

## ORDINANCE No.

Grant residential solid waste, recycling and composting collection franchises in the City (Ordinance)

The City of Portland ordains:

### Section 1. THE COUNCIL FINDS:

**Section 2. NATURE OF GRANT.** The City of Portland (City) hereby grants a Residential Solid Waste, Recycling and Composting collection franchise to each of the following Grantees:

Elmer's Sanitary Service LLC	Rossman Sanitary Service, Inc. dba Republic Services of Lake Oswego
Gruetter Sanitary Service, Inc.	S&C Licensing LLC
Heiberg Garbage & Recycling LLC	Wacker Sanitary Service
Kahut Waste Services LLC dba City Sanitary Service	Walker Garbage & Recycling, Inc.
Lehl Garbage, Inc. dba Lehl Disposal	Waste Connections of Oregon, Inc. dba Arrow Sanitary Service
Portland Disposal & Recycling, Inc.	Waste Management of Oregon, Inc.

The franchise is exercised for the public good and is subject to Council's control, including but not limited to Council's decision whether to renew Grantee's franchise and, if so, the terms and conditions of a renewal.

Each Grantee's Franchise Area within the City is shown on Exhibit A, attached and incorporated herein. In consideration for the grant of this franchise, each Grantee agrees to collect residential Solid Waste, Recyclable Materials and Compostables as required under this franchise.

### Section 3. TERM OF FRANCHISE.

- A. Duration. The term of this franchise shall be twelve (12) years from its effective date, unless forfeited or revoked sooner as provided herein.
- B. Effective Date. The effective date of this franchise shall be sixty (60) days after its passage by the City Council, unless Grantee fails to file an unconditional written acceptance of this franchise in accordance with Section 27, in which event this franchise shall be null and void. The passage date is set forth on the last page of this franchise, as stamped by the Council Clerk.

**Section 4. DEFINITIONS.** The following terms have the meanings given below unless the context indicates otherwise. When not inconsistent with the context, words used in the present tense include the future tense, words in the plural include the singular and words in the singular include the plural. The word "shall" is always mandatory.

- A. Administrative Rules means the requirements for residential Solid Waste, Recycling and Composting collection adopted by the Bureau of Planning and Sustainability.
- B. Allowable Expenses includes all reasonable costs incurred by Grantee associated with the residential Solid Waste, Recycling and Composting collection services required herein and the cost of complying with all applicable laws, regulations or orders as now or hereafter amended. Allowable Expenses are presumed to be reasonable if, in the context of the Grantee's overall costs, such expenses are comparable with: (i) the expenses incurred by a majority of similarly situated residential Solid Waste, Recycling and Composting collection companies franchised by the City; or (ii) other such companies in urban areas located on the West Coast of the United States, after adjustment for cost of living, if necessary. Allowable Expenses shall include but not be limited to:
- 1) Disposal tipping fees and related charges established by Metro. The amount recognized as an allowable expense shall be the disposal tipping fee, solid waste transaction fee and other solid waste disposal charges as actually set from time to time by Metro;
  - 2) Labor costs, including supervisory labor, directly associated with residential Solid Waste, Recycling and Composting collection services, including workers' compensation and benefits;
  - 3) Equipment costs including depreciation, vehicle registration fees, motor fuel, oil, tires, repairs, maintenance and sustainable fleet requirements;
  - 4) Container, cart and bin costs including depreciation, repairs, maintenance and replacement;
  - 5) Insurance in the amounts and coverages required by the City;
  - 6) Administrative costs including, but not limited to, officer salaries, administrative staff, data processing, billing and supplies;
  - 7) Utilities;
  - 8) Training and worker safety;
  - 9) Marketing and public education costs approved by the City;
  - 10) Interest costs such as interest charges on the purchase of equipment or facilities, or on loans for working capital, but not interest costs which are otherwise Unallowed Expenses;

