

No. B140226C

ACME IRON & METAL COMPANY, a d/b/a §  
of TXALLOY, INC., and §  
MAYFIELD PAPER COMPANY, INC., §  
ON THEIR OWN BEHALF AND §  
ON BEHALF OF THOSE §  
SIMILARLY SITUATED, §  
Plaintiffs, §

v. §

REPUBLIC WASTE SERVICES OF TEXAS, §  
LTD., sometimes d/b/a §  
TRASHAWAY SERVICES and §  
DUNCAN DISPOSAL, §  
Defendant. §

IN THE DISTRICT COURT OF

TOM GREEN COUNTY, TEXAS

119<sup>th</sup> JUDICIAL DISTRICT

### PLAINTIFFS' ORIGINAL PETITION

TO THE HONORABLE JUDGE OF THIS COURT:

Come now Plaintiffs Acme Iron & Metal Company, a d/b/a of Txalloy, Inc. ("Acme"), and Mayfield Paper Company, Inc. ("Mayfield Paper"), collectively referred to as "Plaintiffs," on their own behalf and on behalf of those similarly situated, and file this lawsuit against Republic Waste Services of Texas, Ltd., which also has done business as Trashaway Services and Duncan Disposal ("Republic"), complaining of Republic's illegal, unauthorized, and improper charges for waste disposal to Plaintiffs and other commercial customers of Republic's in the City of San Angelo, Texas, and in support would show as follows:

#### DISCOVERY, PARTIES, AND VENUE.

1. Discovery in this matter shall be conducted under Level 2, TEX. R. CIV. P. 190.3.
2. Plaintiff Acme Iron & Metal Company is a d/b/a of Txalloy, Inc. Txalloy, Inc. is a Texas corporation with its principal place of business in San Angelo, Tom Green County, Texas.

3. Plaintiff Mayfield Paper Company, Inc. is a Texas corporation doing business in San Angelo, Tom Green County, Texas, and with its principal place of business in San Antonio, Texas.

4. Defendant Republic Waste Services of Texas, Ltd., which also has done business as Trashaway Services, is (according to the exclusive contract between Republic and the City of San Angelo that is at issue in this lawsuit) a Texas limited partnership whose principal office is at 1422 Hughes Street, San Angelo, Texas 76903. It may be served with service of process through its registered agent, CT Corporation System, at its registered office, 1999 Bryan Street, Suite 900, Dallas, Texas 75201.

5. The subject matter of this lawsuit arises out of an exclusive contract between Republic and the City of San Angelo in effect since August 1, 2004 and prior contracts dated February 21, 1989 and February 2, 1999, as well as contractual relationships created by billings sent by Republic to Plaintiffs and other similarly situated commercial businesses in the City of San Angelo. This Court has subject matter jurisdiction over Plaintiffs' claims. The acts complained of herein were performed in Tom Green County, Texas. The contract at issue here recites that it is performable in Tom Green County, Texas and includes a clause selecting Tom Green County as venue. Jurisdiction and venue are proper in this Court.

#### **SUMMARY OF FACTS**

6. The City of San Angelo (the "City") selects a contractor to provide waste collection and disposal services for residential and commercial customers in the City. By a contract signed on July 6, 2004 by the City, and on August 4, 2004 by Republic, the City selected Republic to be the sole and exclusive provider of such services. A true and correct copy of that agreement (the "Contract") is attached hereto as Exhibit A. Before that contract, Republic

provided services to the City under contracts dated February 21, 1989 and February 2, 1999 and beyond, which were superseded by the Contract

7. Under its contracts with the City, Republic is required to provide waste collection and disposal services to residential customers, who are billed for such services by the City. In addition, Republic is required to provide waste collection and disposal services to commercial customers, who are billed directly by Republic for the Commercial Service charges set by City ordinance.

8. The Contract further provides that the rates charged for waste collection and disposal will be those set by City ordinance or resolution. Specifically, Section 2.1.2.1 of the Contract, titled "Commercial Billing," provides in relevant part:

Contractor [Republic] will be responsible for billing and collection of all charges for commercial service in accordance with the rates for commercial waste collection service established by City ordinance or resolution.

9. Accordingly, the City has from time to time adopted ordinances setting the allowable charges for waste collection and disposal. The ordinances also specify what additional charges are allowable, including a City franchise fee, a City Landfill Surcharge Fee, a State Landfill Surcharge Fee, and a Fuel Surcharge Fee.

10. No City ordinance has ever authorized Republic to charge any "environmental fee" or any additional franchise fee to the customer, or has allowed such unauthorized fees to be passed on to the City.

11. To the best of Plaintiffs' knowledge, residential customers in the City – who are billed directly by the City, not by Republic – have been billed in a manner consistent with the Contract and the ordinances setting rates.

