but not be limited to, epidemics, landslides, lightening, earthquakes, fires, storms, floods, washouts, droughts, tornadoes, hurricanes, and any other inabilities of either party, whether similar to those enumerated or otherwise, and not within the reasonable control of the party claiming such inability. Franchisee understands that it is not guaranteed to receive compensation for these services. Council and the Franchisee agree that this obligation to provide emergency services without a guarantee of compensation constitutes part of the consideration offered by the Franchisee to support this Franchise Agreement.

c. No acceptance of any payment by the City shall be construed as a release or as an accord and satisfaction of any claim the City may have for sums due or owed under this Agreement or of any other obligation of the Franchisee.

SECTION VII. TERM, TERMINATION AND PERFORMANCE EVALUATION

a. Term and Extensions.

This Agreement shall be effective as of the Effective Date and, unless it is terminated earlier pursuant to its terms, shall continue in effect for a period of 40 months from the Effective Date of this Agreement plus any extensions mutually agreed to by the City and the Franchisee. Franchisee shall give ninety (90) days written notice to the City prior to the expiration of the term to request an extension. The City in its sole discretion may decide to approve or decline the extension, or request an amendment of this Agreement prior to such extension.

b. Termination.

1. Right to Terminate

This Agreement may be terminated by either party, for cause or convenience, by providing ninety (90) days' written notice to the non-terminating party. Notwithstanding the foregoing, the City may terminate this Agreement if the City determines in its sole discretion termination is necessary to secure the efficiency of public service at a reasonable rate, to assure the Public Rights-of-Way are maintained in good order throughout the term of this Agreement, or termination is in the public interest when Franchisee is utilizing the Public Rights-of-Way in a manner the City deems is inconsistent with the public use of the City's Public Rights-of-Way without providing prior notice to the Franchisee. If the City chooses to act pursuant to this authority it shall notify the Franchisee of its decision within three days of the termination of this Agreement.

2. Rights Upon Termination.

Subject to applicable law, or as specifically provided for otherwise in this Agreement, this Agreement and all rights, permissions, and privileges of the parties defined in this Agreement shall automatically cease upon the termination of this Agreement, unless such rights are extended by mutual agreement of the parties, except that such termination shall not affect any rights or liabilities accrued prior to such termination.

In the event the Franchisee continues use of the Public Rights-of-Way after the expiration or termination of this Agreement the City may utilize any means available in law or in equity to prevent violations of the EL PASO CITY CODE or this Agreement. Franchisee shall be responsible for all attorney's fees and court costs incurred as a result of any action taken by the City pursuant to this paragraph.

c. Performance Evaluation.

In order to: (i) assure that the Franchisee is complying with the terms of this Agreement, as it may be from time to time amended, and (ii) promote a sharing of information between the City and the Franchisee, the City may schedule a performance evaluation during the term of the Agreement in accordance with the following process:

1. At least sixty (60) days prior to each performance evaluation, the City shall notify the Franchisee of the date, time and location of the evaluation. Such notice shall include specification of any additional information to be provided by the Franchisee pursuant to subsection c.2.(ii) below. Unless specifically waived by the Council, attendance of the Franchisee's duly authorized representative at these meetings shall be mandatory.

2. Within thirty (30) days from receipt of such notification, the Franchisee shall file a report with the City that is certified by a representative of the Franchisee knowledgeable of the operations of the Franchisee within the Authorized Area, in reasonable detail, specifically addressing, a minimum, the following areas:

(i) documentation that all of Franchisee's vehicles used in accordance with this agreement have been properly inspected for compliance with safety and air emission standards in the vehicles' state of registration, and documentation related to local government requirements for the permitting of vehicles for the hauling of Solid Waste;

(ii) any other topic deemed material or relevant by the City for its enforcement of this Agreement.

3. All reports to be prepared under this subsection and submitted by the Franchisee shall be based upon information collected from the Effective Date, inclusive of the most current quarter available. No report under this subsection shall be based upon data that ends more than twenty-four (24) months before the time of the performance evaluation.

4. Following receipt of the report, but not less than twenty (20) days prior to the performance evaluation, the City may request additional information, clarification or detailed documentation concerning those topics identified for inclusion in the performance evaluation. The Franchisee shall make reasonable effort to provide such additional information to the City prior to the meeting. In the event that the information cannot be made available prior to the performance evaluation, the Franchisee shall notify the City in writing explaining the reasons for any delay.