- 11) Equipment or facility rental or lease costs;
  - 12) Professional fees and costs for financial reporting, accounting and regulatory processes associated with this franchise;
  - 13) Any expense incurred in the collection, processing, marketing, sale or disposition of Recyclable or Compostable Materials;
  - 14) Costs associated with implementing environmental management plans; and
  - 15) Costs associated with responding to force majeure events.
- C. Calendar Quarter shall be the segment of a calendar year from January 1 through March 31, from April 1 through June 30, from July 1 through September 30, or from October 1 through December 31.
- D. Collect/Collection includes accept, accumulate, store, process, transport, market and dispose of as required by City regulations, Metro, state and federal law.
- E. Compostables/Composting means Yard Debris and Food Scraps when source separated for composting.
- F. Food Scraps means waste from fruits, vegetables, meats, dairy products, fish, shellfish, nuts, seeds, grains, coffee grounds and other food that results from the distribution, storage, preparation, cooking, handling, selling or serving of food for human consumption. Food Scraps includes but is not limited to excess, spoiled or unusable food and includes inedible parts commonly associated with food preparation such as pits, shells, bones and peels. Food Scraps may include some food-soiled paper products such as coffee filters, tea bags, paper napkins and towels and delivery pizza boxes. Food Scraps may include approved pail liners and compostable bags. Food Scraps does not include liquids or large amounts of grease or oil.
- G. Franchise Area means the geographic area(s) described in Exhibit A for each individual Grantee.
- H. Gross Residential Revenue means all gross receipts associated with residential Solid Waste, Recycling and Composting collection services performed within the Franchise Area. Gross Residential Revenue does not include revenue from the marketing and sale of Recyclable Materials or the provision of additional services, such as commercial drop-boxes or medical waste collection.
- I. Metro means the Metropolitan Service District under ORS Chapter 268 (2018).
- J. Operating Margin shall be Gross Residential Revenue plus any additional revenue from sales of Recyclable Materials, less the sum of Allowable Expenses and Pass-

Through Expenses. For any rate reviews under this franchise, the Operating Margin percentage shall be calculated using a weighted average of a representative sample of Grantees' Operating Margins. The weighting factor shall be calculated on the basis of the Grantees' Gross Residential Revenue plus Recyclable Materials revenue, less Pass-Through Expenses. Expressed as a percentage, the Operating Margin shall be nine and one-half percent (9.5%) of these revenues net of Pass-Through Expenses.

- K. Pass-Through Expenses includes: (i) the franchise fee required under this franchise; (ii) surcharges or taxes levied by state or local governments upon the collection of Solid Waste; and (iii) business license fees paid to the City. The calculation of the Operating Margin shall not include any Pass-Through Expenses.
- L. Recyclable Material/Recyclables/Recycling include, but is not limited to, newspaper, ferrous scrap metal, non-ferrous scrap metal, used motor oil, corrugated cardboard and kraft paper, container glass, aluminum, tin cans, plastic milk jugs, plastic tubs, plastic buckets, plastic plant pots, magazines, scrap paper and junk mail, steel aerosol cans, milk cartons and drink boxes, plastic bottles and phone books. The definition of Recyclable Material may be modified by the City through the Administrative Rules.
- M. Residential Customer means: (i) any individual who subscribes for the collection of Solid Waste, Recycling or Composting from either a single-family dwelling or multiple-family dwelling with up to and including four dwelling units.
- N. Service Level means any type of regulated service provided to Residential Customers as reflected in the rate schedule adopted by City Council.
- O. Solid Waste shall have the meaning given in ORS 459.005(24) (2018) including but not limited to garbage, rubbish, refuse, ashes, discarded home appliances, manure, vegetable or animal solid and semisolid wastes and other waste generated by Residential Customers. Solid Waste does not include:
- 1) Sewage sludge, septic tank and cesspool pumping or other sludge;
  - 2) Commercial and industrial wastes;
  - 3) Discarded or abandoned vehicles;
  - 4) Recyclable or Compostable Material which is source separated and set out for recycling or composting purposes; or
  - 5) Waste that is designated by the Oregon State Department of Environmental Quality or Metro as requiring special handling, treatment, storage or disposal to avoid potential damage to the environment or to public health.

- P. Subcontractor means a person or business contracted by the Grantee to carry out any part of the solid waste, recycling or composting collection services granted under the franchise, including but not limited to roll cart delivery and customer service. Subcontractor does not mean a person or business contracted by the Grantee to sell, repair or maintain vehicles or equipment; process or recover material collected by Grantee under the franchise; or provide standard business services, including but not limited to accounting, janitorial or landscaping services.
- Q. Unallowed Expenses shall include the following:
- 1) Contributions;
  - 2) Fines and penalties;
  - 3) Affiliated party transaction costs to the extent they exceed the fair market rate for such goods or services;
  - 4) Accruals for future unknown regulatory changes;
  - 5) Costs associated with the purchase of other companies including, but not limited to, employee stock ownership plan payments, goodwill, amortization of goodwill and premiums on key-person life insurance policies;
  - 6) Principal or interest payments on the acquisition of residential Solid Waste, Recycling and Composting collection routes; the purchase of equipment and facilities at a price that would be construed to include goodwill, or a premium in excess of fair market value at the time of acquisition; and
  - 7) Federal, state and local income taxes, other than City business license fees.
- R. Yard Debris means organic materials including grass clippings, leaves, prunings of no greater than four (4) inches in diameter and thirty-six (36) inches in length and other plant materials. Yard Debris does not include dirt, sod, rocks and stumps.

## **Section 5. SCOPE OF SERVICES.**

Grantee shall provide collection service for Solid Waste, Recyclable Material and Compostables in the Franchise Area in accordance with the Administrative Rules. Grantee shall furnish all necessary skill, labor, equipment, materials, billing facilities, transportation facilities and related services.