12. However, commercial customers in the City – who are billed by Republic, not the City – have been systematically and consistently overcharged. Republic has billed fuel surcharges in excess of the amount authorized by City ordinance. In addition to the fee authorized by City ordinance, Republic has charged an improper and unauthorized Fuel Surcharge Fee that is based on a percentage of billing, and an “Environmental Recovery Fee.” Republic has disguised these fees by combining them with the authorized, set-amount Fuel Surcharge Fee, in a line item titled “Total Fuel/Environmental Recovery Fee.” See Exhibit B (example invoice from Republic to Acme). Further, Republic has disguised this fee by calling it a “Recovery Fee,” implying that the charge is a pass-along for some “environmental fee” that Republic must pay. Upon information and belief, this is not the case; rather, Republic has simply imposed this fee as a method of realizing additional revenue not authorized by the Contract or any City ordinance. For example, the additional fee was also added to container delivery fees, container rental fees, and charges for non-hauls due to the customer’s actions. Republic has also charged a franchise fee of 2 percent through August 2004 and 4 percent thereafter on all unauthorized Fuel/Environmental Recovery Fees, which was paid to the City, and collected 8.25 percent in sales tax on the improper excess fees, which was distributed to the State and various other governmental entities.

13. Upon information and belief, Republic has historically charged this “Fuel/Environmental Recovery Fee” and the excess franchise fees to all commercial customers in the City, and has assessed the fee in a uniform manner to all such customers. On June 27, 2014, Republic issued a press release that essentially admitted it has made excess unauthorized charges to commercial customers in the City.

14. Acme has estimated the total amount of Republic's overcharges, based on information available at this time, to be possibly in excess of \$9,000,000. This figure was arrived at through use of information in the City's recent Request for Proposal (RFP) for solid waste services, information acquired pursuant to an open records request, estimated growth rates as provided by the San Angelo Chamber of Commerce, actual billings to Acme, and other similar information. A detailed explanation of Acme's estimate is attached hereto as Exhibit C.

### **CAUSES OF ACTION**

#### **A. Breach of Contract.**

15. Plaintiffs restate and incorporate all allegations in the foregoing paragraphs.

16. By sending monthly bills to Plaintiffs and accepting payment for those bills, Republic has established a contractual relationship with Plaintiffs. That contractual relationship incorporates all the terms of Republic's Contract with the City, which in turn incorporates all the terms of any ordinances referenced therein.

17. Additionally, or in the alternative as necessary, Plaintiffs are third-party beneficiaries of the Contract between Republic and the City. Although the Contract purports to state that it "inures solely to the benefit of the parties" and that "no other person shall have any legal or equitable right, remedy or claim under or in respect of or by virtue of this Agreement" (Contract ¶ 4.2), the Contract's incorporation of fee limitations (as reflected in applicable City ordinances) was inarguably for the benefit of customers of Republic's services; the customers had no other choice in the selection of a service provider, either under the exclusive Contract or under earlier contracts (during the term of those earlier contracts, the City refused to issue licenses to other solid waste service providers, making Republic the *de facto* exclusive provider).

The Contract recognizes that Republic has a duty “for the protection of the health and welfare of the public” (Contract ¶ 2.1.2).

18. Republic breached the above-described contract or contracts by charging fees not authorized by the Contract or any City ordinance, thus causing damages to Plaintiffs and others similarly situated in an amount in excess of the minimum jurisdictional limits of this Court. The damage sustained by Plaintiffs and others similarly situated is the aggregate charging of unauthorized “Fuel/Environmental Recovery Fees,” fuel surcharges in excess of the amount authorized by ordinance, and excess franchise fees and sales tax. Pursuant to Tex. R. Civ. P. 47(c), Acme, upon information and belief, believes the total amount of damages at issue would constitute monetary relief of more than \$1,000,000 and could exceed as much as \$9,000,000 to all commercial service customers of Republic within the City of San Angelo. See Exhibit C for a calculation of the estimated overcharges since the year 2000.

19. Plaintiffs are entitled to recover reasonable attorneys’ fees under Texas Civil Practice & Remedies Code Chapter 38 because this suit is for breach of contract.

**B. Unjust Enrichment.**

20. Plaintiffs restate and incorporate all allegations in the foregoing paragraphs.

21. Plaintiffs and all others similarly situated paid sums to Republic for the unauthorized “Fuel/Environmental Recovery Fees,” fuel surcharges in excess of the amount authorized by ordinance, and excess franchise fees and sales tax. Republic’s charging of those fees was improper and illegal. If Republic is allowed to keep such fees, it will be unjustly enriched.

22. Additionally or in the alternative to the other relief sought, Plaintiffs seek the equitable remedy of disgorgement of the improperly collected fees, for themselves and for all others similarly situated.

