

**CONTRACT NO. KC-355-21
AGREEMENT RELATING TO CAPITAL IMPROVEMENTS
AT OLYMPIC VIEW TRANSFER STATION**

This AGREEMENT is between KITSAP COUNTY, a political subdivision of the State of Washington (County), and WASTE MANAGEMENT OF WASHINGTON, INC., a Delaware corporation (Contractor); hereafter collectively referred to as Parties. This Agreement shall be effective upon the date that all Parties have executed this Agreement (Effective Date), as evidenced by the signatures below.

RECITALS

WHEREAS, the County issued RFP 2020-125 under Revised Code of Washington (RCW) 36.58.090 in August 2020 seeking qualified firms to: operate and maintain the County's Olympic View Transfer Station (OVTS), transport and dispose solid waste received at OVTS, manage recyclables received at OVTS, and participate in select capital improvement projects for OVTS. Contractor was the successful responder; and

WHEREAS, the County has determined that it is in the best interest of the Parties to have separate but related agreements for the operation and maintenance of OVTS, including the transport and disposal of solid waste and the management of recyclables, and for the participation in select capital improvements for OVTS; and

WHEREAS, the Parties have executed an agreement for the operation and maintenance of OVTS, including the transport and disposal of solid waste and the management of recyclables (Operation and Maintenance Agreement KC-350-21); and

WHEREAS, the County is completing a Facility Master Plan that assesses OVTS. The Facility Master Plan identifies a number of capital improvements that the County would like to accomplish at OVTS. An initial set of projects were identified in the draft Facility Master Plan, attached to RFP 2020-125, and the County may identify others as it is amended from time to time. As the operator of OVTS, Contractor is uniquely situated to provide design and construction management services with County oversight as outlined below; and

WHEREAS, the Parties understand that capital improvements benefit both the County as owner of OVTS and the Contractor's operation of OVTS under the Operation and Maintenance Agreement (KC-350-21) and wish to set forth their respective roles for carrying out select capital improvements upon request of the County.

NOW THEREFORE, the Parties mutually agree to the following terms and conditions.

AGREEMENT

ARTICLE 1 DEFINITIONS

For the purposes of this Agreement, the following terms shall have the following meanings when they are used with initial capitalization:

Agreed Maximum Price (AMP) means the agreed maximum cost of Phase Two Services to complete final design, permitting, environmental review if applicable, construction and commissioning of a specific Capital Improvement Project, including the Contractor's contingency, negotiated support services, allowances, and all applicable taxes and fees. The AMP may be modified as agreed upon by both parties through approved amendments or change orders.

Agreement means this Agreement that may be amended, modified and supplemented from time to time in writing by mutual agreement of the Parties.

Applicable Law means all federal, state, regional or local statutes, rules, codes, regulations, resolutions and ordinances that relate to or affect the County, the Contractor, any equipment or properties (including any component thereof) utilized by the Contractor, the performance of the County's obligations hereunder, or the performance of the Contractor's obligations hereunder.

Business Day means Monday through Friday, from 8:00 A.M., Pacific Time to 5:00 P.M., Pacific Time, and excludes Saturday, Sunday, and Washington State legal holidays.

Capital Improvement Project (Project) means a capital improvement project described in the OVTS Facility Master Plan and/or OVTS Site Master Plan, or a collection of two or more of those projects if they are undertaken together.

Contractor means Waste Management of Washington, Inc., its employees, officers, agents, successors and assigns.

Contractor Representative means an employee of the Contractor designated to be in charge of the Contractor's obligations under this Agreement. The Contractor Representative is identified in Section 8.2. Where both the Contractor and County Representative are referred to together, they are referred to as "Party Representatives."

County means Kitsap County, a political subdivision of the State of Washington.

County Representative means the person, or designee, designated by the County to administer and monitor the provisions of this Agreement. The County Representative is identified in Section 8.1. Where both the Contractor and County Representative are referred to together, they are referred to as "Party Representatives."

Day or Days means calendar days unless otherwise specifically noted in the Agreement.

Design Documents means the plans and specifications developed by or for the Contractor and reviewed and accepted by the County.

Design Professional means a qualified design professional selected by Contractor and approved by County, licensed in the State of Washington, who will be responsible for leading the design of one or more Capital Improvement Projects through Phase One and Phase Two Services.

Final Completion means the date established in the Supplemental Project Amendment, or any amendment thereto, for final completion of all Phase Two Services of a Project.

General Contractor (GC) means a contractor engaged by the Contractor and approved by the County to manage Phase One Services and Phase Two Services for one or more Capital Improvement Projects.

Olympic View Transfer Station (OVTS) means the entirety of the Kitsap County facility located at 9380 SW Barney White Road, Bremerton, Washington 98312 including all real property and equipment including but not limited to the OVTS Transfer Building, scalehouse facility, administration building, Public Recycle Drop-off Area, roads, parking areas, Surface Water Management System, Solid Waste preload compactors, and other ancillary facilities and non-mobile equipment.

Operation and Maintenance Agreement means the agreement for operations and maintenance of OVTS, for solid waste transport and disposal, and for the management of recyclables, between the County and Contractor, KC-350-21 dated September 27, 2021, and any amendments thereto.

OVTS Facility Master Plan means the County-furnished planning document that develops conceptual level designs, program requirements and Project Criteria for Capital Improvement Projects at OVTS.

OVTS Site Master Plan means the preliminary facility planning document prepared by or for the Contractor that advances the planning and preliminary designs for all Capital Improvement Projects in the OVTS Facility Master Plan in sufficient detail to allow the County and the Contractor to determine and/or confirm the scope, priority and Project Criteria for each of the Capital Improvement Projects.

Phase One Services mean those services of designing and initiating a Capital Improvement Project, including but not limited to design development, preconstruction services, preliminary environmental review (if applicable) and negotiation of the Agreed Maximum Price for Phase Two Services.

Phase Two Services mean those services other than Phase One Services for preparing and constructing a Capital Improvement Project, including but not limited to final design, environmental review (if applicable), permitting, construction, construction quality control/oversight and commissioning.

Project Amendment means a written amendment to this Agreement, in a form similar to that shown in Attachment B, executed by the Parties for a specific Capital Improvement Project that sets forth, among other things, the scope, budget, and schedule for Phase One Services of the Project.

Project Criteria means the County's program requirements, objectives, functional needs, quality standards, budget constraints, schedule expectations, and other standards that apply to each Project.

Subcontractor means any entity, supplier, or other vendor contracted directly or indirectly by the Contractor to complete Work required under this Agreement, and shall include any General Contractor unless otherwise specified.

Substantial Completion means the date on which the Work of a Project is sufficiently complete in accordance with the Supplemental Project Amendment for that Project so that the Project can be used for its intended purposes.

Supplemental Project Amendment means a written amendment to this Agreement and the Project Amendment, in a form mutually agreeable and, executed by the Parties, for a specific Capital Improvement Project that sets forth, among other things, the scope, budget and schedule for Phase Two Services of the Project.

Uncontrollable Circumstance means any act, event or condition that has had or may reasonably be expected to have a material adverse effect on the rights or obligations of a Party to this Agreement, or a material adverse effect on OVTS, if that act, event or condition is beyond the reasonable control of the Party relying thereon as justification for not performing an obligation or complying with any condition required of that Party under this Agreement and could not have been prevented or avoided by that Party through the exercise of due diligence.

Work means all design, construction and other services required by this Agreement, including, as context indicates, the management of design, construction procurement and furnishment of all materials, equipment, services and labor reasonably necessary to fulfill its obligations under the Agreement.

Work Product means the OVTS Site Master Plan, drawings, specifications, cost estimates, schedules, and other planning, design and construction documents (including record drawings) provided to the County by the Contractor for a Project.

ARTICLE 2 GENERAL PROVISIONS

Section 2.1 Recitals

The recitals set forth above are expressly incorporated into this Agreement by this reference.

Section 2.2 Governing Law; Venue

The Agreement will be governed in all respects by the laws of the State of Washington, both as to interpretation and performance, without regard to conflicts of law or choice of law provisions. Any action arising out of or in connection with the Agreement may be instituted and maintained only in a court of competent jurisdiction in Kitsap County, Washington or as provided by RCW 36.01.050.

Section 2.3 Complete Agreement

Except as expressly stated herein, this Agreement shall constitute the entire and complete agreement and final expression of the Parties. This Agreement supersedes all prior or contemporaneous agreements, understandings, arrangements, commitments and representations, whether oral or written, with respect to the subject matter hereof. In the event of any conflict between or among the documents constituting this Agreement, the language and provisions set forth in the Agreement shall prevail.

Section 2.4 Severability

If a court of competent jurisdiction holds any provision of the Agreement to be illegal, invalid, or unenforceable, in whole or in part, the validity of the remaining provisions will not be affected, and the Parties' rights and obligations will be construed and enforced as if the Agreement did not contain the particular provision held to be invalid. If any provision of the Agreement conflicts with any statutory provision of the State of Washington, the provision will be deemed inoperative to the extent of the conflict or modified to conform to statutory requirements.

Section 2.5 Time is of the Essence

Time is of the essence of this Agreement. The Contractor agrees to work promptly and fully complete the Work within the limits as described herein. Time is of the essence with respect to all obligations under this Agreement. The County's failure to object to timely performance or the continued payment of compensation is not and shall not be construed as a waiver of this provision.

Should Contractor fail to complete a Project within the agreed time established for the Project in the applicable Supplemental Project Amendment, the County will be entitled to liquidated damages as defined in the Supplemental Project Amendment. Liquidated damages shall be in commercially reasonable amounts that are standard in the industry, enforceable under Applicable Law, and tailored to the Project.

Section 2.6 Construction of Terms

Unless otherwise specified in the Agreement, words describing material or work that have a well-known technical or trade meaning shall be construed in accordance with the well-known meaning generally recognized by Solid Waste professionals, engineers and trades. The captions throughout this Agreement are for convenience and reference only and the words contained in them shall not be held to expand, modify, amplify the construction or meaning of this Agreement. All Parties hereto have been represented by legal counsel and accordingly hereby waive the general rule of construction that an agreement shall be construed against its drafter.

Section 2.7 Compliance with Law

The Contractor and the services under this Agreement shall comply with all Applicable Laws and standards in effect at any given time regardless as to whether such Applicable Laws and standards are referred to by the County. If required for the services provided, the Contractor shall submit to a background check as directed by the County. This provision shall be incorporated into any subcontract executed by the Contractor in the performance of this Agreement.

Section 2.8 No Third-Party Beneficiaries

No provision of the Agreement is intended to, nor will it be construed to, create any third-party beneficiary or provide any rights or benefits to any person or entity other than the County and the Contractor.

Section 2.9 Comprehensive Agreement

All services that are necessary to complete and carry out the terms of the Agreement as described in the Agreement, including any amendments or change orders, shall be considered part of the Agreement and the Contractor shall perform or provide the services without extra compensation unless otherwise expressly stated in the Agreement.

Section 2.10 Notices

Any notices, demands and other communications required by the Agreement will be effective if personally served upon the other Party representative or if mailed by registered or certified mail, postage prepaid, return receipt requested, to the other Party's representative identified in Article 8 at the address therein, or if emailed to the other Party's representative identified in Article 8 at the email address therein. Notice will be deemed to be given three (3) days following the date of mailing, or immediately if personally served. For service by email, service will be effective upon confirmation of receipt or three (3) days after mailing the original.

Section 2.11 Article, Section and Subsection References

Any articles, sections or subsections mentioned in this Agreement by number only (without reference to another document) refer to those articles, sections or subsections contained in this Agreement.

Section 2.12 Amendment or Waiver

Either Party's failure to insist upon the strict performance of any provision of the Agreement, or to exercise any right based upon a breach thereof or the acceptance of any performance during such breach, will not constitute a waiver of any right or remedy under the Agreement unless expressly so agreed in writing by an authorized representative.