**Section 6. FRANCHISE FEE AND AUDITING.**

- A. Franchise Fee. Grantee shall pay to the City, for the rights and benefits granted under this franchise, a fee of up to eight percent (8%) of Gross Residential Revenue during the term of the franchise. The City Council shall specify the amount of the franchise fee by ordinance. Franchise fee revenue in excess of five percent (5%) of Gross Residential Revenue shall be dedicated to rate-stabilization purposes for Residential Customers. Any adjustment of franchise fee revenue in excess of five percent (5%) shall only occur during a rate review proceeding, as set forth in Section 9. The City shall issue an invoice for franchise fees after each Calendar Quarter. Grantee's payment shall be made within thirty (30) days of the invoice's date. Interest shall be charged on invoices not timely paid. Interest shall accrue at one and one-half percent (1.5%) per month on unpaid balances, compounded daily from the due date.
- B. Auditing. An acceptance of any payment shall not be construed as an accord that the amount paid is the correct amount, nor shall an acceptance of payment be construed as a release of any claim the City may have for further sums payable. All amounts paid shall be subject to confirmation and recomputation by the City. Grantee agrees to reimburse the City for:
- 1) The reasonable costs for such confirmation if the City's recomputation discloses that the Grantee has paid less than ninety-five percent (95%) of the franchise fee owing for the period at issue; or
  - 2) One-half (1/2) of the reasonable costs of such confirmation if the City's recomputation discloses that the Grantee had paid ninety-five percent (95%), but less than ninety-eight percent (98%), of the franchise fee owing for the period at issue;
  - 3) There shall be no cost to the Grantee if the City's recomputation discloses that the Grantee has paid ninety-eight percent (98%) or greater; and
  - 4) The City shall reimburse the Grantee for any overpayment if the City's recomputation discloses that the Grantee has paid more than 100%.
- C. Publication Cost. Grantee shall pay the cost to publish the proposed franchise ordinance and any amendments thereto, together with the cost of publishing notice of City Council consideration of the proposed franchise, as such publications are required by City Charter.
- D. Non-Franchise Fees. Payment of this franchise fee shall not exempt Grantee from the payment of any other license fee, tax or charge on the business, occupation,

property or income of the Grantee that may be imposed by the City, except as otherwise may be provided in the ordinance or ordinances imposing such other license fee, tax or charge.

**Section 7. REGULATION.**

- A. Applicable Laws. This franchise is subject to the Charter and general ordinances of the City, now in effect or hereafter amended. This franchise is also subject to all present and future laws, regulations, orders of regulatory bodies and Administrative Rules. Grantee shall obtain all licenses and permits required by federal, state, Metro and local governments.
- B. Recycling. Grantee shall provide all Residential Customers with the "opportunity to recycle" in accordance with all relevant requirements of state law, now in effect or hereafter amended. Grantee shall, pursuant to a Recyclable Material collection strategy established by the City, implement the necessary collection services to comply with such strategy, including but not limited to any waste reduction or diversion requirements or goals that may be specified by the state, Metro or the City.
- C. Effect of Non-Compliance. Grantee shall not be relieved of its obligation to promptly comply with any provision of this franchise by any failure of the City to enforce compliance.
- D. Environmental Management Practices. The City will establish, in its Administrative Rules, reporting standards for environmental management practices. As used in this section, environmental management practices may include recycling of office paper and other materials; purchase of recycled content and environmentally preferable products; waste reduction, energy and water conservation; and the use of reduced emission vehicle fuels. The City will provide technical advice and assistance to the Grantee to develop a plan for implementing environmental management practices in its business operations. Upon City request, Grantee shall submit a brief report regarding environmental management practices within its business operations.
- E. Open Books and Records. Upon at least twenty-four (24) hours' notice, the City shall have the right to inspect, at any time during normal business hours at an office of the Grantee located in the local metropolitan area, all books, records, maps, plans, income tax returns, financial statements and other like materials which are directly related to the franchise.
- F. Reports. All reports required in this Section and in Section 8 are limited to information directly attributable to the residential Solid Waste, Recycling and Composting collection services provided under this franchise. Grantee shall submit an annual financial report, quarterly reports and other financial reports as specified in the Administrative Rules.