**C. Violations of the Texas Deceptive Trade Practices Act.**

23. Plaintiffs restate and incorporate all allegations in the foregoing paragraphs.

24. Plaintiffs are consumers under the Texas Deceptive Trade Practices Act. Plaintiffs purchased services from Republic, which is an entity that can be sued under the DTPA.

25. Republic violated the DTPA when it breached an implied warranty that it would not charge Plaintiffs and others similarly situated more than authorized in the Contract and applicable ordinances, but then charged in excess of those maximum amounts.

26. Additionally or in the alternative as necessary, Republic violated the DTPA when it engaged in an unconscionable course of action by exceeding the authorized charges and disguising those charges as described herein, thus taking advantage of Plaintiffs and others similarly situated to a grossly unfair degree.

27. Republic's wrongful conduct was a producing cause of injury to Plaintiffs and others similarly situated, which resulted in damages in an amount corresponding to all charges in excess of those authorized by the Contract and applicable ordinances.

**D. Discriminatory Treatment by a Public Utility.**

28. Plaintiffs restate and incorporate all allegations in the foregoing paragraphs.

29. Republic, under the Contract, functions as a public utility. The current City ordinance (Section 8.1500) is under Article 8.000, "Utility Related Fees."

30. As a public utility, Republic may not treat similarly situated customers differently without a reasonable basis reflected in a contract, ordinance, or similar governing document.

There is no basis for the charging of improper "Fuel/Environmental Recovery Fees," fuel surcharges in excess of the amount authorized by ordinance, and excess franchise fees and sales tax to commercial customers that are not charged to residential customers.

31. The discriminatory treatment by Republic of Plaintiffs and others similarly situated has proximately caused damages as set forth herein, which Plaintiffs seek to recover for themselves and for others similarly situated.

**E. Fraud.**

32. Plaintiffs restate and incorporate all allegations in the foregoing paragraphs.

33. Republic made material, false representations to Plaintiffs and all its other customers. Republic, by billing for the above-described improper charges, represented that those charges were proper and authorized by contract and City ordinance, when in fact they were not. Republic made these material misrepresentations knowing of their falsity, or recklessly as a positive assertion and without knowledge of its truth. Republic made these material misrepresentations with the intent that Plaintiffs and its other customers rely and act on them. Plaintiffs and Republic's other customers justifiably relied on the misrepresentations, by paying the unauthorized charges and fees to Republic, causing them injury in an amount in excess of the minimum jurisdictional limits of this Court.

34. Plaintiffs seek recovery of their actual damages proximately caused by Republic's fraudulent misrepresentations, along with exemplary damages.

35. The injury caused by Republic's fraud was inherently undiscoverable because by its nature it was unlikely to be discovered despite the exercise of diligence. The injury further was objectively verifiable.



**F. Negligent Misrepresentation.**

36. Plaintiffs restate and incorporate all allegations in the foregoing paragraphs.

37. Republic made misrepresentations to Plaintiffs and its other customers in the course of its business and supplied false information for the guidance of others. Republic, by billing for the above-described improper charges, represented that those charges were proper and authorized by contract and City ordinance, when in fact they were not. Plaintiffs and Republic's other customers justifiably relied on the misrepresentations, by paying the unauthorized charges and fees to Republic, causing them injury in an amount in excess of the minimum jurisdictional limits of this Court.

38. Plaintiffs seek recovery of their actual damages proximately caused by Republic's fraudulent misrepresentations, along with exemplary damages.

39. The injury caused by Republic's fraud was inherently undiscoverable because by its nature it was unlikely to be discovered despite the exercise of diligence. The injury further was objectively verifiable.

**CLASS ACTION ALLEGATIONS**

40. Plaintiffs restate and incorporate all allegations in the foregoing paragraphs.

41. Pursuant to Rule 42 of the Texas Rules of Civil Procedure, Plaintiffs bring this action on behalf of themselves and all others similarly situated, as representatives of the following class: All commercial waste hauling and disposal customers that were overcharged by Republic in the City of San Angelo from 2000 to the present. As described below, this action satisfies the numerosity, commonality, typicality, and adequacy of representation requirements of Rule 42.

42. **Numerosity.** The persons and/or entities in this class are so numerous that joinder of all members is impracticable. Although the exact number of class members is unknown to Plaintiffs at this time, it is ascertainable by appropriate discovery, and Plaintiffs, upon information and belief, estimate that the class includes several thousand or more members. The identity and location of class members may be identified from records maintained and possessed by Republic or its representatives.

43. **Commonality.** There are common questions of law or fact affecting the class. Predominant common questions include whether Republic's charge of "Fuel/Environmental Recovery Fees," fuel surcharges in excess of the amount authorized by ordinance, and excess franchise fees and sales tax was authorized by the Contract or any City ordinance; whether Republic misrepresented the nature of such charges; and whether Republic's charging of such alleged "fee" constituted a breach of contract, either directly with the class members or under a third-party beneficiary or similar theory.

