

RESOLUTION NO. 2013-12-___ (R)

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF MCKINNEY, TEXAS, APPROVING AMENDMENT NO. 1 TO THE LICENSE AGREEMENT WITH PROGRESSIVE WASTE SOLUTIONS OF TX, INC.; AUTHORIZING THE CITY MANAGER TO EXECUTE THE AMENDMENT; AND PROVIDING AN EFFECTIVE DATE

WHEREAS, the City Council of the City of McKinney, Texas, (the "City") desires to extend the length of the Primary Term until September 30, 2024 with added provisions governing the Contractor's construction of a compressed natural gas refueling facility which may be utilized by the City's vehicles; and

NOW, THEREFORE, BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF MCKINNEY, TEXAS, THAT:

- Section 1. The foregoing recitals are hereby found to be true and correct legislative and factual findings of the City of McKinney, Texas, and are fully incorporated into the body of this Resolution.
- Section 2. The City Council of the City of McKinney, Texas does hereby approve the first amendment to the license agreement.
- Section 3. The City Manager is hereby authorized to execute the Amendment No. 1 to the License Agreement with Progressive Waste Solutions of TX, Inc., a copy of which is attached hereto as Exhibit A.
- Section 4. This Resolution shall be immediately effective upon its passage.

DULY PASSED AND APPROVED BY THE CITY COUNCIL OF THE CITY OF MCKINNEY, TEXAS ON THE 17th DAY OF DECEMBER, 2013.

CITY OF MCKINNEY, TEXAS

BRIAN LOUGHMILLER
Mayor

ATTEST:

SANDY HART, TRMC, MMC
City Secretary
BLANCA I. GARCIA, TRMC
Assistant City Secretary

APPROVED AS TO FORM:

MARK S. HOUSER
City Attorney

EXHIBIT A

Amendment No. 1 to the License Agreement

This Amendment No. 1 (this "Amendment") to the License Agreement dated as of May 20, 2008 (the "Agreement"), by and between the City of McKinney, Texas, a Texas municipal corporation (the "City"), and Progressive Waste Solutions of TX, Inc., formally known as IESI TX Corporation, (the "Contractor" and together with the City, the "Parties"), is entered into as of December __, 2013 (the "Commencement Date").

WHEREAS, the Parties entered into a license agreement dated September 24, 1996 which was amended on October 18, 1999, September 20, 2001, October 31, 2005, and resulted in the consummation of the Agreement;

WHEREAS, the Parties desire to further amend the Agreement;

WHEREAS, the Contractor desires to have a Natural Gas refueling station (the "Refueling Station") constructed on that certain property owned by Contractor located at 2138 County Lane, McKinney, Texas (the "Property") pursuant to the site plan (the "Site Plan") attached hereto as Annex I and otherwise in accordance with the plans and specifications mutually agreed by the parties.

WHEREAS, the Contractor agrees to provide two (2) dedicated slow fill fueling stalls to the City at the Refueling Station in order to fuel vehicles owned and operated by the City (the "City Vehicles") with compressed natural gas (the "Fuel");

WHEREAS, the Contractor desires to perform its obligations under the Agreement with vehicles that are powered by natural gas (the "Contractor Natural Gas Vehicles"); and

WHEREAS the Parties agree to extend the length of the Primary Term until September 30, 2024.

NOW, THEREFORE, in consideration of the foregoing, the parties hereby agree to amend the Agreement as follows:

1. Definitions. Capitalized terms used herein but not defined herein shall have the meanings assigned to them in the Agreement, as amended by this Amendment.
2. Term. Section 4.1 is hereby amended and restated in its entirety as follows:

“The Primary Term of this Agreement shall be for a period of sixteen (16) years and five (5) months commencing May 20, 2008 (the “Effective Date”) and, unless renewed according to the terms of Section 4.2, terminating on September 30, 2024.”
3. The following Section 5.3 Branding is added to the Agreement:
 - 5.3. Branding. Contractor shall 1) convert all Commercial Containers and 2) refurbish all roll off and frontload Containers used in connection with the Agreement to reflect the new Progressive Waste Solutions branding by April 1, 2015.
4. Treatment of Failure to Perform. Section 16.1 is hereby amended and restated in its entirety as follows:

“With the exception of Section 24, in the event Contractor fails, during the Primary Term hereof or any renewal term, to perform its duties and discharge its obligations in accordance with the terms, provisions, and conditions hereof, the City shall be entitled at its sole option, either to 1) declare the Contractor to be in non-compliance with the terms of the Agreement (hereafter “Non-Compliance”) or 2) declare the Contractor to be in default. Should Contractor default under Section 24 during any period covered by this Amendment, City

may, after Year Three and upon sixty (60) days written notice and opportunity to cure, unilaterally reduce the Primary Term by a period not to exceed four (4) years.”

5. Non-Compliance Penalties. The sentence below is added at the end to Section 21.4:

“The obligations of Contractor set forth in Section 24 shall not be subject to this Section 21.4.”

6. The following Section 24 Natural Gas is added to the Agreement:

“24.1. Creation of Refueling Station. On or before December 31, 2014, the Contractor shall have Phase One of the Refueling Station constructed, at Contractor’s sole cost, on the Property pursuant to, and at the location specified in, the Site Plan, including all related onsite and offsite infrastructure required therefor. Phase One of the Refueling Station shall contain twenty-six (26) slow-fill Fuel dispensers (the “Slow-Fill Dispensers”) to be used to provide Fuel to Contractor’s Natural Gas Vehicles. The Refueling Station shall be designed with the capacity to expand the Slow-Fill Dispensers to refuel up to seventy (70) vehicles, per day. The Refueling Station shall provide two (2) slow-fill dispensers dedicated to provide Fuel for City Vehicles. On or before April, 1 2015, The Contractor shall have Phase Two of the Refueling Station constructed, at Contractor’s sole cost, on the Property pursuant to, and at a location specified in, the Site Plan. Phase Two shall contain one (1) unmanned fast-fill dispenser to provide Fuel to the general public (the “Fast-Fill Dispenser”). The Fast-Fill Dispenser shall be equipped with credit card readers. The City agrees that its employees shall comply with all rules, regulations and security policies promulgated by Contractor in connection with use of the Refueling Station.

24.2. Cost of Fuel. Contractor shall set the price of Fuel for the general public from the Fast-Fill Dispenser as it may determine in its sole discretion. Contractor shall set the price of Fuel from the Slow-Fill Dispensers to refuel City Vehicles at Cost until the end of the Primary Term, or until the Parties otherwise agree in writing. For purposes of this Section and for each Invoiced quantity under Section 24.3, Cost components shall include Contractor’s documented and verified cost, per unit of Fuel, of: 1) the Fuel, 2) transport and delivery of the Fuel, 3) electricity to operate the Refueling Station, 4) maintenance or monitoring by third parties or governmental agencies, 5) federal taxes levied on the Fuel, minus 6) state taxes levied on the Fuel. After the end of the Primary Term, the Parties shall negotiate in good faith to provide Contractor with a market-based, commercially-reasonable markup for its status as a governmental customer on the sale of Fuel for City Vehicles. City may utilize the Fast-Fill Dispenser, as needed at any time for City Vehicles, and the price of Fuel charged shall be Cost, as defined in this Section 24.2.

24.3. Fuel Payment. Upon completion of the Refueling Station and the commencement of refueling of the City Vehicles, and no later than ten (10) days after the end of each calendar month, Contractor shall provide an invoice to City for the amount payable by the City to the Contractor for Fuel purchased (the “Invoice”), which Invoice shall document the Contractor’s Cost. The City shall have thirty (30) days upon receipt of the Invoice to remit payment to Contractor. To the extent the full amount of any Invoice is not timely received, Contractor at its sole discretion, may suspend the refueling services of the Refueling Station for City Vehicles until such time as the City pays all outstanding Invoices, not otherwise in dispute, in full. The Parties

further agree that any cessation of operations of the Refueling Station shall not constitute a Non-Compliance or default event under the Agreement and shall not be construed as a default by Contractor under the Agreement.