- 1) *Quarterly Reports.* After the end of each Calendar Quarter, the Grantee shall submit written reports to the City's Bureau of Planning and Sustainability. Reports must be verified by an officer or manager of the Grantee and be submitted by the due dates identified in the Administrative Rules. The report shall contain: (i) an accurate statement of gross receipts from collection rates and miscellaneous customer charges; (ii) the number of accounts by Service Level; (iii) the quantities of Recyclables and Compostables collected; (iv) the number of setouts and extras collected each month in Recycling and Composting programs; (v) labor hours for each type of collection service: Solid Waste, Recyclable Materials, and Compostables; and (vi) the number of duplex, triplex, and four-plex accounts sharing each Service Level.
- 2) *Annual Reports.* Each year, the Grantee shall submit an accrual-based detailed cost report to the City's Bureau of Planning and Sustainability. Reports must be verified by an officer or manager of the Grantee and be submitted by the due dates identified in the Administrative Rules. The report shall contain: (i) summary statement of franchise revenues, Recyclable Material sales, miscellaneous fees charged to customers and costs itemized on the detailed cost report as specified in the Administrative Rules; (ii) detailed analysis of certain "other" and "miscellaneous" franchise cost line items and cost allocation methods as specified in the Administrative Rules; and (iii) names and addresses of Grantee owners and percentage of ownership.
- 3) *General Reports.* Grantee shall prepare and submit to the City such other non-financial reports as the City deems reasonably necessary. In addition, the Grantee shall submit to the City any information for reporting purposes required by the Department of Environmental Quality or Metro.
- 4) *Format of Submissions.* The City, after consultation with the Grantee, may specify the form and details of all reports provided under this Section.

G. Public Records.

- 1) *Oregon Public Records Law.* Grantee and the City acknowledge that records submitted to the City may be subject to public inspection under the Oregon Public Records Law. Grantee acknowledges its responsibility for becoming familiar with the public records law.
- 2) *Confidentiality.* Grantee may identify information submitted to the City as confidential by prominently marking such information with



“Confidential” in letters at least one-half (1/2) inch in height. The City shall treat any information so marked as confidential and not subject to public disclosure, unless and until the City receives a public records request for disclosure of the information. Within five (5) business days of receiving such request, the City shall provide the Grantee with written notice of the request, including a copy of the request. Grantee shall have five (5) business days within which to provide a written response to the City, before the City may release any of information marked “Confidential.” Regardless of the Grantee’s response, if any, the City retains final discretion whether to release the requested information, provided that the City shall give the Grantee at least five (5) business days written notice after receipt of any response from Grantee prior to releasing such information.

**Section 8. RATE CRITERIA.** The City shall establish a rate schedule for all Service Levels for the residential Solid Waste, Recycling and Compostables collection services. All rate schedules shall be adopted via ordinance by the City Council. The City shall set rates sufficient for Grantees in aggregate to recover Grantees’ projected Allowable Expenses, Operating Margin and Pass-Through Expenses. The rate schedules established by the City shall reasonably reflect the distribution of customer Service Levels of residential Solid Waste, Recycling and Compostables collection services. The rate schedule may also include incentives to Residential Customers to reduce their Solid Waste and to reuse and recycle. In accordance with the Administrative Rules, recycling revenue will be offset for the benefit of customers through a weighted average of revenue.

**Section 9. RATE ADJUSTMENT.**

A. Frequency. To insure that the rate schedule in effect at any time (Current Rate Schedule) conforms with the rate setting criteria established in Section 8, the rates shall be subject to review. If, as a result of the rate review, the City determines that the Current Rate Schedule does not conform to Section 8, the City Council shall adjust the Current Rate Schedule accordingly.

- 1) *Annual Review.* The City shall conduct an annual rate review in accordance with the process set forth in this agreement.
- 2) *City-Initiated Review.* The City may initiate rate review at any time if it has reasonable cause to believe that the Current Rate Schedule results in an Operating Margin that is either less than eight and one-half percent (8.5%) or greater than ten and one-half percent (10.5%);
- 3) *Grantee-Initiated Review.* Grantee may initiate rate review at any time upon the written request of Grantees representing at least fifty percent (50%) of the City's Residential Customers. The City shall initiate rate review within thirty (30) days of such request. The

City shall complete rate review and adopt a modified rate schedule, if any, within one-hundred eighty (180) days of such a request.

B. Process. The City shall select a representative number of Grantees, as described below, to determine the reasonableness of the Allowable Expenses in the preceding rate period and the projected Allowable Expenses, Operating Margin and Pass-Through Expenses for the next succeeding rate period.

- 1) *Representative Grantees.* Grantees shall be selected based upon a weighted random sampling technique that assigns each Grantee a probability of selection proportional to the Grantee's share of Residential Customers. The number of Grantees selected and the details of the process shall be specified in the Administrative Rules.
- 2) *Reasonableness of Expenses.* The City may, at its discretion, have Grantees' detailed cost reports reviewed by an independent Certified Public Accountant who is selected and paid for by the City. Any report adjustments recommended by the accountant may be taken into consideration in the rate review process. In addition to the accountant review, the City may consider information submitted by Grantee or others relevant to the rate schedules, including but not limited to available expense information, adjusted for cost of living, if necessary, for similarly situated residential collection companies in urban areas on the West Coast of the United States. All such information shall be part of the rate-making record. Based on its determination of the projected Allowable Expenses, Operating Margin and projected Pass-Through Expenses, the City shall establish a rate schedule for all Service Levels that conforms to Section 8.