44. **Typicality.** The claims of Plaintiffs are typical of the claims of the rest of the class in that all members of the class sustained the same proportionate damages: the apparently uniform overcharging of fees (by as much as 30% or more in some cases) by Republic not authorized by the Contract or any City ordinance.

45. **Fair and Adequate Representation.** Plaintiffs will fairly and adequately represent the interest of the class. Plaintiffs are members of the proposed class, are interested in representing the class, are willing to pay the costs of notice and litigation, have no interests adverse to other members of the class, and have suffered the same harm as the class.

### **JURY DEMAND**

46. Plaintiffs demand a jury trial and tender the applicable fee.

### **CONCLUSION AND PRAYER**

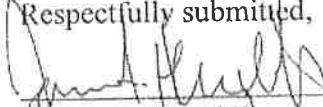
Wherefore, premises considered, Plaintiffs Acme Iron & Metal Company, a d/b/a of Txalloy, Inc., and Mayfield Paper Company, Inc., on behalf of themselves and others similarly situated, pray that the Court render the following relief:

- Certification of the class as described in this Petition;
- Appointment of undersigned as class counsel;
- An award of money damages to the class as set forth herein;
- An award of reasonable and necessary attorneys' fees;
- An award of prejudgment and postjudgment interest and costs of suit;

And all other relief, at law or in equity, to which Plaintiffs and the class may show themselves justly entitled.

[signature block on following page]

Respectfully submitted,



James A. Hemphill

State Bar No. 00787674

(512) 480-5762 direct phone

(512) 536-9907 direct fax

jhemphill@gdham.com

David A. King

State Bar No. 24083310

dking@gdham.com

GRAVES, DOUGHERTY, HEARON & MOODY, PC

401 Congress Ave., Suite 2200

Austin, Texas 78701

(512) 480-5600 phone

Paul Stipanovic

State Bar No. 00795669

(325) 653-3291 phone

(325) 655 6838 fax

info@ghtxlaw.com

GOSSETT, HARRISON, MILLICAN, & STIPANOVIC, PC

2 South Koenigheim

P.O. Drawer 911

San Angelo, Texas 76902

COUNSEL FOR PLAINTIFFS

## EXHIBIT A

**AGREEMENT FOR WASTE COLLECTION AND DISPOSAL  
AND LANDFILL LEASE AND OPERATION  
BETWEEN THE CITY OF SAN ANGELO AND  
REPUBLIC WASTE SERVICES OF TEXAS**

THIS AGREEMENT is made and entered into by and between the **City of San Angelo**, a Texas home-rule municipal corporation, acting by and through its duly authorized Mayor (hereinafter "City"), whose address is 72 West College, P.O. Box 1751, San Angelo, Texas 76902, and **Republic Waste Services of Texas**, a Texas Limited Partnership, dba **Trashaway Services**, whose principal office and business address is 1422 Hughes Avenue, San Angelo, Texas 76903 (hereinafter "Contractor"). This Agreement and the other agreements, documents and instruments incorporated by reference herein, shall supersede that certain agreement titled "Agreement Between the City of San Angelo, Texas and Trashaway Service, Inc." dated February 21, 1989 and the Amendment to the Agreement Between the City of San Angelo and Trashaway Services, Inc. dated February 2, 1999.

**WITNESSETH:**

WHEREAS, CITY desires to retain a company to provide waste collection and disposal services and to lease and operate a solid waste landfill and to perform such work as may be incidental thereto; and

WHEREAS, CONTRACTOR is a competent and qualified waste collection and disposal company and desires to provide waste collection, disposal and landfill construction and operation services according to the terms and conditions stated herein;

NOW THEREFORE, in consideration of the premises and of the mutual covenants and conditions contained herein, and other valuable consideration, City and Contractor hereby agree as follows:

**I. GENERAL**

**1.1 Grant** For and in consideration of compliance by Contractor with the covenants and conditions set forth herein and the ordinances and regulations of City governing the collection of garbage, trash, brush, and other refuse, and the disposal of solid waste and landfill operations, City hereby grants to Contractor the exclusive right, privilege and permit to use the streets, alleys and thoroughfares within the Corporate limits of the City for the purpose of engaging in the business of waste collection and disposal, except that commercial, institutional and industrial businesses may, by obtaining a permit pursuant to City ordinance, haul their own garbage, trash and debris. Those residences and businesses that generate waste that Contractor is not required or legally authorized to collect and dispose of pursuant to law or this Contract, shall have the right as allowed by City ordinance to contract with other garbage and waste collection businesses that are duly permitted to collect such waste. City also hereby grants to Contractor the exclusive right,

privilege and permit to use and operate the landfill property described below for the purposes stated herein during the term of this Agreement and any extensions thereof.

