

**AGREEMENT BETWEEN  
THE CITY OF SAN ANTONIO  
AND  
NEW EARTH, INC.  
FOR  
ORGANIC MATERIAL PROCESSING SERVICES (RFP 013-049)**

**STATE OF TEXAS  
COUNTY OF BEXAR**

This agreement (hereinafter referred to as the "Agreement"), made and entered into in San Antonio, Bexar County, Texas, between the City of San Antonio, a Municipal Corporation in the State of Texas acting by and through its City Manager (hereinafter referred to as "City"), and

New Earth, Inc.  
7800 IH 10 East  
San Antonio, TX 78219

a Corporation chartered under the laws of the State of Texas (hereinafter referred to as "New Earth" or "Contractor"), said Agreement being executed by John Kalmbach, Vice President, San Antonio, and pursuant to Ordinance No. 2014-02-20-0088, passed and approved by the City Council on February 20, 2014.

Terms and conditions for performance and compensation payment for this Agreement are set forth in the following contract documents, true and correct copies of which are attached and fully incorporated herein verbatim for all purposes:

1. Exhibit I, a Request for Proposals for "Organic Material Processing Services" (RFP 013-049), issued by the City on September 27, 2013;
2. Exhibit II, Addendum 1 to RFP, issued October 7, 2013;
3. Exhibit III, Price Schedule submitted by New Earth as RFP Attachment B;
4. Exhibit IV, Copy of enabling Ordinance No. 2014-02-20-0088

**Referenced Documents:** Further, New Earth's response to the RFP is also fully incorporated by reference, verbatim, for all purposes. All the documents attached hereto and those incorporated by reference constitute the contract documents for this Agreement.

**Conflict:** The RFP governs New Earth's response; this Integration Agreement governs both the RFP and response; the Enabling Ordinance governs all in case of conflict.

This agreement supersedes any previous agreement or understanding of the parties, whether written or oral.

**Compensation:** As authorized by the Ordinance, City will pay Contractor a \$16.50 cost per ton of Organic Material delivered to the Contractor, less any credits received by the City. The

estimated total annual budget sum, during the initial term of the Agreement, shall not exceed \$600,000.00, unless City Council action is taken to amend the enabling Ordinance.

If funding for the entire Agreement is not appropriated at the time this Agreement is entered into, City retains the right to terminate this Agreement at the expiration of each of City's budget periods, and any subsequent contract period is subject to and contingent upon such appropriation.

In consideration of Contractor's performance in a satisfactory and efficient manner, as determined solely by the Director Solid Waste Management Department (hereinafter "Director"), of all services and activities set forth in this Agreement, City agrees to pay Contractor an amount estimated not to exceed six hundred thousand dollars (\$600,000.00) per year during the initial term of the Agreement as total compensation. Contractor shall provide compost to the City, as specified in RFP Attachment A, Part Three, Proposed Plan, to promote the Program.

It is understood and agreed by the Parties that the City does not guarantee any minimum volume of work, and that Contractor will be paid for actual work performed and for allowable expenses, provided that Contractor shall present City with an invoice for all expenses and services monthly within 14 days of the end of the month. Payment shall be made no more than 30 calendar days following receipt and approval of each invoice.

**Work Start Date:** Work shall start immediately upon instruction to New Earth from the Director Solid Waste Management Department or his designee, but no sooner than the effective date of the enabling Ordinance, for performance of various City projects described in the RFP's scope of services or the contract documents identified above. The Parties acknowledge and agree that the current contract to process organic materials, as authorized by Ordinance 2011-08-18-0688, and amended by Ordinances 2012-09-20-0754, 2013-01-31-0078 and 2013-09-12-0627, shall terminate immediately upon execution of this Agreement and that there shall be no interruption in the services provided by New Earth to the City.

**Term of Performance and Termination Date:** The term of this agreement is for five (5) years and shall commence, after approval by the City Council as signified by the passage of an Ordinance, upon execution after the effective date of the enabling Ordinance, and terminate on December 31, 2019. The City has the sole discretion to renew the Agreement for five (5) additional renewal terms of one (1) year each, under the same terms and conditions. City Council approval will be required for the renewal terms if there is a substantial change in the terms and conditions of the contract, or if the price adjustment exceeds the annual CPI adjustment as provided for in the contract documents.

**Notice:** Except where the terms of this Agreement expressly provide otherwise, any election, notice or communication required or permitted to be given under this Agreement shall be in writing and deemed to have been duly given if and when delivered personally (with receipt acknowledged), or three (3) days after depositing same in the U.S. mail, first class, with proper postage prepaid, or upon receipt if sending the same by certified mail, return receipt requested, or upon receipt when sent by a commercial courier service (such as Federal Express or DHL Worldwide Express) for expedited delivery to be confirmed in writing by such courier, at the

addresses set forth below or to such other address as either party may from time to time designate in writing.