C. Change in Law or Material Change in Cost.

- 1) *Definitions.* For purposes of this Subsection 9(C), "Change in Law" means any new or revised law, statute, rule, regulation, ordinance, order or requirement of any federal, state, regional or local government effective after the effective date of this franchise. "Material Change" means any material change in the Grantees' Allowable Expenses to perform its obligations under this franchise which is beyond Grantee's control, including change in location of disposal site, change in method of collection, any amendment to the list of Recyclable Materials and any change in the City's Solid Waste, Recycling or Composting collection program requirements.
- 2) *Rate Adjustment.* If a Change in Law or Material Change significantly increases Grantees' projected Allowable Expenses, the City shall adjust the rate schedule either prior to the effective

date of the Change in Law or the Material Change, or as soon thereafter as practicable. For all other Changes in Law or Material Changes that increase Grantees' projected Allowable Expenses , the City shall adjust the rate schedule at a date specified during the annual rate review.

- D. Dispute Resolution. If the Grantee is dissatisfied with a rate adjustment approved by the City, then Grantee may seek review by any proceedings available, including a claim for breach of contract. The parties agree that writ of review shall not be the exclusive means of resolving disputes under this franchise and the City agrees not to raise as a bar to any breach of contract proceeding brought by Grantee that writ of review is the exclusive remedy.

**Section 10. COVENANT TO INDEMNIFY AND HOLD THE CITY HARMLESS.**

Grantee agrees to indemnify, defend and hold harmless the City, its officers, agents and employees from any claim for injury, damage, loss, liability, cost or expense (including court and appeal costs and attorney fees or expenses), arising from any casualty or accident to person or property by reason of any act done under this franchise, by or for Grantee, its officers, agents or employees, or by reason of any neglect or omission of Grantee to keep its equipment or operating system in safe condition. Grantee also agrees to indemnify the City for any damages, claims, additional costs or expenses assessed against or payable by the City arising out of or resulting, directly or indirectly, from Grantee's failure to conduct its business operations in accordance with federal, state or local laws governing such operation, unless Grantee's failure arises directly from the City's negligence or willful misconduct. Grantee shall consult and cooperate with the City while conducting its defense of the City.

**Section 11. INSURANCE.**

A. Insurance Requirements.

- 1) *Commercial General Liability*. The Grantee shall provide and maintain during the term of this franchise commercial general liability and property damage insurance in the minimum amount of \$2,000,000 (two million U.S. dollars) per occurrence, and aggregate limit of not less than \$2,000,000 (two million U.S. dollars) that protects Grantee and the City and its officers, agents and employees from any and all claims, demands, actions and suits for damage to property or personal injury arising from Grantee's work under this franchise. The City reserves the right to increase insurance limits to meet any increase to the maximum statutory liability imposed on municipalities of the State of Oregon during the term of the franchise.
- 2) *Automobile Liability*. The Grantee shall carry automobile liability insurance with a combined single limit of not less than \$2,000,000 (two million U.S. dollars) for bodily injury and property damage. The insurance shall include coverage for any damages or injuries

arising out of the use of automobiles or other motor vehicles by Grantee.

- 3) *Pollution Liability.* The Grantee shall carry an endorsement for Automobile Pollution Liability in the minimum amount of \$1,000,000 (one million U.S. dollars) for bodily injury, property damage and environmental restoration resulting from hazardous materials collected by Grantee or from the vehicle itself. If Grantee is subject to the 1980 Federal Motor Carrier Act, Grantee shall maintain all insurance coverage required under the Act.
- 4) *Workers' Compensation.* The Grantee shall comply with the workers' compensation law, ORS Chapter 656, as it may be amended. If required, the Grantee shall maintain coverage for all subject workers as defined by ORS Chapter 656 and shall maintain a current, valid certificate of workers' compensation insurance on file with the City Auditor for the term of the franchise. Grantees who are non-subject workers meeting one of the exceptions in ORS 656.027 may not be required to carry workers' compensation insurance. If Grantee requests an exemption from the workers' compensation coverage listed above, it must make that request in writing to the City Attorney, stating its qualification for exemption under ORS 656.027.
- 5) *Additional Insureds.* The coverage shall apply as to claims between insureds on the policy. The insurance shall be without prejudice to other coverage. For liability coverage, the insurance certificate shall list the City as Certificate Holder and name as additional insureds "the City of Portland, Oregon, and its officers, agents and employees," and an endorsement to the liability policy shall confirm the naming of the City as an additional insured. Notwithstanding the naming of additional insureds, the insurance shall protect each additional insured in the same manner as though a separate policy had been issued to each, but nothing herein shall operate to increase the insurer's liability as set forth elsewhere in the policy beyond the amount or amounts for which the insurer would have been liable if only one person or interest had been named as insured.
- 6) *Cancellation.* The insurance shall provide that the insurance shall not be canceled or materially altered without thirty (30) calendar days' prior written notice first being given to the City Auditor. If the insurance is canceled or materially altered within the term of this franchise, Grantee shall provide a replacement policy with the same terms. Grantee agrees to maintain continuous uninterrupted coverage, in the terms and amounts required, for the duration of the franchise.