**1.2 Lease.** City agrees to lease and does hereby lease to Contractor the sanitary landfill site owned and designated as such by City, a legal description of which is attached hereto as "Exhibit A", (hereinafter the "Landfill").

**1.2.1 Lease Payments.** Contractor shall pay City each month for the use of the Landfill in accordance with the following terms and conditions:

1. Contract Year 1 Beginning August 1, 2004 – Three thousand seven hundred sixty one dollars (\$3761.00) per month.
2. Contract Year 2 Beginning August 1, 2005 – Three thousand nine hundred eighty six dollars (\$3986.00) per month.
3. Contract Year 3 Beginning August 1, 2006 - Four thousand two hundred twenty five dollars (\$4225.00) per month.
4. Contract Year 4 Beginning August 1, 2007 – Four thousand four hundred seventy nine dollars (\$4479.00) per month.
5. Contract Years 5-10 - Increasing annually at a six percent (6%) rate from Four thousand seven hundred forty eight dollars (\$4748.00) per month in year five.
6. Extensions beyond Contract year 10 - Increasing annually at a minimum of 6%, to be negotiated by City and Contractor at least one hundred twenty (120) days prior to the expiration of the primary lease term and any extensions thereof.

**1.3 Definitions.** These definitions and those additional definitions of pertinent terms contained in 30 TAC §330.2 (1995), shall control and serve as guidance for the interpretation of this contract instrument.

**1.3.1 Brush** - Mesquite trees, greasewood, cacti or any other tree or shrubbery occurring naturally or that is grown in the area.

**1.3.2 Debris** - Dirt, concrete, rocks, bricks, other wastes or building materials.

**1.3.3 Garbage** - Shall include, among other similar matter, all animal or vegetable matter, such as waste materials and refuse from kitchens, residences, grocery stores, butcher shops, restaurants, cafes, hotels, rooming houses and boarding houses, and other deleterious substances.

**1.3.4 Leachate** - Liquid that has passed through or emerged from solid waste and contains soluble, suspended, or miscible materials removed from such waste.

**1.3.5 Liquid Waste** - Waste material that is determined to be a "free liquid" as a result of the paint filter test (EPA method 9095).

**1.3.6 Medical Waste** - Waste generated by health care-related facilities which is associated with health care activities not including garbage or rubbish generated from offices, kitchens or other non-health care activities.

**1.3.7 Refuse** - Discarded waste materials in a solid or semi-liquid state, consisting of garbage, rubbish or a combination thereof.

**1.3.8 Rubbish** - Non-putrescible solid wastes consisting of combustible and non-combustible materials including yard and garden wastes.

**1.3.9 Solid Waste** - Any garbage, rubbish, refuse, sludge from a waste treatment plant, water supply plant, or air pollution control facility, and other discarded material, including solid, liquid, semisolid, or contained gaseous material resulting from industrial, municipal, commercial, mining, and agricultural operations, and from community and institutional activities, but does not include:

(A) solid or dissolved material in domestic sewage, or solid or dissolved material in irrigation return flows, or industrial discharges subject to regulation by permit issued pursuant to the Water Code, Chapter 26;

(B) soil, dirt, rock, sand and other natural or man made inert solid materials used to fill land if the object of the fill is to make the land suitable for the construction of surface improvements; or

(C) waste materials which result from activities associated with the exploration, development, or production of oil or gas and are subject to control by the Railroad Commission of Texas.

**1.3.10 Trash** - The same as "Rubbish."

**1.4 Effective Date.** This Agreement shall be effective as of August 1, 2004.

**1.5 Term.**

**1.5.1 Initial Term.** This Agreement shall have an initial term of ten (10) years commencing on August 1, 2004 and terminating on July 31, 2014.

**1.5.2 Renewal by Agreement.** After the initial term, this Agreement may be renewed upon mutual agreement of the parties for as many as two (2), five



(5) year terms. Either party that does not wish to renew this Agreement upon expiration of the initial term or first renewal term shall so notify the other party ninety (90) days prior to the expiration of the current term.

**1.5.3 Contractor Renewal Option.** If the initial term or any renewal term of this Agreement shall end during the life of a cell that has already been built and developed by Contractor, Contractor shall have the option to renew the Agreement for a period based on the estimated life expectancy of that currently existing cell. The estimated life expectancy of the cell shall be determined by mutual agreement of City and Contractor subject to the limitation in Section 1.5.4, and such life expectancy shall be expressed in writing in an amendment to this Agreement and signed by both parties at the time of renewal. Contractor shall not initiate building or developing a new landfill cell during the final two years of the initial term or any renewal term without the express written consent of City.