5. The Council shall hear any interested persons during such performance evaluation. The Franchisee shall be entitled to all the rights of due process consistent with the City proceedings, including but not limited to, the right to present evidence and the right to be represented by counsel.

SECTION VIII. TRANSFERS OF OWNERSHIP AND CONTROL

a. Franchisee Ownership, Management and Operation.

1. Only the Franchisee and its Affiliates identified herein, shall operate, manage, and maintain the Solid Waste Collection Service. The Franchisee shall not otherwise directly or indirectly transfer or assign, in whole or in part, this Agreement or the operation, management, or maintenance of the Solid Waste Collection Service without the prior written consent of Council, and such prior written consent shall not be unreasonably withheld provided that the Assignee: (i) assumes all of Franchisee's obligations and liabilities under this Agreement occurring both before and after the transfer or assignment; (ii) agrees to comply with all provisions of this Agreement; (iii) has the legal, technical and financial ability to properly perform and discharge such obligations and liabilities, which abilities are each at least as great as those of the Franchisee; and (iv) has the capacity to enter into contracts with the City and/or is not barred from entering into contracts with the City. The Franchisee and its Affiliates shall request approval from Council in writing and shall provide the Council with the Assignee's qualifications at least one hundred and twenty (120) days before the proposed transfer is to occur.

2. The Council's written consent shall not be required for a transfer solely for security purposes (such as the grant of a mortgage or security interest), but shall be required for any realization on the security by the recipient, such as a foreclosure on a mortgage or security interest. The Director shall be advised in writing of a transfer solely for security purposes at least sixty (60) days before such transfer occurs. If the Franchisee cannot provide at least sixty (60) days notice before a transfer solely for security purposes, then Franchisee must notify the Director in writing of such a transfer at the earliest possible date after becoming aware of such transfer.

3. The Franchisee may not transfer or assign this Agreement to an Affiliate not identified herein, without the prior written consent of Council, and such prior written consent shall not be unreasonably withheld provided that the Affiliate: (i) assumes all of Franchisee's obligations and liabilities under this Agreement occurring both before and

after the transfer or assignment; (ii) agrees to comply with all provisions of this Agreement; (iii) has the legal, technical and financial ability to properly perform and discharge such obligations and liabilities, which abilities are each at least as great as those of the Franchisee; and (iv) has the capacity to enter into contracts with the City and/or is not barred from entering into contracts with the City. The Franchisee shall request approval from Council in writing and shall provide the Council with the Affiliate's qualifications at least one hundred and twenty (120) days before the proposed transfer is to occur.

b. Schedule of Ownership.

The Franchisee represents and warrants that its current ownership is as set forth on Attachment "2", attached to and made a part of this Agreement, and that it has full legal and equitable title to the Solid Waste Collection Service as of the Effective Date of this Agreement.

SECTION IX. DEFAULT

a. Events of Default.

The occurrence of any one or more of the following events at any time during the term of this Agreement shall constitute an Event of Default by the Franchisee under this Agreement:

1. The failure or refusal by the Franchisee to pay consideration when due as prescribed by this Agreement.
2. The Franchisee's material violation of or failure to comply with any provision or condition of chapter 9.04 of the City Code relating to Solid Waste collection service or any other applicable provision or condition of the City Code.
3. The suspension or revocation of the Franchisee's Hauler Permit.`
4. The Franchisee's material violation of or failure to comply with any of the other terms, covenants, representations, or warranties contained in this Agreement, or the Franchisee's failure or refusal to perform any obligation contained in this Agreement.
5 The Franchisee's failure or refusal to pay or cause to be paid any of the City's governmentally-imposed taxes of any kind whatsoever, including but not limited to real property taxes, sales taxes, and personal property taxes on or before the due date for same; provided, however, Franchisee shall not be in default under this subsection with respect to the non-payment of taxes which are being disputed in good faith in accordance with applicable law.
6 The entry of any judgment against the Franchisee by which another party becomes entitled to possession of any of the Franchisee's Solid Waste Collection Service's assets, and for which transfer of these assets requires prior consent of the Council, and such judgment is not stayed pending rehearing or appeal following entry of the judgment for a period of forty-five (45) or more days.
7 The dissolution of the Franchisee.
8. The Franchisee's filing of a voluntary petition in bankruptcy; the filing of an involuntary petition in bankruptcy against the Franchisee; an adjudication finding the Franchisee insolvent; the Franchisee's obtaining an order for relief under Section 301 of the Bankruptcy Code (11 U.S.C. §301); filing any petition or failing to contest any petition filed against it seeking any reorganization, arrangement, composition,