Section 2.13 Independent Contractor

Each Party under the Agreement shall be for all purposes an independent contractor. Nothing contained herein will be deemed to create an association, a partnership, a joint venture, or a relationship of principal and agent, or employer and employee between the Parties. The Contractor shall have complete responsibility and control over its personnel. Neither the Contractor nor its personnel shall be, or be deemed to be, or act or purport to act, as an employee, agent or representative of the County. The Contractor and its personnel shall have no County employee-type benefits of any kind whatsoever, including without limitation, insurance, pension plan, vacation pay or sick pay, or other right or privilege afforded to County employees. The Contractor and its personnel shall be responsible for payment of all its employee's insurance, taxes, and benefits.

Section 2.14 Public Records

The Contractor agrees that the Agreement and all records associated with the Agreement shall be available to the County for inspection and copying by the public pursuant to the Public Records Act, Chapter 42.56 RCW ("Act"). If the County determines that records in the custody of the Contractor are needed to respond to a request under the Act, the Contractor shall make all such records promptly available to the County at no cost to the County. With the exception of the Agreement, if the Contractor considers any portion of any record, electronic or hard copy, to be protected from disclosure under the Act, the Contractor shall clearly identify when providing such record to County all specific information

it claims to be confidential or proprietary. If the County receives a request under the Act to inspect or copy proprietary information that has been identified by the Contractor as protected from disclosure and the County determines that release of the information is required by the Act or otherwise appropriate, the County's sole obligation will be to make a reasonable effort to notify the Contractor of the request and the date that such protected information will be released unless the Contractor obtains a court order to enjoin disclosure pursuant to RCW 42.56.540. If the Contractor fails to timely obtain a court order enjoining disclosure, the County will release the requested information on the date specified. The County has no obligation on behalf of the Contractor to claim any exemption from disclosure under the Act. The County will not be liable to the Contractor for releasing records pursuant to the Act.

Section 2.15 Counterparts

The Agreement may be executed in several counterparts, each of which will be deemed an original, but all of which together will constitute one and the same agreement.

Section 2.16 Approval

Except as otherwise expressly provided herein, in any instance in which the consent or approval of the County or the Contractor is required hereunder, or under any agreements in connection with any transaction contemplated hereby, such consent or approval shall not be unreasonably withheld.

Section 2.17 Assignment, Delegation, Subcontracting and Change of Control

(A) Assignments.

Except as provided herein, prior written consent of the other Party is required when a Party assigns or transfers any right, duty, obligation, or remedy under the Agreement. Where the Contractor intends to assign or transfer any right, duty, obligation or remedy under the Agreement to a subsidiary, only prior notice to the County is required. Any purported assignment or transfer in violation of this section shall be void.

(B) Delegation.

The Contractor may delegate certain performance obligations through subcontracts as provided in this Agreement, however such delegation does not relieve the Contractor from responsibility for such obligations.

(C) Subcontracts.

Upon request, the Contractor shall provide the County a list of all Subcontractors and the Subcontractors' proposed responsibilities. Further, the Contractor shall not contract with, and agrees to require any Subcontractor to not to contract with, any entity that is presently debarred, suspended, proposed for debarment, or declared ineligible from hiring by any federal or state agency, or that does not possess the appropriate contractor license and registration required by the state. "Subcontract" means any contract between the Contractor and another party or between a Subcontractor and another party delegating or assigning, in whole or in part, the making or furnishing of any material or service for the performance of the Agreement. All subcontracts shall incorporate by reference the terms and conditions of this Agreement applicable to such Subcontractor's services, except as excluded or modified in the Project Amendment or in the Supplemental Project Amendment. As between the County and the Contractor, the Contractor will be solely responsible for the performance and payment of its Subcontractors.

(D) Change in Control or Ownership.

Any direct or indirect change in control or the transfer of a direct or indirect controlling interest in the beneficial ownership of the Contractor, including by merger (whether that party is the surviving or disappearing entity), consolidation, dissolution, or operation of law shall constitute a Contractor Event of Default under the terms of this Agreement, unless the County consents in writing to that transfer. The “change in control” or “transfer of a direct or indirect controlling interest” of the Contractor shall include, but is not limited to, the transfer or assignment of twenty-five percent (25%) or more of the beneficial ownership of the Contractor to or from a single entity; however, intra-company transfers in the form of transfers between different subsidiaries or branches of the Contractor’s parent corporation shall not be construed as a “change in control” or “transfer of a controlling interest” of the Contractor.

Notwithstanding the foregoing, the County may in its sole discretion and at the Contractor’s sole expense (including, but not limited to, the County’s attorneys’ fees, if any) determine that new ownership can adequately and faithfully render the service called for in this Agreement for the remaining Term of the Agreement. If it so determines, the County may then elect to execute a novation, allowing new ownership to assume the rights and duties of this Agreement and releasing the previous ownership of all obligations and liability. The new ownership would then be solely liable for any Work and/or claims related to this Agreement.

(E) Successors and Assigns.

To the extent permitted by law, the Agreement is binding on the Parties’ respective partners, successors, assigns, executors, and legal representatives.

Section 2.18 Limitation of Liability of the County

Obligations of the County under this Agreement are limited obligations payable solely from such amounts as may lawfully be paid by the County for services of the type required to be rendered by the Contractor under this Agreement from the Solid Waste Enterprise Fund. This Fund shall be maintained in such a manner as to ensure funds sufficient to satisfy the County’s obligations under this Agreement.

Execution and delivery of this Agreement by the County is not intended to and shall not impose any personal liability on any public official, officers, employees or agents of the County. No recourse shall be had by the Contractor for any claims based on this Agreement against any public official, officer, employee or other agent of the County in his or her individual capacity. All such liability, if any, is expressly waived by the Contractor by the Contractor’s execution of this Agreement.

Section 2.19 Discrimination

The Contractor and its personnel shall not discriminate against any person on the basis of race, color, creed, religion, national origin, age, sex, marital status, sexual orientation, veteran status, disability, or other circumstance prohibited by federal, state, or local law, and shall comply with Title VI of the Civil Rights Act of 1964, PL 88 354 and Americans with Disabilities Act of 1990 in the performance of the Agreement, including the procurement of services, materials, or equipment. Further, this provision shall be incorporated into any subcontract executed by the Contractor in the performance of this Agreement. Contractor shall also use best efforts, as provided in Chapter 39.19 RCW, to procure services, materials, or equipment from disadvantaged, minority, and women-owned Subcontractors or Subcontractors with meaningful minority and women representation among their employees.

Section 2.20 Survival

Those provisions of this Agreement that by their sense and purpose should survive expiration or termination of the Agreement shall so survive.

ARTICLE 3 TERM

This Agreement shall be effective upon execution by both Parties and shall terminate on May 31, 2042 at 11:59 P.M., Pacific Time.

This provision in no way limits the County’s authority to terminate this Agreement pursuant to the provisions in this Agreement.

ARTICLE 4 PROCESS AND ROLES AND RESPONSIBILITIES

Section 4.1 Progressive Design-Build Process

The Parties agree that the County and the Contractor will work together in a progressive design-build approach to facilitate the development and completion of Capital Improvement Projects at OVTS during the term of this Agreement. The Parties will discuss the need for and priority of Projects, but the County will make the final decision on the selection of which Projects to move forward with and when, taking into account the Contractor’s input. As each Project is selected, amendments to this Agreement will be signed by the Parties to provide additional design and construction details, Party obligations, and costs as described below.

The preliminary step in this process will be the development of an OVTS Site Master Plan, which is intended to help the County and the Contractor understand the relationship between the Projects and the most efficient order of construction. The next step will be the selection of a Project and negotiation of Phase One Services for that Project (generally design tasks), as further described below. The final step will be negotiation of Phase Two Services (generally construction tasks) for the Project as described below.

(A) OVTS Site Master Plan.

Following execution of this Agreement, the Contractor will initiate the development of an OVTS Site Master Plan that incorporates all the Projects identified in Attachment A to the degree necessary to understand the interrelationship of the Projects. Neither the Site Master Plan nor the Facility Master Plan shall limit the type or scope of Projects available to be constructed under this Agreement. Once the Contractor hires a General Contractor, in accordance with Section 4.2 below, the Parties will negotiate a Site Master Plan Amendment to identify the scope, schedule and cost for completing the Site Master Plan.

The Parties intend that development of the Site Master Plan will include confirmation, or refinement as necessary, of the County’s Project Criteria for each Project. An initial draft of the Project Criteria will be provided to the Contractor and will include the intended use, space required, cost, time, site, performance, and other functional requirements for a particular Project. The Project Criteria may also include planning level documents and other technical materials and requirements prepared by or for the County if available for the Project. The Contractor shall then review and prepare a written evaluation of the Project Criteria, including recommendations to the County for different and innovative approaches to the design and construction. The Parties shall discuss the Contractor’s written evaluation of the Project Criteria and the County will decide upon what revisions, if any, should be made to such Criteria. Once finalized, Project Criteria shall be the basis for all Phase One and Phase Two Services, subject to any later revisions agreed upon by the Party Representatives.

(B) Phase One Services.

When a Project has been selected for construction, the Parties will negotiate a Project Amendment to this Agreement for Phase One Services for that Project with the intent to create or confirm the Project’s basis of design, the County’s needs and objectives for the Project, and the steps to advance the Project. Phase One Services will include design development, preconstruction services, preliminary environmental review (if applicable), and negotiation for Phase Two Services. All design and other

Project decisions will be based on cost, schedule, quality, operability, life cycle and other considerations, with the Contractor's design-build team providing ongoing, transparent cost estimates. At the point in time where the design has been advanced to an appropriate level of definition that aligns with the County's requirements, the Contractor will provide a formal commercial proposal including the Agreed Maximum Price for Phase Two Services to be included in the Supplemental Project Amendment. The level of design completion needed to establish pricing for Phase Two Services will be estimated in the Project Amendment as it may vary for each Project. Phase One Services will commence upon the County's issuance of a written Notice to Proceed with Phase One Services for that Project to Contractor. The Contractor shall ensure that Phase One Services are completed in accordance with the Project Amendment.

(C) Phase Two Services.

Following the establishment of the Agreed Maximum Price for Phase Two Services, the Parties will negotiate a Supplemental Project Amendment for the Phase Two Services for the Project. Phase Two Services will include final design, environmental review (if applicable), permitting, construction, construction quality control and oversight, and commissioning of the Project. The Supplemental Project Amendment must include all relevant commercial terms and other details for the Project, such as scope, cost, the Contractor's contingency and use thereof, schedule, liquidated damages, and all other requirements related to the completed Project. Phase Two Services will commence upon the County's issuance of a written Notice to Proceed with Phase Two Services for that Project to Contractor. The Contractor shall ensure that Phase Two Services are completed in accordance with the Supplemental Project Amendment.

Section 4.2 Contractor Responsibilities

(A) General.

The Contractor shall serve as a contract manager for each Project and ensure that Subcontractors fulfill their obligations under the Subcontracts. In this role, the Contractor shall be responsible for:

- (1) Engaging a General Contractor as necessary to assist in the performance of the Contractor's obligations under Section 4.2(B)-(D) as it deems in its judgment to be necessary to fulfill the obligations under this Agreement.
- (2) Reviewing and responding to any Requests for Information by the County, construction submittals, inspection reports, pay applications, change order requests, material testing reports, and other submittals and data.
- (3) Being available to meet on site with the representatives of the County and the General Contractor.
- (4) Monitoring the daily construction activities and progress and being present on site from time-to-time as required by the nature of the ongoing construction activities. This includes coordinating with the County and the General Contractor; providing construction observations to confirm that the Work is proceeding according to the construction contract documents; and notifying the County if problems, disputes, or changes arise during construction.
- (5) Providing monthly reports summarizing progress for the Project activities, including design and construction progress reports from Subcontractors.
- (6) Coordinating with the County on all design and construction questions and concerns.
- (7) Managing the General Contractor in establishing the Project schedules with input from the County and ensuring compliance therewith.

- (8) Reporting to the County Representative at mutually agreed, regular intervals.
- (9) Ensuring overall site safety and security during each Project.

These responsibilities shall not be delegated to any Subcontractor and shall not involve OVTS operations management staff provided under the Operation and Maintenance Agreement (KC-350-21). The Contractor's costs for managing these general duties shall be stated in Article 6.