**1.5.4 Limitation.** Notwithstanding the foregoing Sections 1.5.1-1.5.3, in no event shall the term of this Agreement, including the initial term and any renewals thereof, whether by mutual agreement or Contractor option, exceed twenty (20) years.

## **1.6 Termination.**

**1.6.1 Mutual Agreement.** This Agreement may be terminated at any time by mutual agreement of the parties.

**1.6.2 By City.** This Agreement may be terminated by City upon the following occurrences:

(1) Breach by Contractor of any of the conditions, covenants, or agreements contained herein; or failure of Contractor to dispose of waste as in accordance with Section 2.3 below, upon ten (10) days written notice provided by receipted hand delivery or certified mail, to Contractor by City to cure such breach, covenant, condition, violation, or failure to properly dispose of waste by Contractor. Such notice must define with specificity the alleged breach, act or omission. In the event the alleged breach, covenant, condition, violation or failure cannot be cured within the ten (10) day time period, the City Council shall hold a public hearing to determine whether to extend the time to cure the matter or to cancel this Agreement. If the Council finds that Contractor is making diligent efforts to cure the matter, and that an extension of time will not be detrimental to the public health and safety, the Council may allow such extension of time to cure the breach, covenant, condition, violation or failure as it deems reasonable; or

(2) In the event that City determines through its City Council at public hearing that Contractor is unable or unwilling to perform its obligations hereunder, City may cancel this Agreement upon thirty (30) days written notice to Contractor.

**1.6.3 By Contractor.** This Agreement may be terminated by Contractor upon the following occurrences:

(1) Breach by City of the conditions, covenants, or agreements contained in Sections 3.2 and 3.5 below upon one hundred eighty (180) days written notice provided by receipted hand delivery or certified mail, to City by Contractor to cure such breach, covenant, condition, or violation by City. Such notice must define with specificity the alleged breach, act or omission. In the event the alleged breach, covenant, condition, violation or failure cannot be cured within the ten (10) day time period, Contractor may extend the time to cure the matter or to cancel this Agreement if it finds that City is making diligent efforts to cure the matter. Such extension shall not be unreasonably withheld; or

(2) If Contractor's regulatory or operational costs increase and the City Council denies a rate adjustment duly requested by Contractor pursuant to Section 3.2.6 of this Agreement. Such termination shall become effective upon one hundred eighty (180) days written notice provided by receipted hand delivery or certified mail, to City by Contractor.

**1.6.4 Amounts Due.** Any termination of this Agreement shall not relieve City or Contractor from payment of any sum or sums that shall be due and payable to the other party.

**1.7 Cumulative Remedies.** All rights, options, and remedies of the parties contained in this Agreement or otherwise shall be construed and held to be cumulative, and no one of them shall be exclusive of the other, and the Parties shall have the right to pursue any one or all of such remedies or any other remedy or relief which may be provided by law, whether or not stated in this Agreement.

**1.8 Waiver.** No waiver by either party of a breach of any of the obligations or terms of this Agreement shall be construed or held to be a waiver of any succeeding or preceding breach of the same or any other obligation or term contained in this Agreement.

**1.9 Force Majeure.** Neither City nor Contractor shall be liable for the failure to perform their duties if such failure is caused by a catastrophe, riot, war, strike, accident, or act of nature beyond the reasonable control of Contractor or City. If such circumstances persist for more than thirty (30) days, or if after their cessation, Contractor is unable to render full or substantial performance for a period of thirty

(30) days, the City may terminate this Agreement by giving Contractor ten (10) days advance written notice. In the event Contractor is required to perform additional services as a result of an occurrence as described above, Contractor shall be compensated for the costs of materials, equipment, labor, and landfill based upon rates agreed to by City and Contractor.

**1.10 Independent Contractor Status.** It is the intent of the parties that Contractor, and any of its officers, agents, and employees, shall carry out the terms of this Agreement as an independent contractor and not as an agent, servant or employee of City.

## **II. DUTIES OF CONTRACTOR.**

**2.1 Collecting Waste.** Contractor shall collect waste in the manner set forth in the following Sections 2.1.1 - 2.1.6 and shall dispose of all waste collected by it from premises within the corporate limits of City to the Landfill. No other location may be used for the disposal of such waste without the written consent of City.

Contractor shall provide all labor, supervision, vehicles and equipment necessary to provide for the collection and disposal of containerized or non-containerized solid waste placed for collection as may be established by ordinance or resolution of the City of San Angelo, for the consideration set out herein. Any vehicles or equipment required for the performance of this Agreement shall be provided by Contractor and maintained in a safe and sanitary condition. Location, placement and removal of any dumpsters that may be placed in the City shall comply with City ordinances.