readjustment, liquidation, dissolution or similar relief for itself under any laws relating to bankruptcy, insolvency or other relief for debtors; seeking or consenting to or acquiescing in the appointment of any bankruptcy trustee, receiver, master, custodian or liquidator of the Franchisee, or any of Franchisee's property or this Agreement or of any and all of the revenues, issues, earnings, profits or income thereof; making an assignment for the benefit of creditors (except secured creditors); or failing to pay Franchisee's debts as they become due such that the Franchisee is unable to meet its obligations under this Agreement.

9. The Franchisee engages in any fraudulent or deceitful conduct with the City or its customers.

10. The Franchisee knowingly or intentionally makes a false statement or a misrepresentation as to a material matter in the application for or in the negotiation of this Agreement.

11. Any director, officer, employee, or agent of the Franchisee is convicted of the offense of bribery or fraud connected with or resulting from the granting, term extension, or renewal of this Agreement.

12. The Franchisee's failure or refusal to comply with a violation of any applicable local, state, or federal law or regulation.

b. Default Procedures.

Upon the occurrence of an Event of Default which can be cured by the immediate payment of money to the City or a third party, the Franchisee shall have thirty (30) days from written notice of the occurrence of the Event of Default from the Director to cure the Default before the City may exercise any of the default remedies provided for in Section X. Upon the occurrence of an Event of Default by the Franchisee which cannot be cured by the immediate payment of money to the City or a third party, the Franchisee shall have thirty (30) days from the date of written notice from the City to the Franchisee of the occurrence of the Event of Default to cure the Event of Default before the City may exercise any of its rights or remedies provided for in Section X, unless the Director, the City Manager, or the Council authorizes a longer cure period upon a showing of good cause to extend the cure period. If an Event of Default is not cured within the time period allowed for curing the Event of Default, as provided above, the Event of Default becomes, without additional notice, an Uncured Event of Default, which shall entitle the City to exercise the remedies provided for in Section X.

SECTION X. REMEDIES

a. Default Remedies.

Upon the occurrence of any Uncured Event of Default as described in Section IX., the Director shall report the occurrence of default to the City Manager and the Council. The Council shall be entitled in its sole discretion to exercise any or all of the following remedies, which shall be cumulative:

1. Exercise its rights to liquidated damages as described in subsection c. of this Section X.

2. Commence an action at law against the Franchisee for monetary damages.

3. Commence an action in equity seeking injunctive relief or the specific performance of any of the provisions of this Agreement which, as a matter of equity, are specifically enforceable, or other equitable relief.

4. Revoke the Franchise granted under this Agreement.

b. Revocation Procedure.

Upon the occurrence of an Uncured Event of Default, the Council shall have the right to revoke the Agreement. Upon revocation, the rights, permissions, and privileges comprising the Franchise granted under this Agreement shall be automatically terminated and deemed null and void and shall have no further force or effect, and the provisions that are contractual in nature which are also included as a part of this Agreement are hereby automatically terminated, other than provisions that expressly are continued after termination or which impose obligations or rights of a kind that are intended and appropriate to be continued beyond termination, such as but not limited to Franchisee's obligations to defend and indemnify.

Upon revocation, the City shall retain any portion of the consideration and other fees or payments paid to it, or which are due and payable to it, to the date of the revocation. Notwithstanding the above, the Director shall notify the Franchisee in writing at least ten (10) days in advance of the Council hearing at which the issue of revocation shall be considered or decided. The Franchisee shall have the right to appear before the Council in person or by legal counsel and raise any objections or defenses the Franchisee may have that are relevant to the proposed revocation. The Council reserves the right, in its sole discretion, to seek liquidated damages or to pursue other remedies as provided in this Section X, or allowed in law or equity in addition to revocation.

c. Liquidated Damages.