The Contractor shall serve as the County's sole contact with respect to the Projects. The County shall not contact any Subcontractors for a Project without prior or concurrent notice to the Contractor.

(B) Management of Design and Construction.

The Parties understand and agree that the Contractor intends to subcontract with a General Contractor to provide certain design and construction management services. The General Contractor, and any Contractor staff who may perform these services, shall be qualified with relevant experience to lead and manage the capital improvement design and implementation Work, and have experience in progressive design-build project delivery. If the Contractor uses any of its own employees for these services, the Contractor shall not utilize the OVTS operations management staff provided under the Operation and Maintenance Agreement (KC-350-21). Any General Contractor engaged by the Contractor under this Agreement must be acceptable to the County, which shall be conveyed to the Contractor in writing by the County Representative.

Management of design and construction services shall include, but are not limited to:

- (1) Procurement of design and construction services.
- (2) Contracting with and oversight of Subcontractors for design and construction services.
- (3) Securing all permits, licenses and other governmental approvals necessary for construction and compliance therewith.
- (4) Ensuring compliance of all Subcontractors with site safety and security protocols during construction.
- (5) Establishing project schedules incorporating input from the County and ensuring compliance therewith.
- (6) Construction oversight and quality control services.
- (7) Management of tasks outlined in Section 4.2(C) and Section 4.2(D).
- (8) Providing or obtaining information for design and construction progress reports for the Project activities.

(C) Design Procurement and Process.

- (1) Hiring. The Contractor shall engage or ensure the engagement of a Design Professional(s) and any other qualified Subcontractor design firm(s) it deems in its judgment to be necessary to fulfill the obligations under this Agreement. For the procurement of architectural and engineering services, the Contractor shall ensure compliance with the requirements of Chapter 39.80 RCW. Any Subcontractors engaged under this section must be acceptable to the County, which shall be conveyed in writing by the County Representative.

- (2) Design progress. Unless the Parties agree otherwise, design for each Project will be progressed in Design Documents from conceptual (approximately 10%) in the OVTS Site Master Plan, to approximately 30%, 60%, 90% and Final or as reasonably determined by the Parties in the Project Amendment. It is anticipated that the Contractor's commercial proposal for Phase Two Services (to be finalized in a Supplemental Project Amendment) for each Project will be prepared when Project design reaches approximately 90% complete or as reasonably determined by the Parties.
- (3) Design technology. Design Documents will include drawings and plans prepared with Autodesk Revit 2022 building design software, or other proprietary software mutually acceptable to the Parties, and fully illustrating all aspects of the facility improvements, and technical specifications prepared in the Construction Specifications Institute's 41 division MasterFormat 2020 Edition and three-part section format, or other proprietary software acceptable to the Parties. The County will review and provide comments on each design progress stage of the drawings and specifications (approximately 10%, 30%, 60%, 90% and Final or as reasonably determined by the Parties).
- (4) Cost estimates. The Contractor will provide the County with construction cost estimates at the approximately 10%, 30% and 60% design stages or as reasonably determined by the Parties and at other stages and intermediate levels as the Parties agree are needed in order to make decisions regarding the nature of the capital improvements. The cost estimates will include all aspects of the construction including taxes, permit fees, and the Contractor's contingency, as well as other identified variables applicable to the estimates. The amount in each cost estimate stage for the Contractor's contingency shall be reduced as the design progresses and shall be no more than 10% when the design reaches the point where the Contractor commits to the Agreed Maximum Price for Phase Two Services, unless otherwise agreed upon by the Parties in the Supplemental Project Amendment. The Contractor will control the use and distribution of the Contractor's contingency budget after the final Agreed Maximum Price for Phase Two Services is established. In addition to the cost estimates prepared for each stage of the design development, the Contractor will provide life cycle cost estimates for design alternatives when requested by the County in order to aid the County's decision-making regarding selection of alternatives with input from the Contractor.
- (5) Construction schedule. The Contractor will provide an estimated construction schedule to accompany each design stage submittal at approximately 10%, 30%, 60%, 90% and Final design or as reasonably determined by the Parties. The schedules shall be prepared in Primavera P6 software or other proprietary software mutually acceptable to the Parties. The schedules shall clearly indicate phasing of the construction that reasonably may be required for OVTS operations to continue without interruption or interference.
- (6) Design Review. Party Representatives shall confer at least weekly by phone or email and shall meet monthly, at times mutually agreeable to the Parties, to review the status of the design progress, and more frequently as necessary to resolve design questions and issues. The County-Contractor meetings may be virtual meetings using video conferencing software such as Microsoft Teams or Zoom. The County shall have final approval authority for the design scope of work and design details. Design review meetings will be conducted at each stage of the design development and the County's comments and input to the design will be incorporated as mutually agreed during the design review process.

(D) Construction Procurement and Process.

- (1) Hiring. The Contractor shall engage or ensure the engagement of qualified construction firm(s) that in the Contractor's judgment are necessary to fulfill its obligations under the Agreement. Any Subcontractors engaged under this section must be acceptable to the County, which shall be conveyed in writing by the County Representative.
 - (a) The Contractor shall limit the General Contractor's performance of construction activities for each Project to not more than twenty percent (20%) of the total direct cost of construction, excluding major equipment purchases such as the second compactor (greater than \$50,000 excluding WSST), unless otherwise agreed by the Parties in a Project Amendment and/or Supplemental Agreement.
 - (b) The Contractor shall limit the General Contractor's cost for job site and home office management and overhead for each Project to not more than twenty percent (20%) of the total direct cost of construction, excluding major equipment purchases such as the second compactor, unless otherwise agreed by the Parties in a Project Amendment and/or Supplemental Agreement.
 - (c) Not less than sixty percent (60%) of the total direct cost of construction, excluding major equipment purchases such as the second compactor, shall be performed by construction Subcontractors procured through competitive bidding, with not less than three (3) bids obtained for each construction package, unless a fewer number of bids is approved by the County. The Contractor shall ensure the successful bidder for each construction package is selected on a best value basis which includes consideration of the Subcontractors' qualifications, proposed costs, and schedules.
- (2) Notice to Proceed. The Contractor shall not issue a Notice to Proceed with construction until the County receives all required documents. Required documentation shall include: a Performance and Payment Bond as detailed in Section 11.3, a copy of all Certificates of Insurance and Additional Insured Endorsements. The Notice to Proceed shall provide a start date and the date for Final Completion as agreed upon by the County and Contractor.
- (3) Testing and Inspections. For all testing and inspections, the Contractor shall engage or ensure the engagement of an independent, qualified testing laboratory or special inspection Subcontractor to perform site inspections and testing services as appropriate for each such Project and as required by the authorities having jurisdiction including, but not limited to, the following:
 - Subgrade and backfill compaction testing
 - Forms and rebar placement inspection
 - Concrete sampling, test cylinder forming and compression strength testing
 - Grout sampling and compression cube testing
 - Anchor bolt inspection and testing
 - Structural welding inspection and testing
 - High performance coating inspection

- (4) Documentation and tracking.
- (a) The Contractor shall thoroughly document or ensure the thorough documentation of all construction oversight activities, including inspection and testing, on a continuous basis and shall provide copies of such documentation to the County Representative in a timely manner.
 - (b) The Contractor shall utilize or require all Subcontractors to utilize a formal submittal process that covers all materials and equipment specified in the design specifications. The process will track submittals in an electronic submittal log by specification section and date and will clearly show the review and approval comments of the Design Professional. The County will be included in the submittal process and will be given an opportunity to comment on all submittals and the Design Professional's review before the submittals are completed.
 - (c) The Contractor shall maintain updated drawings showing all changes made during construction as the changes are made, which will be a condition for approving Phase Two Services progress payments. Upon completion of construction and the commissioning of the Project, the Contractor will provide the County with construction record drawings in Autodesk AutoCAD 2022 or other proprietary software acceptable to the Parties.
- (5) Temporary facilities and controls. The Contractor shall provide or ensure the provision of all necessary temporary facilities and controls during construction, including but not limited to health and safety plans, traffic control plans and measures, trench safety measures, fire protection measures, and COVID-19 and other infectious disease protocols.
- (6) Impact to OVTS operations. The Contractor shall ensure that all construction Work, including phased construction as necessary, does not impede or otherwise negatively impact ongoing operations of OVTS. All electrical service interruptions shall be scheduled for hours outside the operating hours of OVTS, unless such interruptions are reasonably unforeseen or done for health and safety reasons.
- (7) Construction Schedules. Unless otherwise agreed by the Parties, the Contractor will submit an updated Project schedule with each monthly invoice. In addition, the Contractor will submit a two-week look-ahead schedule along with the agenda for each weekly construction progress meeting.
- (8) Construction review. The Contractor shall schedule weekly construction progress meetings throughout the construction period at times mutually acceptable to the Parties. These meetings will be conducted at OVTS and will be attended by representatives of the Contractor, Design Professional, County, General Contractor, key Subcontractors, and others as appropriate; provided that meetings may be virtual meetings using video conferencing software such as Microsoft Teams or Zoom as agreed by the Parties. The Contractor shall prepare and distribute the agenda for these meetings at least one (1) day before each meeting, and record and distribute meeting notes within two (2) Business Days of each meeting.
- (9) Changes during construction. Refer to Section 6.7, Change Orders, for the requirements for managing changes in Project design and execution during construction.

(E) Warranties.

- (1) The Contractor shall ensure that for any equipment, material, or item installed at OVTS under this Agreement, the County will be a beneficiary of any and all warranties that are furnished as a customary trade practice and that installation will not void any such warranty. To effect this arrangement, all subcontracts executed in performance of this Agreement shall include the following language:

This contract is for the benefit of the Olympic View Transfer Station, which is operated by Waste Management of Washington, Inc. and owned by Kitsap County. Kitsap County is therefore hereby made a third-party beneficiary to this contract and is entitled to the rights and benefits hereunder and may enforce the provisions hereof as if it were a party hereto.

- (2) The Contractor itself makes no representation or warranty, either express or implied, as to the quality of the equipment, material or item installed at OVTS under this Agreement. Any other representation or warranty that may be applicable to a Project shall be addressed in the Project Amendment or Supplemental Project Amendment specific to the Project. During the term of this Agreement, the Parties will work cooperatively to enforce any warranty in any subcontract or supply contract. Upon the expiration of this Agreement, the County will take sole responsibility to enforce any warranty in any subcontract or supply contract.

(F) County assumption.

Should the County provide notice to the Contractor that it intends to assume some or all responsibilities for implementing one or more improvements, as provided in Section 4.3(F) below, the Contractor agrees to act in good faith and without delay in providing the County with all documents (not including privileged or proprietary documents) and other support that the County reasonably determines are necessary to proceed with the improvement and agrees to assist the County as reasonably necessary for the transition.

Section 4.3 County Responsibilities

(A) The County will collaborate closely with the Contractor to facilitate the design, permitting, environmental review (if applicable), construction, and commissioning of the Projects to be implemented at OVTS and shall compensate the Contractor according to this Agreement. The County Representative will be available to timely respond to questions and information requests related to the Projects or this Agreement.

(B) The County will provide detailed Project Criteria for each Project in the OVTS Facility Master Plan as set forth in this Agreement.

(C) The County will perform its review, acceptance, and approval obligations set forth herein in good faith and without delay. Unless the Parties agree otherwise, the County will complete design submittal and construction submittal reviews within two (2) weeks of receipt of design submittals.

(D) The County will be solely responsible for securing any and all property rights from third parties necessary and applicable to any certain Project, including without limitation any rights to conduct testing of subsurface conditions necessary for the Project.

(E) Further details regarding the County's specific responsibilities for each Project will be detailed as necessary in each Project Amendment or Supplemental Project Amendment, as applicable.

(F) The County retains the right to enter OVTS at any time and without prior notice to inspect all Work performed under this Agreement.

(G) The County reserves the right to assume some or all responsibilities for implementing the improvements at any time during the process should the County determine that such change of approach is in the best interests of the County. Any assumption shall be effective upon the date identified in a Notice of Assumption. Notwithstanding the assumption, the County shall remain responsible to the Contractor for all costs actually incurred by the Contractor or any Subcontractor before the effective date of assumption when such costs are in conformance with this Agreement, with a Project Amendment, or with a Supplemental Project Amendment or any reasonable costs of demobilization actually incurred by a Subcontractor. Payment shall be made in accordance with Article 6 of this Agreement.