**If intended for City, to:**

City of San Antonio  
Attn: Solid Waste Management Department  
P.O. Box 839966  
San Antonio, Texas 78283-3966

**If intended for Contractor, to:**

New Earth, Inc.  
Attn: John Kalmbach  
7800 IH 10 East  
San Antonio, TX 78219

**Assignment and Subcontracting:** Contractor shall supply qualified personnel as may be necessary to complete the work to be performed under this Agreement. Persons retained to perform work pursuant to this Agreement shall be the employees or subcontractors of Contractor. Contractor, its employees or its subcontractors shall perform all necessary work.

It is City's understanding, and this Agreement is made in reliance thereon, that Contractor intends to use the following subcontractors: none. The list of subcontractors shall be provided to the Director for approval, and any deviation from this subcontractor list, whether in the form of deletions, additions or substitutions shall be approved by the Director, prior to the provision of any services by said subcontractor.

Any work or services approved for subcontracting hereunder shall be subcontracted only by written contract and, unless specific waiver is granted in writing by the City, shall be subject by its terms to each and every provision of this Agreement. Compliance by subcontractors with this Agreement shall be the responsibility of Contractor. City shall in no event be obligated to any third party, including any subcontractor of Contractor, for performance of services or payment of fees. Any references in this Agreement to an assignee, transferee, or subcontractor, indicate only such an entity as has been approved by the Director.

Except as otherwise stated herein, Contractor may not sell, assign, pledge, transfer or convey any interest in this Agreement, nor delegate the performance of any duties hereunder, by transfer, by subcontracting or any other means, without the consent of the Director. As a condition of such consent, if such consent is granted, Contractor shall remain liable for completion of the services outlined in this Agreement in the event of default by the successor Contractor, assignee, transferee or subcontractor.

Any attempt to transfer, pledge or otherwise assign this Agreement without said written approval, shall be void ab initio and shall confer no rights upon any third person. Should Contractor assign, transfer, convey, delegate, or otherwise dispose of any part of all or any part of its right, title or interest in this Agreement, City may, at its option, cancel this Agreement and all rights, titles and interest of Contractor shall thereupon cease and terminate, in accordance with the termination provisions above, notwithstanding any other remedy available to City under this Agreement. The violation of this provision by Contractor shall in no event release Contractor

from any obligation under the terms of this Agreement, nor shall it relieve or release Contractor from the payment of any damages to City, which City sustains as a result of such violation.

**Nonwaiver of Performance:** Unless otherwise specifically provided for in this Agreement, a waiver by either Party of a breach of any of the terms, conditions, covenants or guarantees of this Agreement shall not be construed or held to be a waiver of any succeeding or preceding breach of the same or any other term, condition, covenant or guarantee herein contained. Further, any failure of either Party to insist in any one or more cases upon the strict performance of any of the covenants of this Agreement, or to exercise any option herein contained, shall in no event be construed as a waiver or relinquishment for the future of such covenant or option. In fact, no waiver, change, modification or discharge by either party hereto of any provision of this Agreement shall be deemed to have been made or shall be effective unless expressed in writing and signed by the party to be charged. In case of City, such changes must be approved by the Director. No act or omission by a Party shall in any manner impair or prejudice any right, power, privilege, or remedy available to that Party hereunder or by law or in equity, such rights, powers, privileges, or remedies to be always specifically preserved hereby.

**Independent Contractor:** Contractor covenants and agrees that he or she is an independent contractor and not an officer, agent, servant or employee of City; that Contractor shall have exclusive control of and exclusive right to control the details of the work performed hereunder and all persons performing same, and shall be responsible for the acts and omissions of its officers, agents, employees, contractors, subcontractors and consultants; that the doctrine of respondent superior shall not apply as between City and Contractor, its officers, agents, employees, contractors, subcontractors and consultants, and nothing herein shall be construed as creating the relationship of employer-employee, principal-agent, partners or joint venturers between City and Contractor. The parties hereto understand and agree that the City shall not be liable for any claims which may be asserted by any third party occurring in connection with the services to be performed by the Contractor under this Agreement and that the Contractor has no authority to bind the City.

**Termination:** For purposes of this Agreement, "termination" of this Agreement shall mean termination by expiration of the Agreement term as stated above, or earlier termination pursuant to any of the provisions hereof. This Agreement may be terminated without cause by City upon 90 calendar days written notice. Upon written notice City may terminate this Agreement as of the date provided in the notice, in whole or in part, upon the occurrence of the sale, transfer, pledge, conveyance or assignment of this Agreement without prior approval, as provided above in Assignment and Subcontracting, which shall constitute an Event for Cause under this Agreement.