In addition to the other remedies provided for in this Section X., other remedies provided in this Agreement and remedies available at law or in equity, in the event the Council determines that the Franchisee has committed, continued, or permitted a material failure or refusal of compliance or other Uncured Event of Default that has not been cured as provided in this Agreement, the Franchisee shall pay Two Hundred Dollars ($200.00) per day for each day or part of a day that the material failure or refusal or other Uncured Event of Default is committed, continued, or permitted. This subsection X.c. does not apply to the failure or refusal by the Franchisee to pay the Franchise Fee or other consideration when it becomes due (Event of Default, subsection IX.a.1.) or the failure or the refusal to pay or cause to be paid any of the City's governmentally imposed taxes (Event of Default, subsection IX.a.4).

d. Remedies Cumulative.

Subject to applicable law, the rights and remedies of the City set forth in this Section X. shall be in addition to and not in limitation of, any other rights and remedies provided by law or in equity. If the Council determines that a violation by the Franchisee was the Franchisee's fault and within its control to have prevented or avoided, the Council may pursue any or all of the remedies provided in Section X. or otherwise at law or in equity. The remedies of the City created under this Agreement shall be cumulative of other remedies under the Agreement, at law or in equity to the maximum extent permitted by law. The exercise by the City of any one or

more remedies under this Agreement shall not preclude the exercise by the City, at the same or different times, of any other remedies for the same material Uncured Event of Default.

e. Curable Violations.

The Franchisee shall not be found in violation of this Agreement or any other applicable law or regulation, and shall suffer no penalties or damages as a result, if the violation occurs without fault of the Franchisee; provided, that the Franchisee has made reasonably diligent efforts to have prevented or avoided the violation, or the violation occurs as a result of circumstances beyond Franchisee's control or its ability to have prevented or avoided, and, if curable, is promptly cured. The Franchisee shall not be excused by mere economic hardship, or election of actions based on, or for the purpose of realizing economic benefit or advantage; nor by the negligence or misfeasance or malfeasance of its directors, officers, principals, employees, agents, representatives, contractors or subcontractors.

SECTION XI. RECORDKEEPING AND AUDIT

a. Complete and Accurate Books Required.

The Franchisee shall keep complete and accurate books of account and records of its Solid Waste Collection Service business and operations in the Authorized Area under and in connection with this Agreement in accordance with generally accepted accounting principles and generally accepted government auditing standards.

b. City Review of Documentation.

The City may fully review the Franchisee's books, accounts, documents, and other records of the Franchisee or the Franchisee's Affiliates within the scope of this Agreement during normal business hours on a non-disruptive basis and with such advance notice as is reasonably necessary to monitor compliance with the terms of this Agreement. All books, accounts, documents, and other records shall be made available at a location in the Authorized Area, or the Franchisee shall pay the City's expenses in traveling to any other location necessary to review the books, accounts, documents, or other records. Books, accounts, documents, and other records that are kept on an electronic basis shall also be made available on the same basis as the paper books, accounts, documents, and other records. The reviewable items shall include, but shall not be limited to, records required to be kept by the Franchisee pursuant to law. To the extent permitted by law, the City agrees to treat any information disclosed by the Franchisee under this Section as confidential, if the Franchisee provides prior written notice that the information is confidential.

c. Reports.

If the Franchisee is a publicly traded company, the Franchisee shall file with the City by the end of each calendar year a copy of its certified financial statements filed with the Security and Exchange Commission, prepared and audited by an independent certified public accounting firm acceptable to the City, whose work papers will be made available to the City for inspection upon request.

d. Additional Reports.

The Franchisee shall, when required by the Council, the City Manager, or the Director, report to the City any reasonably requested information relating to the Franchisee or the Affiliates or necessary for the administration of this Agreement. The Director shall have the right to establish formats for all reports, determine the time for reports and the frequency with which any reports are to be made, and require that any reports be made under oath.

SECTION XII. MISCELLANEOUS

a. Entire Agreement.