(H) The County also retains final authority on matters related to improvement priorities and the implementation schedule.

ARTICLE 5 OWNERSHIP OF LAND AND IMPROVEMENTS

Kitsap County owns OVTS, the land thereunder, and all capital improvements constructed under this Agreement. Neither the Contractor nor any Subcontractor, shall remove or dismantle any part of OVTS or any capital improvements without written authorization of the County Representative or as specifically contemplated for a Project.

ARTICLE 6 COMPENSATION; COSTS

Section 6.1 Compensation for Management of Design and Construction

For services provided directly by the Contractor under Section 4.2, the County agrees to pay the Contractor; however, such payments are specifically part of the Fees established in the Operation and Maintenance Agreement (KC-350-21) and will not be separately paid under this Agreement. No payments will be made under this Agreement for the Contractor's cost for participating in and managing the design-build process.

Section 6.2 Reimbursement for Design and Construction Costs

For all services that the Parties agree may be subcontracted out by the Contractor in accordance with this Agreement, the Contractor shall be responsible for all costs incurred by the Subcontractors, but the County shall reimburse Contractor for those costs, provided the costs have been approved in a Project Amendment or Supplemental Project Amendment, subject to any amendments or change orders. Such costs include but are not limited to:

- Design and engineering costs including surveying
- Project permitting costs
- Project environmental review costs (if applicable)
- Project construction costs, including without limitation materials, rental costs and taxes associated with the Work, and costs and expenses invoiced by Subcontractors
- Construction quality control oversight and testing costs
- Project commissioning costs
- Costs to secure and maintain performance and payment bonds in accordance with Section 11.3(A) and Project insurance (other than Worker's Compensation coverage)

The Party Representatives shall meet, review and agree on a draft invoice from the Contractor for services performed under this Agreement by the fifth (5th) Business Day of each month. The invoice shall include only the costs identified above that were invoiced to the Contractor in the preceding month and are only the costs actually incurred by a Subcontractor. The invoice shall also specify the amount to be retained under RCW 60.28.011 unless a retainage bond has been secured in compliance with Chapter 60.28 RCW. On the seventh (7th) Business Day of each month, the Contractor shall provide to the County a reviewed and agreed invoice in a format acceptable to the County and accompanied by supporting documentation as required by the County. Supporting documentation shall include, but is not limited to, invoices from Subcontractors. Additional documentation that may be reasonably requested by the County includes, but is not limited to, quantity surveys for construction quantities completed and invoiced, certification of upkeep of construction record drawings, documentation showing resolution of non-conforming Work, and other progress documentation.

The County will pay the Contractor within thirty (30) days from the date the County receives a complete and correct invoice, unless otherwise provided herein. All funds disbursed to the Contractor will be processed by Direct Deposit via Automated Clearing House (ACH), unless agreed otherwise agreed to by the Parties.

If any amount is disputed in good faith, the County may withhold payment to the extent of the disputed amount but shall pay all undisputed amounts as set forth above for a complete and correct invoice. The disputed amount shall be resolved in accordance with Article 14. To the extent that the dispute is resolved in favor of the Contractor, the County will pay the Contractor the remaining amount that the Parties agree the Contractor is entitled. The Contractor shall continue to perform its obligations under this Agreement during any dispute resolution.

Section 6.3 Prevailing Wage

The Contractor shall ensure that prevailing wages in effect on November 19, 2020 are paid to all employees and Subcontractors who perform various classes of work as identified by the Washington State Department of Labor and Industries (L&I) as requiring prevailing wages. As relevant to its employees and Subcontractors, the Contractor shall ensure compliance with the necessary reporting to both the County and to L&I. For all Subcontractors, prevailing wages shall also be paid and reported as per L&I, and the date for determining prevailing wages will be the date of the contract with the Subcontractor. The applicable prevailing wage rate schedule can be found at <https://lni.wa.gov/licensing-permits/public-works-projects/prevailing-wage-rates/> by searching Kitsap, the relevant trade and the above date.

Section 6.4 Retainage

In accordance with RCW 60.28.011, the County will retain five percent (5%) of funds to be paid to the Contractor under a Project Amendment or Supplemental Project Amendment for all labor, materials, supplies, or equipment, other than professional services as defined in Chapter 39.80 RCW, that have been provided or used in the design or construction of a Project. The County will hold these funds in the manner elected by the Contractor under RCW 60.28.011(4), or the Contractor may, at no cost to the County, elect to provide a retainage bond as set forth in RCW 60.28.011(6) and in Section 11.3(B). All terms of release or claims of lien shall be governed by Chapter 60.28 RCW, with the trigger for giving notice of a lien under RCW 60.28.011(2) as being the date of Substantial Completion as defined herein unless otherwise established in a Supplemental Project Amendment.

Section 6.5 Calculation Rounding

Rounding for calculations shall be done to the nearest hundredth. For example: 8.355 shall be rounded to 8.36, and 8.354 shall be rounded to 8.35.

Section 6.6 Effect on Operations and Maintenance

The Parties acknowledge and agree that the completion of certain Projects could impact the operations at OVTS and thus may have an impact on the Fees paid by the County to the Contractor under the Operation and Maintenance Agreement (KC-350-21).

If a Project does in fact result in additional temporary and substantial costs incurred by the Contractor during Phase Two Services to operate OVTS during such Project, the Parties shall engage in good faith negotiations to reimburse the Contractor for those costs directly attributable to the Project and shall reimburse any agreed costs via invoices submitted to the County by the Contractor under this Agreement. Further, should the completion of a Project reduce or increase operational costs of OVTS, the Parties agree to engage in good faith negotiations to adjust the Variable Fees paid under the Operation and Maintenance Agreement (KC-350-21) and execute an amendment thereto for such cost adjustment.

Section 6.7 Change Orders

If and when changes in a Project that are outside the cost and scope of the Supplemental Project Amendment become necessary or advisable, the Contractor and County will confer and agree on the scope, cost, and schedule for any changes that are pursued. Following agreement, the County will prepare a change order and will provide the Contractor with written direction to proceed. Implementation of the change order will not occur until the written direction to proceed is received by the Contractor.

A minor change in the design that is within the cost and scope of the Supplemental Project Amendment shall be documented in a Design Change Notice (DCN) and may be initiated after the County has reviewed and accepted the DCN.

The Contractor may make or approve such changes and revisions to Project design or construction as is necessary to cure apparent defective Work by a Contractor or Subcontractor, with notification to the County, and such shall not affect the Agreed Maximum Price.

If the County and the Contractor are unable to reach agreement on the terms of any proposed change, the Contractor shall pursue resolution of the disagreement pursuant to Article 13.

Section 6.8 No Other Payments

The Contractor shall not receive payments for any fees other than those specifically identified herein except with written authorization from County Representative.

ARTICLE 7 RECORDKEEPING AND REPORTING; INSPECTION AND AUDIT

(A) The Contractor shall keep and require all Subcontractors to keep accurate books and records of all transactions connected with this Agreement including, but not limited to, all correspondence and invoices, transaction tickets or receipts, and injury and damage reports, and shall retain them for six (6) years after completion of the Agreement or longer if requested by the County.

(B) The Contractor shall at all times maintain, and require the General Contractor to maintain, an accounting system that uses generally accepted accounting principles for all services rendered and materials supplied, including additional and deleted Work, in connection with this Agreement.

(C) The Contractor shall provide to the County by the fifteenth (15th) day of each month a written report for the preceding month summarizing activities during the prior month and plans and schedules for future activities during implementation of Phase One Services and Phase Two Services, unless otherwise agreed by the Parties.

(D) The County shall have the right, at any time and upon reasonable notice to Contractor, to inspect the Contractor and the General Contractor books and records connected with this Agreement, excluding proprietary and confidential profit and loss statements and any attorney-client privileged materials, and cause an audit to be made thereof anytime during the term of this Agreement and for a period of six (6) years after expiration or termination. Any audit shall be at the County's sole cost and expense, but all copies of the Contractor or General Contractor's books and records shall be at no cost to the County. If, as a result of an audit, it is established that a Party is liable to the other Party for the payment of any sum, the liable Party will, upon written demand from the County Representative or the Contractor Representative, as applicable, pay such sum to the other Party, together with any interest at the rate specified by any Applicable Law; provided, however, that in the event of a disagreement regarding the audit's findings, the Parties shall pursue resolution of the disagreement pursuant to Article 13. In the event that there is no Applicable Law in effect, then any such sum shall earn interest at the rate of 10% per year, from the date that the sum should have been paid. This section 7(D) shall survive the expiration or termination of this Agreement.

ARTICLE 8 REPRESENTATIVES

Section 8.1 County Representative

The County Representative is: Solid Waste Division Senior Maintenance and Operations Manager, 614 Division Street, MS-27, Port Orchard, Washington 98366.

Section 8.2 Contractor Representative

The Contractor Representative is: District Engineer, 720 4th Avenue, Suite 400, Kirkland, Washington 98033. All written notices shall be provided simultaneously to Area Director – Transportation & Recycling Operations, 720 4th Avenue, Suite 400, Kirkland, Washington 98033.

The Contractor Representative shall be Contractor's agent and shall represent Contractor for purposes of fulfilling Contractor's obligations under this Agreement. All written directions, instructions or notices given by County to the Contractor Representative and related to the subject matter of the Agreement shall bind the Contractor, unless contrary to this Agreement. The Contractor Representative shall have authority to act on behalf of the Contractor with respect to the actions required under the Agreement. The Contractor Representative's statements, representations, actions and commitments shall fully bind Contractor. The Contractor Representative shall be available to the County Representative at all times during the term of this Agreement.

Section 8.3 Change in Representative

The Parties shall notify each other in writing at least fifteen (15) days prior to any change in the Representative designations.

ARTICLE 9 UNCONTROLLABLE CIRCUMSTANCES

Section 9.1 General

(A) The following acts, events or conditions are to be considered an Uncontrollable Circumstance:

- (1) An act of God, including, but not limited to, hurricanes, tornadoes, epidemic or pandemic, landslide, lightning, earthquake, and volcanic eruptions that directly inhibit the ability of the Contractor to perform its obligations under this Agreement (including, without limitation, any failure of technology resulting therefrom);
- (2) For the Contractor, a non-Contractor or industry-wide strike that substantially impacts and makes impossible the ability of the Contractor to perform its obligations under this Agreement;

- (3) A change in law that substantially impacts and makes impossible the Contractor's ability to perform under this Agreement;
- (4) An act of terrorism or war;
- (5) Supply chain or labor shortages or delays that were not reasonably foreseeable;
- (6) Delays in permitting or approvals from governmental agencies that are outside of General Contractor's control and not caused or exacerbated by any General Contractor action; or
- (7) For either Party, any strike or labor dispute that substantially impacts and makes impossible the ability to perform under this Agreement.

(B) The following acts, events or conditions, in and of themselves, shall not constitute an Uncontrollable Circumstance:

- (1) Adverse changes in the financial ability of any Party to this Agreement to perform its obligations under this Agreement;
- (2) The consequences of errors on the part of the Contractor or any of its employees, agents, Subcontractors or affiliates;
- (3) The failure of any technology to perform; and
- (4) Typical ice, snow and flood conditions, except those resulting in road restrictions and/or road closures.

Section 9.2 Obligations in the event of an Uncontrollable Circumstance

Both the Contractor's obligations to provide the services provided for in this Agreement and the County's obligation to pay under this Agreement are subject to Uncontrollable Circumstances.

The occurrence of an Uncontrollable Circumstance will not result in a termination of this Agreement but will allow the affected Party to temporarily suspend or modify performance for the duration of the Uncontrollable Circumstance. This suspension or modification will not be a breach of the Agreement or result in liability for loss, damage, or delay so long as:

(A) The affected Party works with the other Party at the start of the Uncontrollable Circumstance to develop and implement alternatives to minimize disruption and continue providing all possible services required under this Agreement to the extent feasible.