**Defaults With Opportunity for Cure.** Should Contractor default in the performance of this Agreement in a manner stated in this section below, same shall be considered an event of default. City shall deliver written notice of said default specifying such matter(s) in default. Contractor shall have fifteen (15) calendar days after receipt of the written notice to cure such default. If Contractor fails to cure the default within such fifteen-day cure period, City shall have the right, without further notice, to terminate this Agreement in whole or in part as City deems appropriate, and to contract with another Contractor to complete the work required in this Agreement. City

shall also have the right to offset the cost of said new Agreement with a new Contractor against Contractor's future or unpaid invoice(s), subject to the duty on the part of City to mitigate its losses to the extent required by law.

Bankruptcy or selling substantially all of company's assets.  
Failing to perform or failing to comply with any covenant herein required.  
Performing unsatisfactorily.

**Termination By Law.** If any state or federal law or regulation is enacted or promulgated which prohibits the performance of any of the duties herein, or, if any law is interpreted to prohibit such performance, this Agreement shall automatically terminate as of the effective date of such prohibition.

Regardless of how this Agreement is terminated, Contractor shall affect an orderly transfer to City or to such person(s) or firm(s) as the City may designate, at no additional cost to City, all completed or partially completed documents, papers, records, charts, reports, and any other materials or information produced as a result of or pertaining to the services rendered by Contractor, or provided to Contractor, hereunder, regardless of storage medium, if so requested by City, or shall otherwise be retained by Contractor in accordance with records retention requirements. Any record transfer shall be completed within thirty (30) calendar days of a written request by City and shall be completed at Contractor's sole cost and expense. Payment of compensation due or to become due to Contractor is conditioned upon delivery of all such documents, if requested.

Within forty-five (45) calendar days of the effective date of completion, or termination or expiration of this Agreement, Contractor shall submit to City its claims, in detail, for the monies owed by City for services performed under this Agreement through the effective date of termination. Failure by Contractor to submit its claims within said forty-five (45) calendar days shall negate any liability on the part of City and constitute a **Waiver** by Contractor of any and all right or claims to collect moneys that Contractor may rightfully be otherwise entitled to for services performed pursuant to this Agreement.

Upon the effective date of expiration or termination of this Agreement, Contractor shall cease all operations of work being performed by Contractor or any of its subcontractors pursuant to this Agreement.

**Termination not sole remedy.** In no event shall City's action of terminating this Agreement, whether for cause or otherwise, be deemed an election of City's remedies, nor shall such termination limit, in any way, at law or at equity, City's right to seek damages from or otherwise pursue Contractor for any default hereunder or other action.

**Amendments:** Except where the terms of this Agreement expressly provide otherwise, any alterations, additions, or deletions to the terms hereof, shall be effected by amendment, in writing, executed by both City and Contractor, and signed by the Director. Substantive changes, to include an increase in the amount of compensation, shall require additional City Council approval.

**THIS AGREEMENT SHALL BE CONSTRUED UNDER AND IN ACCORDANCE WITH THE LAWS OF THE STATE OF TEXAS AND ALL OBLIGATIONS OF THE PARTIES CREATED HEREUNDER ARE PERFORMABLE IN BEXAR COUNTY, TEXAS.**

Any legal action or proceeding brought or maintained, directly or indirectly, as a result of this Agreement shall be heard and determined in the City of San Antonio, Bexar County, Texas.

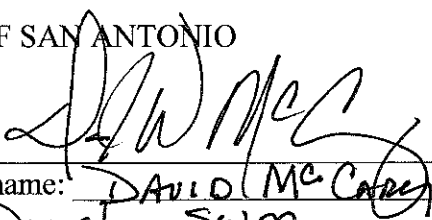
**Entire Agreement:** This Agreement, together with its authorizing ordinance and its exhibits as listed above, constitute the final and entire agreement between the parties hereto and contain all of the terms and conditions agreed upon. No other agreements, oral or otherwise, regarding the subject matter of this Agreement shall be deemed to exist or to bind the parties hereto, unless same be in writing, dated subsequent to the date hereto, and duly executed by the parties.

**Agreed, Consented to, and Executed this \_\_\_\_ day of February, 2014.**

NEW EARTH, INC.

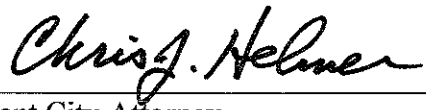
BY:   
John Kalmbach  
Vice President, San Antonio

CITY OF SAN ANTONIO

BY:   
Printed name: DAVID McCarty  
Title: Director SWM  
CITY MANAGER, or her designee

APPROVED AS TO FORM:

Office of the City Attorney  
Robert F. Greenblum, City Attorney

By:   
Assistant City Attorney

*21 Feb 2014*

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