**2.1.1 Residential Waste Service.** Contractor agrees to collect and dispose of all garbage, trash, brush, debris, rubbish or other waste (except those items prohibited in Section 2.1.4 herein or by law) of the residences and businesses of the City of San Angelo, from the streets and alleys within the City limits, for the term of this Agreement. Contractor agrees to maintain a high standard of service for the protection of the health and welfare of the public and in the performance of this Agreement, will use the number of trucks and personnel as required by the amount of solid waste it is required to collect.

**2.1.2 Commercial Waste Service.** Contractor agrees to collect and dispose of all garbage, trash, brush, debris, rubbish or other waste (except those items prohibited in Section 2.1.4 herein or by law) of the commercial businesses of the City of San Angelo, from the streets and alleys within the City limits, for the term of this Agreement. Contractor agrees to maintain a high standard of service for the protection of the health and welfare of the public and in the performance of this Agreement, will use the number of trucks and personnel as required by the amount of solid waste it is required to collect.

**2.1.2.1 Commercial Billing.** Contractor will be responsible for billing and collection of all charges for commercial service in accordance with the rates for commercial waste collection service established by City ordinance or resolution. Contractor shall also be responsible for billing and collection of all charges for any other special solid waste collection services it provides. Contractor further agrees to collect from the customers it is responsible for billing and remit to City, sanitary inspection, landfill expansion and any other related add-on fees which may be hereinafter enacted by City. Contractor also agrees to remit to City an amount equal to four (4%) percent (or such other percentage allowed under Section 3.2.3(4)) of amounts billed under this section excluding any add-on fees authorized by the City, as a fee for granting the permit evidenced by this Agreement, which fee shall be in lieu of any permit fees authorized by City ordinance.

**2.1.3 Schedule.** Contractor will provide waste pickup based on the following schedule:

RESIDENTIAL -	Not less than twice per week
COMMERCIAL-	Not less than once per week

In the event that New Year's Day, Independence Day, Labor Day, Thanksgiving Day or Christmas Day falls on a day regularly scheduled for trash pickup, the residential garbage scheduled for pickup on that day shall be picked up on the next regularly scheduled pickup day following the holiday. Contractor may also alter the schedule for inclement weather or other emergency situation that makes it reasonably impossible to transport waste to the dump site, with the concurrence of the City Manager or his designee. Provided, however, no residential or commercial customer shall be deprived of garbage collection for a period exceeding seven days. When service is suspended for any of the reasons herein, Contractor will notify the radio, television and print news media as soon as possible after such decision is made.

**2.1.4 Prohibited Waste.** Contractor shall not pick up and/or haul waste that is prohibited under federal and/or state law. Further, Contractor shall not be required to pick up and/or dispose of any type of medical waste, liquid waste, automotive tires, oil filters, lead acid batteries, petroleum products and by-products and/or explosive materials. In the event such waste and/or products are found, Contractor shall not provide pick up of the same and/or of the containers in which the waste and/or waste products are located and shall notify the City within forty-eight (48) hours of discovery of same. Contractor shall inform each customer, quarterly, of the types of materials that are acceptable in the waste stream.

**2.1.5 Complaints.** Contractor agrees to respond within a reasonable time to any complaint from the City or any citizen regarding services. Contractor

shall maintain a written log of the source, date and nature of such complaint, the resolution thereof, and shall provide to City a written report of such complaints at least twice annually.

**2.1.6 Recycling Services.** City agrees to and does hereby grant Contractor permission to perform recycling services for residential and commercial customers located in the City of San Angelo. Initiation, carrying on and termination of such services as well as selection of materials to be recycled, locations of recycling containers and selection of markets for the sale of such materials shall be at the sole discretion of Contractor. Such service shall not be exclusive as to Contractor. If any federal or state law, rule or regulation now in effect or that may become effective in the future mandates or regulates recycling, Contractor shall comply with any such law, rule or regulation.

**2.2 Landfill Construction, Operation and Closing.** Contractor shall be responsible for construction, operation and closing of the landfill and disposal areas of the Landfill adhering to City's permit requirements as approved by the Texas Commission on Environmental Quality (hereinafter "TCEQ"). Contractor shall specifically be responsible for performing the following duties and/or assuming the following costs:

1. Construction of liner system.
2. Installation of flexible membrane liner.
3. Installation and operation of leachate collection system. The leachate disposed of in the City's sewer shall be monitored and charges or fees assessed for such disposal as provided by law. Contractor shall notify City prior to disposal of leachate at a rate of fifty (50) or more gallons per minute.
4. Placement of drainage media and liner protection cover.
5. Final closure placement.
6. Installation of upper flexible membrane liner.
7. Construction site drainage and grading.
8. Revegetation of closed cells to meet TCEQ requirements.
9. Construct site fencing and roads.