As soon as possible after the commencement of an Uncontrollable Circumstance, but in no event later than forty-eight (48) hours following the time a Party becomes aware that the Uncontrollable Circumstance is likely to interfere with any Party's ability to perform its obligations under this Agreement, the Party shall notify the other Party by telephone call (in person, not via message or voice mail) to the Party's Representative of the event. As promptly as possible, but not later than two (2) weeks following such notice, the Party affected by the Uncontrollable Circumstance shall provide to the other a written description of (1) the Uncontrollable Circumstance and the cause thereof (to the extent known), (2) the date the Uncontrollable Circumstance began, its estimated duration, and the impact, if any, on the Agreement, and (3) its estimated impact on the other obligations of such Party under this Agreement. Each Party shall provide prompt written notice of the cessation of such Uncontrollable Circumstance.

Whenever such act, event or condition shall occur, the Party claiming to be adversely affected thereby shall, as promptly and as reasonably as possible, use its best efforts to eliminate the cause thereof, reduce costs and resume performance under this Agreement. While the delay continues, the affected Party shall give notice to the other Party, before the first day of each succeeding month, updating the information previously submitted. The Contractor shall furnish promptly (if and to the extent available to the Contractor) any additional documents or other information relating to the Uncontrollable Circumstance reasonably requested by the County.

The Contractor shall not be entitled to receive a fee increase or any other additional compensation due to the occurrence of Uncontrollable Circumstance(s).

ARTICLE 10 INDEMNIFICATION

(A) Subject only to the limitations set forth herein, the Contractor covenants and agrees that, to the maximum extent permitted by law, it will indemnify the County against and hold the County harmless from any and all liabilities, actions, damages, claims, demands, judgment, losses, costs, expenses, suits and actions, including but not limited to attorneys' fees and expenses at trial and on appeal, and including but not limited to reasonable attorneys' fees expended in determining whether the indemnification provisions of the Agreement apply to a Party or matter if it is determined that such provisions do apply to all or part of a matter, relating to or resulting from:

- (1) any injury to or death of any Person or Persons, or loss of or damage to property caused or alleged to be caused by the Contractor or any of its officers, agents, employees, Subcontractors (or any officer, agent or employee of any Subcontractor), or any person under the control of or alleged to be under the control of or acting at the direction of the Contractor or any Subcontractor, arising in connection with or as a result of the negligent or intentional performance by the Contractor or any Subcontractor of its obligations under this Agreement;
- (2) an allegation of infringement, violation or conversion of any patent, license, proprietary right, trade secret or other similar interest, in connection with or as a result of the performance by the Contractor or any Subcontractor under this Agreement.

(B) The Contractor is not required to indemnify the County or hold the County harmless pursuant to the provisions of this Section for any loss, damage or claim caused solely by the active (as opposed to passive) negligence of the County or its willful misconduct.

(C) In the event of joint or concurrent negligence of the Parties, including Subcontractors thereto, giving rise to a loss or claim against either or both of them, it is the intention of the Parties that the Contractor's defense and indemnification of the County under this Article shall apply.

(D) If this Agreement is subject to RCW 4.24.115, then the Contractor's obligation and liability to defend, indemnify, and hold the County harmless shall be limited to only the extent of Contractor or Subcontractor's negligence. In such case, the Parties agree that the duty to defend shall be triggered by allegations of concurrent negligence and that the Parties shall have a right of contribution against the other.

(E) The County shall notify the Contractor within ten (10) working days of the County's receipt of written notice from any third party of any act, omission or occurrence with respect to which the County intends to seek indemnification in accordance with this Agreement and, if requested by the Contractor, shall also supply the Contractor all records, data, contracts and documents reasonably related to that third party claim to enable the Contractor to evaluate that claim for purposes thereof. If the Contractor replies in writing to the County within twenty (20) days from the date of such notice that it will undertake the defense of the County and will hold the County harmless with respect to such claims, then no additional attorneys' fees incurred by the County in its own defense shall be compensable as a claim

entitled to indemnity, unless (1) the Contractor has agreed to pay such fees and expenses, (2) the Contractor has failed to assume the defense of that claim or has failed to employ counsel reasonably satisfactory to the County, or (3) the named parties in any action or proceeding relating to that claim (including any impleaded parties) include the Contractor and the County, and the County has been advised by its counsel that the County has a conflicting interest from the Contractor or that there may be one or more legal defenses available to the County which are different from or additional to those available to the Contractor. The County will reasonably cooperate in providing information and testimony to assist in the defense of the matter, but all out-of-pocket costs thereof shall be a part of the indemnified amounts for which the Contractor shall hold the County harmless. Control of the defense of the claims shall be the right and responsibility in this case of the Contractor, which shall have authority to contest, compromise or settle the matter in its sole discretion.

In the event the Contractor replies in writing within the twenty (20) days that it accepts responsibility for the indemnified claim regarding the matter in question but does not desire to take an active role in the defense of the matter, then alternatively, the Contractor may consent, in writing, to the County's selection of an attorney to defend the matter who is satisfactory to the Contractor, which consent and satisfaction with the selection shall be evidenced in writing with the selection of the attorney in writing. However, no matter will be settled or compromised without the written consent of the Contractor; further, at any time the Contractor may elect to assume the active control of the matter, including the replacement of the selected counsel by other counsel satisfactory solely to it, and thereafter may consent, settle or compromise the case in its sole discretion.

If the Contractor replies to the County within twenty (20) days from the date of such notice, but denies its responsibility to indemnify and hold the County harmless with respect to such claim, the Parties shall attempt to agree on a mutually satisfactory attorney to represent them and agree on who shall control the defense of the claim and has the authority to approve any proposal, settlement or compromise. If an agreement cannot be reached within twenty (20) days, or if the Contractor does not reply to the County within twenty (20) days from the date of such notice, each Party may designate its own attorney, whose reasonable fees shall be compensable as an indemnified claim to the County. Whether or not any such agreement can be reached or the Contractor does or does not reply, each Party shall reasonably cooperate in providing information and testimony to assist in the defense of the matter, and the costs thereof (including out-of-pocket expenses) shall be a part of the indemnified amounts for which the Contractor shall hold the County harmless under the assumptions of liability and other provisions for indemnification under this Agreement. Any indemnification in this Agreement shall include an indemnification of the respective officers, directors, employees, agents, shareholders and successors and assigns of the County.

(F) The foregoing indemnification and hold harmless provisions are for the sole and exclusive benefit and protection of the County and its officers, officials, agents and employees, and are not intended, nor shall they be construed, to confer any rights or impose any liabilities on any person or persons other than the County and its respective officers, officials, agents and employees.

(G) It is further specifically and expressly understood that the indemnification provided in this Section constitutes the Contractor's waiver of immunity under industrial insurance and Title 51 RCW solely for the purposes of this indemnification. This waiver has been mutually negotiated by the Parties.

(H) If any claims indemnified against under this Section have the potential for coverage under any insurance, then before pursuing recovery under this indemnity, the County shall pursue all recovery for such claim from any third-party insurance. Once the County has determined, in its sole discretion, that it has exhausted all recovery under all such available insurance, the Contractor shall pay only the amount of the loss, if any, that exceeds the total amount that all insurance has paid for the loss. Nothing in this Agreement shall constitute a waiver or relinquishment of any claims which the Parties may have against insurers, nor shall any provision of this Agreement waive or relinquish any subrogation or contribution rights that the Parties or their insurers may have against another insurer or potentially liable party.

(I) Except as otherwise expressly stated herein, the Parties do not under this Article waive or surrender indemnity available under any federal, state, regional or local law. This Article shall survive termination or expiration of the Agreement.

ARTICLE 11 INSURANCE AND BONDS

Section 11.1 Liability Insurance

(A) At all times during the Term of the Agreement, the Contractor shall obtain, maintain and pay for the insurance coverage designated in this Article from generally recognized financially responsible insurers that are approved by the County in its sole discretion and licensed in the State of Washington and whose claims paying ability is rated not less than A/VII by A.M. Best Company, Inc. at all times during the Term of the Agreement. The insurance must fully protect the County from any and all claims, risks and losses in connection with any activity performed by Contractor under this Agreement.

(B) The Contractor shall also require any General Contractor hired to perform parts of this agreement to obtain and maintain and pay the insurance coverages in Section 11.1(F) on the terms and conditions set forth in this Section 11.1.

(C) The Contractor shall require that any Subcontractor performing professional services under this Agreement obtain, maintain, and pay for professional liability or professional errors and omissions coverage appropriate to the Subcontractor's profession on the terms and conditions set forth in this Section 11.1. The coverage also (1) must have a limit of not less than \$1 million per occurrence, (2) must apply to liability for professional errors, acts, or omissions arising out of the Subcontractor's services, and (3) must not exclude bodily injury, property damage, or hazards related to the services rendered by the Subcontractor.

(D) In the event the Contractor fails to comply with any provision of this Section, the County in its sole discretion may procure and maintain, at the Contractor's sole expense, insurance to the extent the County deems proper. The Contractor shall reimburse the County for the cost of that insurance within fifteen (15) days of receiving written notice by the County to do so.

(E) Within thirty (30) days following the execution of this Agreement, the Contractor at its sole expense shall obtain and file with the County a certificate of the liability insurance and amendatory endorsements that includes the coverage required under this Article. Failure to obtain the required documents in the above required time frame shall not waive the Contractor's obligation to provide them. The County reserves the right to review complete copies of all required insurance policies, including endorsements, required by these specifications at any time. Contractor agrees to make copies available for review at the office of Contractor's local legal counsel.

(F) All insurance policies obtained in connection with this Agreement must provide the following:

(1) Coverages

(a) Commercial General Liability including:

- Employees as Additional Insured
- Premises/Operations Liability
- Products and Completed Operations Liability
- Coverage for Insured Contracts

(b) Pollution Legal Liability including:

- New and Pre-Existing Conditions
- Third Party Bodily Injury, Property Damage and Clean-up Costs
- Sudden and Accidental Pollution

- (c) Automobile Liability, including coverage for owned, non-owned leased or hired vehicles
 - (d) Builders Risk/Course of Construction Insurance (Contractor to ensure provided by General Contractor)
- (2) Minimum Limits for all Coverages, excluding professional liability or professional errors and omissions coverage as stated in Section 11.1(C)
- \$3,000,000 per occurrence;
 - \$6,000,000 annual aggregate.

Any deductibles or self-insured retentions shall be for the account of the Contractor and paid entirely by Contractor without contribution from the County. Payment of deductibles or self-insured retentions shall have no bearing on the Contractor's responsibility to perform other duties as required by this agreement.

(3) Additional Insured

Except for Workers' Compensation, Employers' Liability, and Professional Liability the County shall be named as an additional insured for all insurance coverage required or obtained under or in connection with this Agreement and shall be fully and completely protected from claims and risks by this policy and for any injury, death, damage and/or loss of any sort whatsoever, including consequential damages, sustained by any, person, organization or corporation in connection with any activity performed by the Contractor under an Agreement with Kitsap County.

(4) Primary Coverage

For any claims related to this Agreement, the Contractor's insurance coverage shall be primary insurance as respects the County, its officers, officials, employees, and volunteers. Any insurance or self-insurance maintained by the County, its officers, officials, employees, or volunteers shall be excess of the Contractor's insurance and shall not contribute with it.

(5) Waiver of Subrogation

To the extent of Contractor's indemnification obligations hereunder, Contractor hereby grants to the County a waiver of any right to subrogation which any insurer of said Contractor may acquire against the County by virtue of the payment of any loss under such insurance. Contractor agrees to obtain any endorsement that may be necessary to affect this waiver of subrogation, but this provision applies regardless of whether or not the County has received a waiver of subrogation endorsement from the insurer.

(6) Separation of Insured

The insurance shall be endorsed to include a "cross liability," "severability of interests," or "separation of insureds" indicating essentially that "except with respect to the limits of insurance, and any rights or duties specifically assigned in this coverage part to the first named insured, this insurance applies as if each named insured were the only named insured and separately to each insured against whom claim is made or suit is brought".