This Agreement (with all referenced Exhibits, attachments, and provisions incorporated by reference) embodies the entire agreement and the rights, privileges, and permissions between the City and the Franchisee, superseding all oral or written previous negotiations or agreements between the City and the Franchisee relating to matters set forth in this Agreement. This Agreement can only be modified by an Agreement amendment approved by Council.

b. Notices.

Any notice, payment, statement, or demand required or permitted to be given under this Agreement by either party to the other may be effected by any of the means described in subsection XII.d. of this Agreement. Mailed notices shall be addressed to the parties at the addresses appearing below, but each party may change its address by written notice in accordance with this section. Mailed notices shall be deemed communicated as of three (3) days after mailing.

If to the City:

City of El Paso
Attention: City Manager
2 Civic Center Plaza
El Paso, Texas 79901-1196

With copies to:

City of El Paso, Environmental Services Department
Attention: Director
7968 San Paulo
El Paso, Texas 79907

And:

City Attorney
2 Civic Center Plaza
El Paso, Texas 79901-1196

If to the Franchisee:

Heist Disposal, Inc.
Attn: Vice President
PO Box 370335
El Paso, TX 79937-0335

Either the City or the Franchisee may change its address or personnel for the receipt of notices at any time by giving notice of the change to the other party as provided in this subsection XII.b. Any notice given by either the City or the Franchisee must be signed by an authorized representative.

c. Notice of Claim.

This Agreement is subject to the provisions of Section 1.5 of the El Paso City Charter, as amended, relating to requirements for filing a notice of a claim against the City. Section 1.5 of the El Paso City Charter, as amended, is expressly incorporated by reference and made a part of this Agreement as if written word for word in this Agreement. Franchisee shall comply with the requirements of Section 1.5 as a precondition of any claim against the City relating to or arising out of this Agreement.

d. Delivery of Notices.

Notices required to be given under this Agreement may be transmitted in any of the following four ways:

1. By personal delivery, in which case they are deemed given when delivered.
2. By delivery to Federal Express, United Parcel Service, or other nationally recognized overnight courier service, in which case they shall be deemed given when received for such service.
3. By being deposited in the U.S. Mail, by registered or certified mail, return receipt requested, postage prepaid, in which case notice shall be deemed given three (3) calendar days after having been deposited in the U.S. Mail.
4. By facsimile or electronic mail transmission where the sender's transmittal log shows successful transmission to all the recipients (with any replacement transmission as a recipient shall request) and with a hard copy on the same date or the next day mailed to all by first class mail, postage prepaid, in which case notice shall be deemed given on the date of facsimile or electronic mail transmission.

e. City/Franchisee Meetings.

The Franchisee shall meet with the Director, the City Manager or the Council at reasonable times to discuss any aspect of this Agreement or the services or facilities of the Franchisee. At all meetings Franchisee shall make available personnel qualified for the issues to be discussed and such meetings shall be at City's offices unless otherwise agreed.

f. Legal Construction.

This Agreement shall be governed by and construed in accordance with the laws and court decisions of the State of Texas, without regard to conflict of law or choice of law principles of Texas or of any other state.

g. No Inducement.

The Franchisee, by accepting this Agreement, acknowledges that it has not been induced to accept this Agreement by any promise, oral or written, by or on behalf of the City or by any third person regarding any term or condition not expressed in this Agreement. The Franchisee further pledges that no promise or inducement, oral or written, has been made to any City employee or official regarding the grant, receipt or award of this Agreement.

h. Franchisee Acknowledgement.

The Franchisee further acknowledges by acceptance of this Agreement that it has carefully read the terms and conditions of this Agreement and accepts the obligations imposed by the terms and conditions herein.

i. No Waiver by City.

No failure by the City to insist upon the strict performance of any covenant, provision, term or condition of this Agreement, or to exercise any right, term or remedy upon a breach thereof shall constitute a waiver of any such breach of such covenant, agreement, term, or condition. No waiver of any breach shall affect or alter this Agreement, but each and every covenant, provision, term or condition of this Agreement shall continue in full force and effect with respect to any other then existing or subsequent breach thereof.

j. Governmental Licenses.

The Franchisee shall, at its expense, obtain and maintain all additional governmental regulatory licenses necessary to operate the Solid Waste Collection Service in accordance with this Agreement.

k. Severability.