24.4. Operation of Refueling Station. Upon the completion of the construction of the Refueling Station, the Contractor shall at all times operate the Refueling Station in a commercially reasonable manner and in full compliance with all applicable federal, state and local laws. The Parties agree and acknowledge that the availability of Fuel is subject to factors beyond either Party's control, and mutually agree that the inability to provide Fuel to the Vehicles, or the failure of any equipment necessary to refuel the Vehicles (in either case not as the result of the negligence of Contractor) shall constitute a Force Majeure event. The Contractor, through its agents, will operate the Fast-Fill Dispenser at the Refueling Station twenty-four (24) hours a day, seven (7) days a week, unless service at the Fast-Fill Dispenser is interrupted by maintenance or a Force Majeure event. The Contractor through its agents will provide Slow-Fill Dispensers accessible during the hours of 6 a.m. to 12 a.m. (Midnight), on each of the following days Monday-Friday, and 6 a.m. to 2 p.m. on Saturday. The Refueling Station shall be closed and unavailable to refuel City Vehicles on every federal holiday; however City shall have access to the Refueling Facility on any day for emergency purposes and upon reasonable notice to Contractor. The City agrees and acknowledges that it will provide Vehicles with refueling hardware that is in good working order, and the Contractor may refuse to refuel any vehicle that it may determine, in its sole discretion, does not possess properly-functioning refueling hardware. The City shall, to the extent allowed by applicable law and in addition to its obligations set forth in the Agreement, indemnify the Contractor against 1) any claims that may result from the use of the Fuel in City Vehicles, and 2) any claims that may arise as a result of improperly refueling any City Vehicles (to the extent such refueling was performed by an agent of the City or a result of hardware failure on a City Vehicle). The Parties expressly agree and acknowledge that the Contractor, or any of its agents, may limit or terminate vehicle refueling if such limitation or termination is performed for safety or environmental reasons. The Contractor shall have the express right to make repairs, upgrades, or perform maintenance on the Refueling Station as it deems necessary, in its sole discretion, and shall provide the City with prompt notice in writing of any anticipated operational interruptions to the Slow-Fill Dispensers that may occur as a result.

24.5. Operation of Contractor Natural Gas Vehicles. Upon the first anniversary of the Commencement Date ("Year One"), the Contractor shall purchase or reconfigure existing vehicles such that Contractor shall operate solely within the City nine (9) vehicles which qualify as Contractor Natural Gas Vehicles. Upon the second anniversary of the Commencement Date ("Year Two"), the Contractor shall purchase or reconfigure existing vehicles such that Contractor shall operate solely within the City nineteen (19) vehicles, which qualify as Contractor Natural Gas Vehicles. Upon the third anniversary of the Commencement Date ("Year Three"), the Contractor shall purchase or reconfigure existing vehicles such that Contractor shall operate solely within the City twenty-five (25) vehicles, which qualify as Contractor Natural Gas Vehicles.

7. Agreement Continues. Except as modified by this Amendment, the Agreement remains in full force and effect.

8. Counterparts. This Amendment may be executed in multiple counterparts and delivered by facsimile or portable document format, each of which, when executed, shall be deemed an original, and all of which shall constitute but one and the same instrument.

[The Remainder of this Page is Left Intentionally Blank.]

IN WITNESS WHEREOF, the parties have executed this Amendment as of the date first set forth in this Amendment.

CITY OF MCKINNEY
222 N. Tennessee St.
McKinney, Texas 75069

By: _____
Jason Gray, City Manager

ATTEST:

SANDY HART, TRMC, MMC
City Secretary
BLANCA I. GARCIA, TRMC
Assistant City Secretary

APPROVED AS TO FORM:

MARK S. HOUSER
City Attorney

Progressive Waste Solutions of TX, Inc.
2138 Country Lane
McKinney, Texas 75069

By: _____
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ANNEX I