(7) Change in Coverage

The coverages provided by this policy shall not be cancelled without providing at least thirty (30) calendar days prior written notice (ten [10] days' notice for cancellation due to non-payment of premium) to the Kitsap County Department of Public Works, Solid Waste Division,

Attention: Solid Waste Division Manager, 614 Division Street, MS-27, Port Orchard, Washington, 98366 and Kitsap County Risk Management, 614 Division Street, MS-7, Port Orchard, WA 98366. Contractor agrees to provide County thirty (30) days' notice of any reduction in coverage or material change that would result in a negative impact on this agreement.

(G) The Contractor shall provide Workers Compensation or evidence of participation in the Washington State Department of Labor and Industries program, or, in lieu thereof, the Contractor may provide a self-insurance or alternate insurance program. If the Contractor is subject to any Federal Acts, such as FELA, USL&H or Jones Act, it is the Contractor's sole responsibility to make that determination and provide the appropriate insurance coverage. Contractor shall maintain Employers Liability Insurance with limits no less \$1,000,000 per accident for bodily injury or disease.

(H) Maintenance of insurance by the Contractor as specified in this Article shall constitute the minimum coverage required and shall in no way lessen or limit the liability or responsibility of Contractor under this Agreement. Contractor may carry, at its own expense, any additional insurance it deems necessary.

(I) The Contractor immediately shall increase the amounts of insurance required to reflect any changes in state or federal law or other Applicable Law to ensure that the insurance provided shall cover, at a minimum and in addition to the designated insurance requirements listed in this Article, the maximum limits under any applicable tort claims act.

(J) The Contractor's failure to fully comply with any provision of this Article shall be considered a Contractor Event of Default under Article 12.

(K) In the event that any of the insurance required by this Article becomes unavailable, Contractor shall secure insurance with substitute provisions providing as much protection to the County as is reasonably available in the insurance marketplace and approved in writing by the County.

(L) If the Facility is damaged or destroyed due to events for which insurance exists, the Contractor shall act diligently to promptly collect and apply insurance proceeds to the repair or reconstruction of the Facility.

Section 11.2 Delivery of Policies; Certain Required Provisions

The Contractor shall deliver to the County copies of all certificates of insurance for required insurance and any policy amendments and policy renewals. A copy of the insurance policy will be made available to the County for inspection upon request in a means agreed by the Parties. Each policy must provide for thirty (30) days prior written notice by the insurer to the County of cancellation (10 days for failure to pay premium).

Section 11.3 Bonds

(A) Performance and Payment Bonds.

Per RCW 36.58.090(7), the Contractor shall ensure the County receives and is a beneficiary to an executed performance and payment bond with each Project Amendment, as applicable, and Supplemental Project Amendment for the full amendment amount as a project performance guarantee. Each performance and payment bond shall be made payable to Kitsap County with the amount covered by two (2) or more sureties or with a surety company duly and currently licensed to engage in the surety bonding business in the State of Washington.

Conditions of the performance and payment bond shall include:

- (1) The full and faithful performance and completion of the Project Amendment or Supplemental Project Amendment, as applicable, for the specific Project;
- (2) The faithful payment of all laborers, mechanics, subcontractors (as such term is applicable to RCW 39.08.010, including under relevant case law), and material suppliers, and persons who supply such persons or entities with provisions and supplies for carrying on such work;
- (3) The faithful payment of all taxes, increases, and penalties incurred under Titles 50, 51, and 82 RCW; and
- (4) Sufficient duration of the bond following termination or expiration of the applicable Supplemental Project Amendment in order to ensure that performance of the applicable Supplemental Project Amendment was adequate and that all payments under (2) and (3) have been completed.

A mutually acceptable bond shall be filed with the original agreement document within ten (10) Business Days after execution of each Amendment.

(B) Retainage bonds.

Per RCW 60.28.011, in lieu of retainage amounts, the Contractor and any Subcontractor may submit a retainage bond compliant with Chapter 60.28 RCW.

ARTICLE 12 DEFAULTS AND TERMINATION

Section 12.1 Contractor Events of Default

Each of the following shall constitute a Contractor Event of Default for purposes of this Agreement to the extent the Contractor is unable to fulfill any of its material obligations under this Agreement (unless caused by an Uncontrollable Circumstance or a County Event of Default):

(A) The Contractor's failure to comply with or to secure compliance with the requirements of this Agreement that the County reasonably determines threatens public health or safety. The County may not exercise any remedies under Section 12.3 for default under this subsection (A) until it has given the Contractor five (5) days' prior written notice of the failure and Contractor has failed to (1) commence a cure within the five (5)-day period or (2) continuously and diligently pursue a complete cure. Notwithstanding the foregoing, the County may at Contractor's expense use all reasonable means to eliminate an immediate threat to public health or safety.

(B) The Contractor's failure to carry out any of its material obligations under this Agreement or to secure the material performance of any Subcontractor under this Agreement, so long as the County has given the Contractor written notice of the Contractor's failure to meet a specific obligation and Contractor or Subcontractor has failed to remedy the deficiency within thirty (30) days, unless a longer time is specified in the notice or agreed to by the Parties. Material obligations under this Agreement include but are not limited to compliance with all Applicable Laws and County authorizations and orders.

(C) There is entered, without the consent of the Contractor, a decree or order under Title 11 of the United States Code, or any other applicable bankruptcy, insolvency, reorganization or similar law, or appointing a receiver, liquidator, trustee or similar official of Contractor or any substantial part of its properties, and such decree or order shall remain in effect (and not be stayed) for sixty (60) consecutive days.

(D) The Contractor files a petition, answer or consent seeking relief under Title 11 of the United States Code, or any other applicable bankruptcy, insolvency, reorganization or other similar law, or shall consent to the institution of proceedings thereunder or to the filing of that petition or to the appointment of a receiver, liquidator, trustee or other similar official of the Contractor or of any substantial part of the properties of the Contractor, or shall make a general assignment for the benefit of creditors.

(E) There is an Assignment or a Change in Control or Ownership of the Contractor other than that expressly permitted under Section 2.17 of this Agreement.

(F) The Contractor fails to ensure procurement and maintenance of insurance in accordance with Article 11 (Insurance and Bonds) of this Agreement or the payment of prevailing wage in accordance with Section 6.3, provided the County shall have given Contractor thirty (30) days' prior notice of the Contractor's failure to remedy the deficiency and the Contractor fails to remedy it.

Section 12.2 County Event of Default

The repeated or persistent failure or refusal by the County to fulfill any of its material obligations under this Agreement (unless that failure or refusal results from an Uncontrollable Circumstance or Contractor Event of Default) shall constitute a County Event of Default for purposes of this Agreement, provided that the Contractor shall have given the County sixty (60) days' prior written notice of the County's failure to meet the specific obligation.

Section 12.3 Remedies for Default

(A) County Remedies.

- (1) Upon the occurrence of any Contractor Event of Default, the County shall provide the Contractor's Authorized Representative with a written notice (a "Default Notice") specifying the Contractor Event of Default that has occurred, and then the County may, in its sole discretion:
 - (a) be released in full or in part from its obligations under this Agreement;
 - (b) seek the judicial remedy of specific performance; or
 - (c) pursue any combination of the foregoing or any other remedy, including money damages, available at law, equity or under this Agreement.
- (2) In addition to all other damages or remedies available, the County shall have the right to terminate this Agreement:
 - (a) if any of the Contractor Events of Default referred to in Subsections 12.1(B) or (C) shall occur and be continuing for ninety (90) days beyond the date that the Contractor receives the Default Notice; or
 - (b) immediately upon Contractor receipt of the Default Notice if any Contractor Event of Default referred to in Subsections 12.1(A) or (D) occurs.
- (3) If this Agreement is terminated by the County due to a Contractor Event of Default, the Contractor shall, in a timely manner, permit the continued performance of this Agreement by an assignee acceptable to the County in writing and in its sole discretion, including the County itself, and provide transition support.

- (4) If this Agreement is terminated by the County due to a Contractor Event of Default, upon the issuance of the Default Notice, the Parties shall engage in good faith negotiations to agree on a total dollar amount which the County shall receive as a credit for the cessation of management services paid for under Section 6.1 (the "Termination Credit"). The Termination Credit shall be based on the number of unfinished planned Projects and the estimated time to complete such Projects, the percentage of full-time employee ("FTE") estimated per month for an engineer to perform contract management services for the remaining Projects in accordance with this Agreement, and any other criteria the County and the Contractor mutually agree are relevant to determining the amount of the Termination Credit. The Termination Credit shall be credited against the Fees paid under the Operation and Maintenance Agreement (KC-350-21) in equal monthly installments for the remaining term of the Operation and Maintenance Agreement
- (5) Upon termination of this Agreement due to a Contractor Event of Default, the Contractor must immediately inform all Subcontractors of the termination and demand immediate cessation of activities. The County will pay all reimbursement funds owing for Work performed and accepted as of the termination date and may, but is not obligated to, negotiate payment of any reimbursement funds incurred by Subcontractors to close out a Project. The Parties shall retain the right to pursue any cause of action or assert any claim or remedy it may have against the other Party.

(B) Contractor Remedies.

- (1) Upon the occurrence of any of the events described in Section 12.2, the Contractor shall provide the County with a Default Notice specifying the County Event of Default that has occurred, and if the County has not cured the County Event of Default described in the Default Notice within the time specified in Section 12.2, the Contractor may seek to:
 - (a) Be released in whole or in part from its obligations under this Agreement;
 - (b) Terminate this Agreement; or
 - (c) Pursue money damages, but shall not be entitled to equitable relief.
- (2) If this Agreement is terminated by the Contractor due to a County Event of Default, the Contractor shall be entitled to payment for services under Section 6.1 and 6.2 that have been completed and accepted by the County in accordance with this Agreement , payment for services that are owing prior and up to the date of termination of this Agreement and any reasonable reimbursement funds incurred by Subcontractors to close out a Project. The Parties shall retain the right to pursue any cause of action or assert any claim or remedy it may have against the other Party.

Section 12.4 Termination

(A) The County may terminate this Agreement in whole or in part whenever the County determines, in its sole discretion, that such termination is in the best interests of the County. Such termination will be effective upon giving ten (10) calendar days written notice by Certified Mail to the Contractor. In that event, the County shall pay the Contractor for all costs actually incurred by the Contractor or any Subcontractor before the effective date of the notice when such costs are in conformance with this Agreement, with a Project Amendment, or with a Supplemental Project Amendment, and any reasonable reimbursement funds incurred by Subcontractors to close out a Project. Payment shall be made in accordance with Article 6 of this Agreement.

(B) In the event that funding for this Agreement is withdrawn, reduced or limited in any way after the effective date of this Agreement, the County may summarily terminate this Agreement notwithstanding any other termination provision of this Agreement. Termination under this paragraph shall be effective upon the date specified in the written notice of termination sent by Certified Mail from the County to the Contractor. After the effective date, no charges incurred under this Agreement are allowable. For costs incurred before the effective date, the County shall pay the Contractor for all costs actually incurred by the Contractor or any Subcontractor before the date of the notice when such costs are in conformance with this Agreement, with a Project Amendment, or with a Supplemental Project Amendment, and any reasonable reimbursement funds incurred by Subcontractors to close out a Project. Payment shall be made in accordance with Article 6 of this Agreement.

(C) The Contractor may terminate this Agreement upon ten (10) days' written notice by Certified Mail to the County if the Operation and Maintenance Agreement (KC-350-21) expires or is terminated for any reason. In that event, the County shall pay the Contractor for all costs actually incurred by the Contractor or any Subcontractor before the date of the notice when such costs are in conformance with this Agreement, with a Project Amendment, or with a Supplemental Project Amendment, and any reasonable reimbursement funds incurred by Subcontractors to close out a Project. Payment shall be made in accordance with Article 6 of this Agreement.

(D) Termination of this Agreement shall not relieve the Contractor of any responsibilities under the Agreement for Work performed that by their intent or terms survive.