This Agreement is intended to be performed in accordance with, and only to the extent permitted by the EL PASO CITY CODE, and any other applicable laws and regulations. If any provision of this Agreement, or the application thereof to any person, entity, or circumstance, for any reason and to any extent, is invalid or unenforceable, such provision shall be modified to the minimum extent necessary to make such provision valid and enforceable and neither the remainder hereof nor the application of such provision to other persons, entities, or circumstances or other instruments shall be affected thereby, but rather, the same shall be enforced to the greatest extent permitted by law. To the extent that any party's performance under this contract becomes impossible or illegal as a result of future and unknown regulations not contemplated by the parties, and the parties are not able to modify the terms of this Agreement as contemplated above, then the parties shall be excused from further performance under those portions of this Agreement, and such offending portions shall be severed and excluded from this Agreement.

l. City Retained Powers.

In addition to all rights provided in this Agreement, the City reserves all rights and powers conferred by federal law, the Texas Constitution, Texas statutes and decisions, the City Charter, City Code, and City Agreements which City is allowed to exercise.

m. Material Misinformation.

The provision of information by the Franchisee or any of its Affiliates to the City in connection with any matters under this Agreement which contains an untrue statement of a material fact or omits a material fact necessary to make the information not misleading shall constitute a violation of this Agreement and shall be subject to the remedies provided in Section 10. Each day that the Franchisee or an Affiliate fails to correct an untrue statement of a material fact or the omission of a material fact necessary to make the information not misleading shall constitute a separate violation of this Agreement.

n. Time is of the Essence.

Whenever this Agreement shall set forth any time for an act to be performed by or on behalf of the Franchisee, such time shall be deemed of the essence and any failure of the Franchisee to perform within time allotted shall always be sufficient grounds for the City to invoke an appropriate remedy, including possible revocation of the Agreement.

o. Force Majeure.

The time within which Franchisee shall be required to perform any act under this Agreement shall be extended by a period of time equal to the number of days due to a force majeure. The term "force majeure" shall mean delays due to Acts of God, inability to obtain governmental approvals, governmental restrictions, war, act of terrorism, civil disturbances, fire, unavoidable casualty, or other similar causes beyond the control of Franchisee. Notwithstanding anything contained anywhere else in this Agreement, Franchisee shall not be excused from performance of any of its obligations under this Agreement by the negligence or malfeasance of its directors, officers, or employees or by mere economic hardship.

p. Recognition of Rights.

The Franchisee agrees that by adopting this Agreement, neither the City nor the Franchisee have waived any rights, claims, or defenses they may have with respect to the City's rights to impose the requirements contained in this Agreement in whole or in part upon the Franchisee.

q. Police Powers.

1. In accepting this Agreement, the Franchisee acknowledges that its rights under this Agreement are subject to the police power of the City to adopt and enforce general Agreements necessary to the health, safety, and welfare of the public. Except as otherwise agreed to by the parties or exempted by a City ordinance, Franchisee shall comply with all applicable general laws and Agreements enacted by the City pursuant to such powers. Any conflict between the provisions of this Agreement and any other present or future lawful exercise of the City's police powers shall be resolved in favor of the latter.

2. The Franchisee recognizes the right of the City to make reasonable amendments to this Agreement as convenient and necessary to promote the public's interest.

3. The Franchisee also recognizes City's right to impose such other regulations of general applicability as shall be determined by the City to be conducive to the safety, welfare, and accommodation of the public.

r. No Presumption of Renewal

This Agreement and the grant contained herein do not imply, grant, or infer any renewal rights in favor of the Franchisee or its Affiliates.

s. Recognition of City Charter.

The Franchisee recognizes, accepts and agrees that the terms, conditions and provisions of this Agreement are subject to the applicable provisions of the El Paso City Charter. Any request by the Franchisee for an amendment to this Agreement shall be subject to review by the City Attorney for compliance with the applicable provisions of the City Charter.

t. This Agreement and all of the provisions hereof shall be binding upon and shall inure to the benefit of the parties hereto and their respective successors and assigns.

u. This Agreement may be amended, revised or modified only by a written instrument, executed by the parties hereto.