7) *Certificate of Insurance.* Grantee shall maintain on file with the City Auditor a certificate of insurance certifying the insurance coverage required above. The adequacy of the insurance shall be subject to the approval of the City Attorney. Failure to maintain liability insurance shall be cause for conditional forfeiture of this franchise by the City.

B. Insurance Requirements for Subcontractors. Should Grantee subcontract any part of this franchise, Grantee will require those Subcontractors, if not covered by Grantee's insurance, to obtain and keep in force for the duration of this franchise insurance equal to the minimum values indicated above.

**Section 12. NONDISCRIMINATION.** In performing collection services, Grantee shall not discriminate against any person on the grounds of race, sex, sexual orientation, age, creed, color, religion, national origin, marital or economic status, or physical or mental disability.

**Section 13. EQUITY AND DIVERSITY.** Grantee shall abide by Administrative Rules adopted to foster increased equity and diversity in the residential collection system, including, without limitation, rules meant to reduce barriers to economic opportunity for minority-owned and women-owned companies. If applicable, Grantee shall comply with Administrative Rules requiring Grantees that serve a certain percentage of Residential Customers to identify opportunities to utilize minority-owned and woman-owned Subcontractors, suppliers, and vendors.

**Section 14. EXCLUSIVITY.**

A. Franchise Not Exclusive. This franchise is not exclusive. The City expressly reserves the right to grant franchises to other persons or corporations as well as the right in its own name to use its streets for purposes similar to or different from those allowed to Grantee.

B. Need for Additional Franchises in Franchised Area. The City may grant additional franchises in Grantee's existing Franchise Area if the City determines that a need exists. The City Council shall consider the following criteria to determine need: (i) the effect that multiple franchises in a Franchise Area would have on the efficient delivery of service, including but not limited to, the unnecessary deterioration of City streets or inefficient fuel consumption; (ii) the effect that multiple franchises in a Franchise Area would have on the opportunity for the existing Grantee to make a reasonable Operating Margin on Allowed Expenses; (iii) the effect that multiple franchises in a Franchise Area would have on the Grantee's ability to generate the revenues needed to invest in efficient, modern equipment; (iv) the effect that multiple franchises in a Franchise Area would have on Grantee's ability to provide the best service, in the City Council's determination, in a manner consistent with the public interest; and (v) any other factors the City Council determines to be relevant. The City shall not grant any

additional franchises for a Grantee's existing Franchise Area without a prior public hearing at which time Grantee shall have the opportunity to be heard.

**Section 15. ASSIGNMENT, TRANSFER.**

- A. Written Consent. This franchise shall not be assigned, sold, leased, mortgaged, merged, divided, or otherwise transferred (Transferred) without the prior written consent of the City as expressed by ordinance. The City's consent in one instance shall not render unnecessary any subsequent consent. In determining whether the City will consent, the City may inquire into the technical, legal and financial qualifications of the prospective party and Grantee shall assist the City in any such inquiry. The City shall not unreasonably delay or withhold its consent, but the City may condition the Transfer upon such conditions as it deems appropriate. No Transfer may occur until: (i) the prospective party provides certificates of insurance to the City; and (ii) the prospective party agrees in writing to make any payments required by Grantee, including but not limited to franchise fees or civil penalties assessed by the City before the Transfer date. Within ten (10) business days after execution of any Transfer, Grantee shall file with the City Auditor a copy of the instrument executing the Transfer. The City's consent is not required if Grantee's Transfer is to an entity that controls, is controlled by, or is under common control with, the Grantee. Within ten (10) business days of a Transfer to any such entity, Grantee shall provide written notification to the City.
- B. Administrative Rules. Prior to requesting the City's written consent, Grantee shall comply with all relevant Administrative Rules, including the requirement to conduct outreach to minority-owned and woman-owned companies interested in purchasing a Franchise Area.
- C. Grantee's Proposed Division of Franchise Area. Grantee may propose division of its Franchise Area to facilitate the sale of one or more portions of its Franchise Area. The City will consider whether the geography of the proposed division will support affordable, efficient and effective collection service.
- D. Financing Equipment. The City's written consent is not required to mortgage, pledge or assign Grantee's tangible assets for financing the acquisition of equipment for collection services, but any such mortgage, pledge or assignment shall be subject to the City's other rights in this franchise.
- E. Subcontractors. Grantee shall not subcontract any of its work under this franchise without the prior written approval of the City. Grantee shall require any approved Subcontractor to agree, as to the portion subcontracted, to fulfill all of Grantee's obligations as set forth in this franchise. Notwithstanding the City's approval, Grantee shall remain obligated for full performance and the City shall incur no obligation other than its obligations to the Grantee. Grantee shall comply with all relevant Administrative Rules, including the requirement to conduct outreach to minority-owned and woman-owned companies interested in subcontracting.