ARTICLE 13 DISPUTE RESOLUTION

Section 13.1 Dispute Resolution Process

All claims, disputes and other matters in question between the County and the Contractor arising out of, or relating to, this Agreement (except those matters specifically identified in Section 13.6 as Major Disputes) shall be resolved in accordance with the following procedure: (A) negotiation, (B) mediation, (C) reference to the Independent Panel, and (D) judicial resolution. During any dispute process, the timeframes herein may be modified as needed by written agreement of the Parties without the need for a formal amendment of this Agreement.

Section 13.2 Negotiation

(A) The County and the Contractor acknowledge the benefits of resolving, and attempting to resolve, all disputes by negotiation between themselves, without resort to any third parties, and agree therefore to negotiate in good faith to resolve all disputes before invoking any other method of dispute resolution as provided for in this Agreement, provided, however, that the period of time for good faith negotiations shall not exceed thirty (30) days, unless a longer period is agreed to in writing by the Parties.

(B) In the event any dispute cannot be resolved within the 30-day period provided for negotiations, any Party may serve upon any other Party a Dispute Notice. Service of a Dispute Notice is a condition to the initiation of additional dispute resolution procedures under this Agreement. A Dispute Notice shall describe the claim, dispute or matter in question in detail sufficient to inform the mediator or Independent Panel of the relevant facts, issues and concerns, and describe the relief requested.

Section 13.3 Mediation

Within seven (7) days of the service of a Dispute Notice, the Parties shall by agreement select and designate a trained mediator to serve as a mediator in the dispute. The mediator so designated shall fix a time and place for the mediation, which date shall not be later than fourteen (14) days from the date the mediator was selected, unless the mediator's schedule cannot accommodate fourteen (14) days, in which case the mediation shall be schedule as soon thereafter but in no event more than thirty

(30) days after the mediator is selected. The mediator shall give the Parties at least five (5) Business Days written notice of the initial mediation session. The mediator shall meet with the Parties until either (A) the dispute is resolved or (B) the mediator decides that further meetings will not likely result in a resolution by agreement. All costs and expenses incurred at mediation shall be shared equally between the County and the Contractor.

Section 13.4 Independent Panel

The Parties agree to establish, within forty-five (45) days after issuance of any Dispute Notice, an Independent Panel to arbitrate all disputes which the Parties have been unable to resolve by negotiation and mediation. In the event of any dispute between the Parties which the Parties cannot otherwise resolve, either Party may invoke the services of the Independent Panel by giving written notice to the other of its intent to invoke the Independent Panel. The Independent Panel shall consist of three (3) members chosen by agreement of the County and the Contractor. Should the Parties be unable to agree on all three, each Party shall select one (1) member and those two (2) members shall select the third member. The Independent Panel shall consist of persons with expertise and experience in the operation of private or public solid waste transfer systems and design and build construction contracts. It is intended that the members of the Independent Panel shall have expertise regarding the subjects raised by the Dispute Notice. All costs and expenses incurred by the Independent Panel in the performance of its duties and responsibilities shall be shared equally between the County and the Contractor.

Section 13.5 Independent Panel Arbitration

In the event the dispute is not resolved by mediation, the dispute may be referred to the Independent Panel for arbitration by its three (3) members. The Independent Panel shall set a hearing date at the earliest agreeable time. Each Party shall then provide the Independent Panel with a memorandum (which shall not exceed 10 pages in length) presenting in concise form its contentions relating to the dispute, including both liability and damages. Copies of this memorandum shall be served upon the Independent Panel and exchanged between the Parties at least seven (7) days before the scheduled hearing date.

The Independent Panel shall conduct itself in accordance with the Federal Rules of Evidence and the Rules of the American Arbitration Association. The Independent Panel shall render its decision regarding the dispute within thirty (30) days of the notice of referral, unless the Independent Panel shall determine that additional time is necessary. In all matters other than Major Disputes, the decision of the Independent Panel in the matter shall be final and binding on the Parties, and judgment may be entered upon it in accordance with Applicable Law in any court having jurisdiction thereof.

Section 13.6 Judicial Review

The Parties acknowledge that there may be certain disputes that are of sufficient magnitude or involve matters of sufficient public interest or require legal interpretation such that they should be resolved in the public forums provided by the state or courts in Kitsap County, Washington having appropriate jurisdiction ("Major Disputes"). Major Disputes shall first be resolved by negotiation or by reference to the Independent Panel unless the Parties agree that the nature of the dispute or other matters justify direct access to the courts. For this purpose, Major Disputes shall include, but are not limited to (a) those in which the actual amount in controversy exceeds \$250,000 or (b) disputes in which matters of public concern or interest (such as public health and safety) provide a reason for resolution of the dispute in a public forum or (c) disagreements arising from legal interpretation of this Agreement or Applicable Laws. If there is a dispute regarding whether a dispute is a Major Dispute under this subparagraph, that matter shall be resolved by the Independent Panel.

ARTICLE 14 OWNERSHIP OF WORK PRODUCT

Section 14.1 Work Product

All Work Product is deemed to be instruments of service and Contractor or Subcontractor, as applicable, shall retain the ownership and property interests therein, including but not limited to any intellectual property rights, copyrights, and/or patents, subject to the provisions set forth in this Article.

Section 14.2 County License in Work Product.

The Contractor shall assign and shall require all Subcontractors to assign to the County an unconditional royalty-free, nonexclusive and irrevocable license to reproduce, publish, recover or otherwise use all Work Product and to authorize others to use the same for federal, state or local government purposes.

Section 14.3 County’s Hold Harmless for Use of Work Product.

County shall hold harmless the Contractor from and against any and all claims, damages, liabilities, losses, and expenses arising out of or resulting from the County’s use or alteration of the Work Product, to the fullest extent permitted by Applicable Law.

IN WITNESS WHEREOF, the Parties have caused this Agreement to be executed on the dates provided below.

Dated this 5th day of April, 2022

Dated this 9th day of May, 2022

WASTE MANAGEMENT OF WASHINGTON, INC.

**BOARD OF COUNTY COMMISSIONERS
KITSAP COUNTY, WASHINGTON**

Signature [Handwritten Signature]
Print Name Jason Rose
Title President

[Handwritten Signature]
EDWARD E. WOLFE, CHAIR
[Handwritten Signature]
CHARLOTTE GARRIDO, COMMISSIONER
[Handwritten Signature]
ROBERT GELDER, COMMISSIONER

ATTEST:

[Handwritten Signature]
DANA DANIELS, CLERK OF THE BOARD



ATTACHMENT A

CAPITAL IMPROVEMENT PROJECTS

Project	Preliminary Budget Estimate (2021 Dollars)
Expanded on and off-site rail infrastructure	\$5.6 million
Second preload compactor	\$5.3 million
Surface water management system improvements	\$2.2 million
Process and loadout for C&D and trackout mitigation	\$2.2 million
Unattended outbound truck scale	\$0.9 million
Intermodal container yard expansion	\$1.9 million
Expanded tipping floor	\$4.9 million
Other project(s) to be determined	\$2.1 million

ATTACHMENT B

**PROJECT AMENDMENT
PHASE ONE SERVICES**

CONTRACT NO. KC-355-21-__

**PROJECT AMENDMENT FOR [NAME OF PROJECT]
Relating to Capital Improvements at Olympic View Transfer Station**

This PROJECT AMENDMENT is between KITSAP COUNTY, a political subdivision of the State of Washington (County), and WASTE MANAGEMENT OF WASHINGTON, INC., a Delaware corporation (Contractor); hereafter collectively referred to as Parties and amends the Agreement Relating to Capital Improvements at Olympic View Transfer Station, Contract No. KC-355-21, by and between the County and Contractor, effective [___], 2022 (the "CIP Agreement"). This PROJECT AMENDMENT shall be effective upon the date that all Parties have executed this Amendment (Effective Date), as evidenced by the signatures below.

RECITALS

WHEREAS, following the issuance of RFP 2020-125 and award to the Contractor, the County and the Contractor entered into agreement for the operation and maintenance of the Olympic View Transfer Station (OVTS) (Operation and Maintenance Agreement, KC-350-21) and the CIP Agreement;

WHEREAS, the Parties intend that the CIP Agreement will function as a master agreement for all Capital Improvement Projects identified in the OVTS Facility Master Plan and OVTS Site Master Plan, as well as any projects later identified that the Parties wish to accomplish at OVTS;

WHEREAS, the first deliverable of the Contractor under the CIP Agreement was the OVTS Site Master Plan completed under the OVTS Site Master Plan Amendment (KC-355-21-__). The Site Master Plan functions as the preliminary facility planning document that advances the planning and preliminary designs for all Capital Improvement Projects identified thus far in the CIP Agreement and establishes Project Criteria for each Project;

WHEREAS, each Capital Improvement Project is to be carried out in a two-step progressive design-build process as described in the CIP Agreement. Design aspects are the majority of Phase One Services and are to be set forth in a Project Amendment to the CIP Agreement. Construction aspects are the majority of Phase Two Services and are to be set forth in a Supplemental Project Amendment to the CIP Agreement. The CIP Agreement requires that County and the Contractor will agree upon and enter into a Project Amendment and a Supplemental Project Amendment for each Capital Improvement Project, unless the parties agree to combine Projects; and

WHEREAS, the County and the Contractor wish to set forth the Phase One Services for [Name of Project] (Project) in compliance with the CIP Agreement, any amendments thereto, and the terms and conditions herein.

NOW THEREFORE, the County and Contractor mutually agree as follows:

AGREEMENT

1. PURPOSE

This Project Amendment covers all Phase One Services for the [Name of Project] described in Section 3 and is intended to create or confirm the basis of design, the County's needs and objectives for the Project, and the steps to advance the Project. The work under this Project Amendment will include design development, preconstruction services, preliminary environmental

review (if applicable), and negotiation of Phase Two Services. All work will be completed using the Contractor's own or contracted material, labor, and equipment, and anything else necessary to complete the tasks identified herein in a professional and workman like manner and in accordance with standard industry practices.

2. DEFINITIONS

Capitalized terms used herein but not defined shall have the meanings set forth in the CIP Agreement.

[Insert required Definitions, if any]

3. DESCRIPTION OF THE PROJECT

The Capital Improvement Project covered by this Project Amendment is entitled [Name of Project] and involves [insert summary description of project].

[Insert general description of the overall project, the purpose/intent/objectives of the Project and the anticipated outcome that the Project will provide for OVTS/the County.]

The Project Criteria for this Capital Improvement Project [are set forth in Attachment ____] [include the following]:

[Insert summary of known Project Criteria]

4. COMMENCEMENT

Following execution of this Project Amendment, Phase One Services will not commence until the County issues to the Contractor a written Notice to Proceed [language requiring other documentation] with Phase One Services in accordance with Section 4.1(B) of the CIP Agreement.

5. BUDGET & COMPENSATION

A. Total cost. The amount of compensation to be paid to the Contractor under this Project Amendment shall not exceed \$_____. A description of compensation is provided in Attachment A: Compensation, which is incorporated herein by this reference, and shall be paid in accordance with the CIP Agreement.

B. Management and overhead. At no point shall any General Contractor cost for management and overhead be more than ___% of the total compensation under this Project Amendment, excluding major equipment purchases.

C. Invoicing and Reimbursement. All invoicing under this Project Amendment shall be made, and the County shall pay Contractor, in accordance with Article 6 of the CIP Agreement.

Except for the following additional supporting documents, no documents other than those identified in Section 6.2 of the CIP Agreement as supporting documentation shall be required as a condition of payment:

[Insert required documentation, if any]

- D. **Retainage.** Unless a retainage bond has been secured by the Contractor as provided in Section 11.3 of the CIP Agreement, the County will retain five (5%) of all funds to be paid to the Contractor under this Project Amendment that are subject to retainage under Chapter 60.28 RCW in the method selected by the Contractor in accordance with RCW 60.28.011, which Contractor will select prior to execution of this Amendment. Without limitation, the Parties anticipate that the following classifications of work for this Project Amendment will be subject to retainage:

[Insert known work classifications (labor, materials, supplies, or equipment), if any, that are subject to RCW 60.28 retention]

- E. **Prevailing wages.** To the extent any work performed under this Project Amendment requires the payment of prevailing wages, Section 6.3 of the CIP Agreement shall apply.