v. The headings, captions and arrangements contained in this Agreement are for reference purposes only and shall not in any way affect the meaning or interpretation hereof. If the context required, words used in the singular shall be read as including the plural and vice versa, and pronouns of any gender shall include all genders. The words "herein", "hereof", "hereunder" and other similar compounds of the word "here" when used in this Agreement shall refer to the entire Agreement and not to any particular provision, paragraph, subparagraph, section or article.

w. This Agreement is executed for the sole benefit of parties hereto and is not for the benefit of any third party. No other party will have rights under this Agreement.

x. Authorization. Each party hereto acknowledges and represents that this Agreement has been duly authorized by its respective entity.

y. This Agreement may be executed in counterparts, each of which shall be fully effective as an original and all of which together shall constitute one and the same instrument.

z. Ambiguities Not to Be Construed against Party Who Drafted Contract. The rule of construction that ambiguities in a document will be construed against the party who drafted it will not be applied in interpreting this Contract.

aa. Order of Precedence. In case of conflict between the terms of this Agreement and the terms contained in any document attached as an attachment or otherwise incorporated by reference, the order of precedence is as follows: Charter of the City of El Paso, EL PASO CITY CODE, and the ordinance granting this Agreement and all exhibits thereto.

IN WITNESS WHEREOF, the parties have caused this Agreement to be duly executed as of the day and year first above written.

List of Attachments:

Attachment "1" – Insurance Requirements
Attachment "2" – Schedule of Ownership

THE CITY OF EL PASO

Joyce A. Wilson
City Manager

APPROVED AS TO FORM:

Josette Flores
Assistant City Attorney

APPROVED AS TO CONTENT:

Ellen Smyth, Director
Environmental Services Department

HEIST DISPOSAL, INC.

Beatrice Heist
Vice President

STATE OF TEXAS §
§
COUNTY OF EL PASO §

BEFORE ME, the undersigned, a Notary Public in and for said State, on this day personally appeared Beatrice Heist, as Vice President of HEIST DISPOSAL, INC., known to me to be the person whose name is subscribed to the foregoing instrument and acknowledged to me that the same was the act of Beatrice Heist, and that he/she executed the same as the act of HEIST DISPOSAL, INC. for the purposes and consideration therein expressed, and in the capacity therein stated.

GIVEN UNDER MY HAND AND SEAL OF OFFICE this the 29th day of JUNE, 2011.

Irma Porras
Notary Public
State of TEXAS

SEAL

IRMA PORRAS
NOTARY PUBLIC
In and for the State of Texas
My commission expires
08-01-2012

ATTACHMENT "1"

INSURANCE REQUIREMENTS

1. COMPREHENSIVE GENERAL LIABILITY INSURANCE:

For the duration of this Agreement and any extension hereof, Franchisee shall carry in a solvent company authorized to do business in Texas, comprehensive general liability insurance in the following amounts:

$1,000,000.00 – Per Occurrence
$1,000,000.00 – General Aggregate
$1,000,000.00 – Products/Completed Operations-Occurrence & Aggregate

With respect to the above-required insurance, the City of El Paso and its officers and employees shall be named as additional insured as their interests may appear. The City shall be provided with sixty (60) calendar days advance notice, in writing, of any cancellation or material change. The City shall be provided with certificates of insurance evidencing the above required insurance prior to the commencement of this contract and thereafter with certificates evidencing renewal or replacement of said policies of insurance at least fifteen (15) calendar days prior to the expiration or cancellation of any such policies.

2. WORKERS' COMPENSATION

For the duration of this Agreement and any extension hereof, Franchisee shall carry Workers' Compensation and Employers' Liability Insurance in the amount required by Texas law:

$500,000.00

3. AUTOMOBILE LIABILITY INSURANCE

Minimum $1,000,000.00 combined single limit per occurrence for bodily injury and property damage. The Business Auto Policy must show Symbol 1 in the Covered Autos Portion of the liability section on Item 2 of the declarations page.

ATTACHMENT "2"

SCHEDULE OF OWNERSHIP

Franchisee Name: **HEIST DISPOSAL, INC.**
Legal Entity: **HEIST DISPOSAL, INC.**

Identity of Owners:
(Identify each partner, member, shareholder, or other owner. For each owner identified identify the individual ownership interest, to include total number of shares owned.)

Beatrice Heist	50%	Ownership
Charles Heist	50%	Ownership