## **Section 16. REMEDIES.**

- A. Immediate Forfeiture. The City Council may declare an immediate forfeiture of this franchise if: (i) Grantee accrues assessments within a 365-day period in excess of the allowable limit, as established in the Administrative Rules, for failure to comply with the collection standards; or (ii) Grantee is found by a court of competent jurisdiction to have practiced any fraud or deceit upon the City. Upon written notification to Grantee of City Council's declaration of immediate forfeiture, all of Grantee's franchise rights shall be immediately suspended.
- B. Conditional Forfeiture. The City Council may declare a conditional forfeiture of this franchise if: (i) Grantee fails to comply with any provision of the franchise; (ii) Grantee fails to obtain and maintain any permit required by the City or any federal, state or other regulatory body; (iii) Grantee's noncompliance with collection standards, as established in the Administrative Rules, creates a hazard to public health or safety; (iv) Grantee fails to maintain the required insurance; or (v) other cause exists for the forfeiture of this franchise. The City shall give Grantee thirty (30) calendar days' written notice of its intent to exercise conditional forfeiture, stating the reasons for such action. If Grantee cures the stated reason within the thirty (30) calendar days, or if Grantee initiates efforts satisfactory to the City to remedy the stated reason and the efforts continue in good faith, the City shall not exercise conditional forfeiture. Upon written notification to Grantee of City Council's declaration of conditional forfeiture, all of Grantee's franchise rights may be suspended, with reinstatement of rights conditioned upon Grantee's curing the stated reason for the conditional forfeiture within the time specified by the City.
- C. Civil Penalties. In addition to any other rights, including rights under the City Code, the City may impose civil penalties for failure to comply with the collection standards set forth in the Administrative Rules.

**Section 17. PREVENTING INTERRUPTION OF SERVICE.** If (i) Grantee's rights are suspended; or (ii) for three (3) consecutive working days or more, Grantee fails for any reason to collect and remove Solid Waste, Recyclable Materials or Compostables as required, except in instances of force majeure, the City may immediately, upon written notice to the Grantee, cause such Solid Waste, Recyclable Materials or Compostables to be collected by whatever means are available to the City. Upon the City's demand, Grantee shall immediately provide driver route listings, customer subscription and billing records, and any other necessary operational information. Grantee agrees it shall reimburse the City for any costs incurred in providing collection service, including but not limited to: (i) all fees paid to Grantee for provision of services otherwise provided by the City; and (ii) any costs incurred by the City in excess of the fees that would have been paid to Grantee if Grantee had performed the services performed by the City.

## **Section 18. FORCE MAJEURE.**

- A. Definition. “Force majeure” means acts of God, landslides, lightning, forest fires, floods, volcanic eruptions, earthquakes, civil disturbances, acts of terrorism, wars, blockades, public riots, explosions, shortage of materials and other events not reasonably within the control of the City or Grantee.
- B. Notice. If an event of force majeure renders either Grantee or the City wholly or partially unable to meet its obligations under this franchise, then that party shall give the other party prompt notice describing the force majeure in reasonable detail.
- C. Grantee Responsibilities. Grantee's primary responsibility shall be to reestablish regular routes and schedules for collection services as soon as possible. Reestablishing collection and disposal of Solid Waste takes priority over reestablishing collection and disposal of Recyclables and Compostables. As soon as practicable, Grantee shall advise the City when it is anticipated that normal routes and schedules can be resumed. Some events of force majeure may require that Grantee hire additional equipment, employ additional personnel, or work existing personnel on overtime hours to reestablish collection.
- D. City Responsibilities. The City may allow Grantee to vary regular routes and schedules for the duration of the force majeure. The City shall attempt, through local news media, to inform the public when regular services may be resumed.
- E. Preparedness Plan. Within two-hundred and seventy (270) calendar days of the effective date of this franchise, Grantees with more than seven thousand (7,000) Residential Customers shall submit to the City a written preparedness plan, on a form provided by the City, demonstrating Grantees’ arrangements to provide vehicles and personnel and to maintain uninterrupted service in case of force majeure.