6. SCHEDULE AND COMPLETION

- A. **Completion Date.** The Contractor and the County acknowledge that time is of the essence in this Project Amendment. All Phase One Services for the Project, as identified herein, shall be completed by [date] ("Phase One Completion Date"), except in the event of an Uncontrollable Circumstance or unless otherwise agreed by the Contractor and the County and documented by an amendment to this Project Amendment.

- B. **Schedule.** The schedule for complying with the Phase One Completion Date is set forth in Attachment B: Schedule.

1. The schedule shall, at minimum, indicate the dates for the start and completion of the various stages of work, including the dates when County information and approvals are required to enable the Contractor to comply with the schedule and assumptions associated with such schedule. The County's review of, and response to, the schedule shall not be construed as relieving the Contractor of its complete and exclusive control over the means, methods, sequences, and techniques for executing the work.
2. The schedule may be revised as required by conditions and progress of the work by agreement of the Party Representatives; provided that the schedule shall not be extended because of any delays attributable to the Contractor or any Subcontractor but may be extended by the County (i) in the event of a delay attributable to the County; (ii) because of Uncontrollable Circumstances; or (iii) as necessary to avoid or minimize negative impacts to the operation of OVTS.

[Insert potential scheduling impacts specific to the Project, if any]

7. DESIGN DEVELOPMENT

- A. **Design Documents.** Based on the OVTS Facility Master Plan, as refined by the OVTS Site Master Plan, the Contractor shall manage the advancement and completion of design for the Project to the County's satisfaction. Design Documents shall progress to the County for review and approval at 30%, 60%, 90% and Final using the agreed upon technology in the CIP Agreement. *[Identify other technology to use here if necessary]*. All submitted design documents shall be stamped with the seal appropriate to the architect, engineer, or other licensed professional.

1. Preliminary to 30% design

a. Objectives

[Insert a description of the Objectives to reach 30% design.]

b. Activities [E.g., update background and site analysis; concept updates with review and revisions; modeling; investigations, etc.]

[Insert a description of the Activities to reach 30% design.]

c. Deliverables

i. Design Document

ii. Cost estimates for construction, which shall cover all aspects of the construction including taxes, permit fees, and a contingency, as well as other identified variables applicable to the estimates.

iii. Cost estimates, including life cycle costs, for design alternatives when requested by the County.

iv. Estimated construction schedule using _____ technology. The schedule must clearly indicate any phasing of the construction that may reasonably be required for OVTS operations to continue without interruption or interference.

d. Assumptions

[Insert a description of the Assumptions to reach 30% design.]

2. 30% to 60% design (*strike if not applicable*)

a. Objectives

[Insert a description of the Objectives to reach 60% design.]

b. Activities

[Insert a description of the Activities to reach 60% design.]

c. Deliverables

i. Design Document

ii. Updated cost estimates for construction, which shall cover all aspects of the construction including taxes, permit fees, and a contingency, as well as other identified variables applicable to the estimates. Contingency costs shall be reduced as the design progresses.

iii. Updated life cycle cost estimates for design alternatives when requested by the County.

iv. Updated estimated construction schedule with any phasing that may reasonably be required for OVTS operations to continue without interruption or interference clearly indicated.

d. Assumptions

[Insert a description of the Assumptions to reach 60% design.]

3. 60% to 90% design

a. Objectives

[Insert a description of the Objectives to reach 90% design.]

b. Activities

[Insert a description of the Activities to reach 90% design.]

c. Deliverables

i. Design Document

ii. Updated cost estimates for construction, which shall cover all aspects of the construction including taxes, permit fees, and a contingency, as well as other identified variables applicable to the estimates. Contingency costs shall be reduced as the design progresses and shall be no more than 10% when the Parties agree on the Agreed Maximum Price for Phase Two Services.

iii. Updated estimated construction schedule with any phasing that may reasonably be required for OVTS operations to continue without interruption or interference clearly indicated.

d. Assumptions

[Insert a description of the Assumptions to reach 90% design.]

B. Design Review. The County shall have the opportunity to review and provide comment at each of the design stages identified above as provided in Section 4.2 of the CIP Agreement. Additionally, the regular progress meetings and project reports should address (i) whether the work is proceeding according to schedule, (ii) whether discrepancies, conflicts, or ambiguities exist in the CIP Agreement or this Project Amendment that require resolution, (iii) whether health and safety issues exist in connection with the Project; (iv) status of the contingency account to the extent provided for in this Amendment; and (v) other items that require resolution so as not to jeopardize the Contractor's ability to complete the work of Phase One for the agreed compensation amount and in accordance with the schedule set forth herein. The County shall have final approval for the design and all related aspects, acknowledging that decisions will be based on cost, schedule, quality, operability, life cycle and other considerations, with the Contractor's design-build team providing input and ongoing, transparent cost estimates.

C. *[Insert other County rights and responsibilities as necessary for the particular project]*

8. PRECONSTRUCTION SERVICES

A. Preconstruction Review. The Contractor shall schedule and conduct weekly meetings with the County, or on such other schedule as otherwise agreed, to discuss such matters as procedures, progress, coordination, and scheduling of the work. The Contractor shall actively and cooperatively advise the County on proposed site use and improvements, selection of materials, and building systems and equipment. The Contractor shall also actively and collaboratively provide recommendations to the County, using reasonably available information and consistent with the Project Criteria requirements, on other preconstruction issues such as constructability; availability of materials and labor; time requirements for procurement, installation and construction, including ways to accelerate the schedule; phasing and site work planning; sequencing and scheduling for procurement, installation and construction; impact on OVTS operations; factors related to construction quality, maintainability and durability; and factors related to construction cost including, but not limited to, costs of alternative designs and materials, preliminary budgets, life-cycle data, and possible cost reductions. All decisions will be based on cost, schedule, quality, operability, life cycle and other considerations, with the Contractor's design-build team providing ongoing, transparent cost estimates.

[Insert additional preconstruction review requirements, if any]

B. Incorporation. The Contractor shall work with the County to incorporate into the Design Documents recommendations on constructability, means, and/or methods that may reduce cost, save time, improve quality, reduce risk, and/or improve the overall process of Project delivery. A primary objective of these efforts will be good faith efforts to ensure that the final cost of the work does not exceed the County's budget for the Capital Improvement Project, and that the Project can be completed on time.

C. Site Investigations. The Contractor shall manage the performance of site investigations, including but not limited to utility locates, to assist in development of the design and construction planning. The Contractor is responsible for verifying accuracy and reliability of information provided by any third party, regardless of the source. The Contractor is responsible for ensuring current and accurate investigations are completed that the Contractor believes are necessary for design or construction.

D. Procurement. The Contractor shall keep the County apprised of any labor, materials and equipment that, to the Contractor's knowledge, might require a long lead time and shall coordinate with the County to ensure they are timely ordered and received. If ordering is necessary prior to the establishment of the AMP or execution of the Supplemental Project Amendment, the Parties shall agree on an arrangement for procurement of such items.

E. Preliminary Environmental Review. *(strike if not applicable)*

F. Permit Assessment and Preparation. *(strike if not applicable)*

G. Others. *[Insert any tasks that need to be completed prior to starting any Phase Two services]*

9. NEGOTIATION FOR PHASE TWO SERVICES

Along with submission of the [90% or as agreed upon by the parties] Design Document, the Contractor shall provide a formal commercial proposal including Agreed Maximum Price (AMP) for Phase Two Services to be included in the Supplemental Project Amendment for the Project. The Parties shall then negotiate in good faith terms a final AMP for the Supplemental Project Amendment.

10. INSURANCE AND INDEMNIFICATION

In addition to the insurance and indemnification provisions in Section 10 and 11 of the CIP Agreement, the Contractor shall require that subcontractors (excluding the General Contractor) for the following work hired, retained, or utilized for this Project Amendment obtain and maintain the insurance coverage set forth in Attachment C: Subcontractor Insurance Requirements:

[Types of work with insurance requirements]

[Insert insurance modifications from the CIP Agreement for the Contractor and/or General Contractor, if any]

11. WARRANTIES

The Contractor warrants to the County that all Contractor employees who perform work under this Project Amendment and all subcontractors, subcontractor employees and agents hired by the Contractor to perform work under this Project Amendment have the qualifications, knowledge, experience, skills, and resources necessary to provide all work. The Contractor also warrants that all work performed hereunder shall be provided in a manner consistent with the standards of care, skill, diligence, and knowledge commonly possessed and exercised by experienced professionals in the same discipline in the same or similar circumstances, and that all work shall be performed to the County's reasonable satisfaction and according to the schedule agreed to by the parties.

12. COUNTY ASSUMPTION OF WORK

[Insert any details specific to the project that would warrant more information than what is in the CIP Agreement]

13. AMENDMENTS OR MODIFICATION

All amendments or modifications to this Project Amendment shall be in writing and signed by both parties. There shall be no modification of this agreement, except in writing, executed with the same formalities as this present instrument.

14. CAPITAL IMPROVEMENT AGREEMENT TERMS

Except as expressly provided in this Project Amendment, all other terms and conditions of the CIP Agreement, and any subsequent amendments thereto applicable to the Project, remain in full force and effect.

15. TERMINATION

This Project Amendment may be terminated under the terms of Section 12.4 in the CIP.

IN WITNESS WHEREOF, the Parties have caused this Project Amendment to be executed on the dates provided below.

Dated this ____ day of _____, 202_

Dated this ____ day of _____, 202_

**WASTE MANAGEMENT OF WASHINGTON,
INC.**

**BOARD OF COUNTY COMMISSIONERS
KITSAP COUNTY, WASHINGTON**

Signature

COMMISSIONER NAME, CHAIR

Print Name

COMMISSIONER NAME, COMMISSIONER

Title

COMMISSIONER NAME, COMMISSIONER

ATTEST:

DANA DANIELS, CLERK OF THE BOARD

**ATTACHMENT A
COMPENSATION**

ATTACHMENT B
SCHEDULE

ATTACHMENT C

SUBCONTRACTOR INSURANCE REQUIREMENTS

Contractor shall ensure that [subcontractor] procure and maintain for the duration of the agreement insurance against claims for injuries to persons or damages to property which may arise from or in connection with their performance of the work hereunder and the results of that work by the Contractor, their agents, representatives, employees or subcontractors.

- Commercial General Liability (CGL):** Insurance Services Office Form CG 00 01 or equivalent, including products and completed operations, with limits of no less than identified below per occurrence for bodily injury, personal injury, and property damage. If a general aggregate limit applies, either the general aggregate limit shall apply separately to this project/location or the general aggregate limit shall be twice the required occurrence limit.
 - \$1,000,000 per occurrence and \$2,000,000 aggregate for bodily injury, personal injury, and property damage.
 - \$3,000,000 per occurrence and \$5,000,000 aggregate for bodily injury, personal injury, and property damage.
 - \$5,000,000 per occurrence and \$10,000,000 aggregate for bodily injury, personal injury, and property damage.
- Automobile Liability:** covering any auto, hired, leased, and non-owned autos, with limits no less than the following:
 - \$1,000,000 per occurrence and \$2,000,000 aggregate for bodily injury and property damage.
 - \$500,000 per occurrence and \$1,000,000 aggregate for bodily injury and property damage.
 - \$100,000 per occurrence and \$300,000 aggregate for bodily injury and property damage.
- Workers' Compensation:** as required by the State of Washington, with Statutory Limits, and Employer's Liability Insurance with limit of no less than \$1,000,000 per accident for bodily injury or disease.
- Professional Liability (Errors and Omissions)** (if Design/Build): Insurance appropriate to the Contractor's profession, with limit no less than \$1,000,000 per occurrence or claim, \$2,000,000 aggregate.
- Builder's Risk (Course of Construction)** insurance utilizing an "All Risk" (Special Perils) coverage form, with limits equal to the completed value of the subcontract and no coinsurance penalty provisions.
- Contractors' Pollution Legal Liability and/or Asbestos Legal Liability and/or Errors and Omissions** (if project involves environmental hazards) with limits no less than \$1,000,000 per occurrence or claim, and \$2,000,000 policy aggregate.