**Section 19. FRANCHISE RENEWAL.**

- A. Initiating Residential Franchise Review. During the six-(6) month period beginning with the forty-eighth-(48) month from the effective date of this franchise, the City Council may, at its discretion, initiate a review of the operation of this franchise. During the same six-(6) month period, Grantees may initiate franchise review upon the written request of Grantees representing at least fifty percent (50%) of the City’s Residential Customers.
- B. Commercial or Multifamily Franchising. If the City Council directs the Bureau of Planning and Sustainability to develop a franchise for commercial or multifamily collection services, the Bureau shall provide written notice to each Grantee. After such notice is provided, the City Council may initiate franchise review of the residential collection system, if City Council determines that such review is necessary to address coordination, consistency and territorial values in franchising commercial or multifamily collection services.



- C. Review Process. If initiated by the City, the City Council shall adopt a resolution outlining the scope of the review. If initiated by Grantees, the City Council shall adopt a resolution outlining the scope of review within thirty (30) calendar days of the Grantee's written request. After adoption of the resolution, the Bureau of Planning and Sustainability shall conduct a review and report back to the City Council within one-hundred and eighty (180) calendar days. The review process may consider the following factors, among any others identified in the resolution: (i) performance of the franchise system for the collection of Solid Waste, Recycling and Composting; (ii) system performance indicators, including quantities of Solid Waste disposed and Recyclables and Compostables collected and overall rates of participation in recycling and composting; (iii) measurements of customer satisfaction, including but not limited to customer concerns, results of public surveys and system compliance issues; (iv) comparative analysis of programs for collection services used in other cities, including but not limited to system features, program costs, funding mechanisms and overall rates of waste diversion and participation in recycling and composting; (v) evaluation of equity in the franchise system, including participation of women and minority workers and barriers to economic opportunities for minority-owned and woman-owned companies; and (vi) whether renewal of the franchise system is in the overall public interest.
- D. City Council Acceptance. Upon City Council's acceptance of the Bureau of Planning and Sustainability's review, the City Council may decide whether or not to renew the franchise upon such terms and conditions as it deems appropriate. The renewal franchise shall be for a term of twelve (12) years.

**Section 20. SEVERABILITY.** If any provision of this franchise, or its application to any person or circumstance, is declared invalid or unenforceable, the remainder of this franchise shall continue in full force and effect.

**Section 21. CHOICE OF LAW.** This franchise shall be governed by the laws of the State of Oregon, even if Oregon's choice of law rules would otherwise require application of the law of a different state.

**Section 22. CHOICE OF FORUM.** Any litigation between the City and the Grantee regarding this franchise shall occur, if in the state courts, in the Multnomah County Court, and if in the federal courts, in the United States District Court for the District of Oregon, Portland Division.

**Section 23. DISPUTE RESOLUTION.** The Administrative Rules set forth a process for non-binding mediation of disputes between the parties.

**Section 24. WRITTEN NOTIFICATIONS.** All notices to, and other written communication between, the parties to this franchise shall be deemed received five (5) business days after being sent by first class mail, or upon receipt when sent by courier services or by e-mail. All notices and written communications shall be sent to the parties set forth below. Each party shall provide written notice to the other of any changes to the below contacts within thirty

(30) calendar days.

For City:  
Bureau of Planning and Sustainability  
Solid Waste & Recycling Program  
1900 SW 4<sup>th</sup> Avenue, Suite 7100  
Portland OR 97201  
[wasteinfo@portlandoregon.gov](mailto:wasteinfo@portlandoregon.gov)

For Grantee:  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

**Section 25. ENTIRE AGREEMENT; AMENDMENT.** This franchise constitutes the entire agreement between the parties concerning collection services and supersedes all other communications, representations, proposals, understandings or agreements, either written or oral, by Grantee and the City. This franchise may only be amended by a writing signed by both parties.

**Section 26. OTHER AUTHORITY SUPERSEDED.** Upon effectiveness of this franchise, all authority to operate previously granted to Grantee by the City, as embodied in Ordinance No. 185830, is superseded by this franchise.

**Section 27. WRITTEN ACCEPTANCE.** Within thirty (30) calendar days after the ordinance granting this franchise becomes effective, Grantee shall execute and file with the City Auditor a written acceptance of this franchise on the form attached and incorporated herein as Exhibit B. Grantee’s failure to file such written acceptance shall be deemed a rejection of the franchise and the granting ordinance shall thereupon be null and void. Such acceptance shall be unqualified and shall be construed to be an acceptance of all the terms, conditions and restrictions contained in this franchise.

Passed by the Council:

Mayor Ted Wheeler  
Prepared by: A. Sperry  
Date Prepared: August 3, 2018

**Mary Hull Caballero**  
Auditor of the City of Portland  
By

Deputy