**2.3 Operation of Municipal Landfill.** Contractor shall provide disposal service at the Landfill for the disposal of solid waste in accordance with all federal and state laws, rules and regulations applicable to the contracted work as such laws, rules and regulations now exist or may be amended during the term of this Agreement or any extensions thereof.

Contractor shall have the duty and responsibility for the operation of the Landfill according to TCEQ Permit No. 79, issued to the City, any amendments and limitations thereof, (hereinafter the "Permit"), which is incorporated by reference and made a part of this agreement for all purposes

the same as if written in full in this Agreement, and any and all state and federal regulations.

**2.3.1 Labor and Equipment.** Contractor shall furnish all labor, supervision, and equipment necessary to provide landfill services to the City. Any vehicles, material or equipment required for the performance of this Agreement shall be provided by Contractor and maintained in a safe and sanitary condition at all times.

**2.3.2 Roads.** Contractor shall be responsible for cleaning up any refuse blown from the Landfill by wind or other natural forces. Contractor shall not be responsible for cleaning up garbage or refuse dumped along the street leading to the Landfill unless it is dumped by Contractor. Contractor shall maintain all weather roads in the Landfill from entrance to dumping areas.

**2.3.3 Sources of Waste.** City shall have the right to landfill its garbage and refuse free of charge so long as such action is in compliance with the Permit and any federal, state or local law or regulation.

It is expressly understood that Contractor shall not dump or deposit or cause to be dumped or deposited at the Landfill, any garbage, refuse, trash, rubbish or miscellaneous waste collected outside of the City limits without the prior written approval of City. Contractor shall exercise due diligence and good faith in determining the source of all solid waste brought to the Landfill, and shall, to the best of its ability, keep accurate records showing the point of origin of all such waste and in any event, shall keep any and all required records in the manner required of an operator or transporter under local, state and federal law and the Permit.

**2.3.4 Landfill Schedule.** Contractor shall keep the Landfill open to the public to accept waste for disposal at the following times:

1. Monday through Friday from 7:00 a.m. to 6:00 p.m.
2. Saturday from 7:00 a.m. to 3:00 p.m.
3. Closed Sunday
4. The Landfill may be closed on the following holidays:

Labor Day  
Memorial Day  
Thanksgiving Day  
Christmas Day  
New Year's Day  
July Fourth

**2.3.5 Waste to be Excluded from Landfill.** Contractor shall inspect all solid waste brought to the Landfill for disposal prior to accepting it for disposal. Contractor shall not accept into the Landfill, waste that is prohibited under federal and/or state law. Further, Contractor shall not be required to and shall not landfill and/or dispose of any type of medical waste, liquid waste, automotive tires, oil filters, lead acid batteries, petroleum products and by-products and/or explosive materials except when properly processed, treated, contained or otherwise handled in accordance with applicable Federal and State laws and regulations. In the event such waste and/or products are found, Contractor shall not allow landfill of the same and/or of the containers or vehicles in which the waste and/or waste products are located and shall notify the City within forty-eight (48) hours of discovery of same. If Contractor inadvertently allows landfill or disposal of such materials, it shall be the sole responsibility of Contractor to have such waste and/or products removed from the Landfill and properly disposed of.

**2.4 Compliance with Laws and Permits.** City has provided Contractor with a copy of its Permit and subsequent amendments. City will provide Contractor with any future amendments thereto. Contractor shall keep a copy of the Permit on site at all times for inspection purposes. Contractor shall do all work under this Agreement and incidental thereto and perform all collection and disposal of waste in compliance with the Permit and any and all city, county, state and federal laws, ordinances or regulations which are now in effect or that may become effective in the future. This Agreement is expressly made subject to the provisions of all pertinent municipal ordinances which are hereby made a part of this Agreement with the same force and effect as if specifically set out herein. Subject to Contractor's right to apply for an increase in the tipping fee charged pursuant to City ordinance, any costs necessitated by compliance with such laws, ordinances or regulations shall be paid entirely by Contractor except as otherwise provided in this Agreement.

**2.4.1 Acts or Omissions/CERCLA.** Contractor covenants and agrees that it will not cause, suffer, allow or permit the occurrence of any act or omission in the execution and performance of this Agreement which act or omission may be or could result in or give rise to any violation of any federal, state or local law, regulation, ordinance or licensing or permitting requirement or which act or omission might give rise to any action at law or equity for personal injury or wrongful death or for damage to property. Specifically, Contractor agrees to comply with the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (hereinafter "CERCLA") and, in addition, with pertinent provisions of both the Texas Water Code and the Texas Solid Waste Disposal Act.

**2.4.2 Impossibility.** If the compliance described in this section is impossible for reasons beyond its control, Contractor shall immediately notify City of the fact and the reasons it cannot comply. Such notice shall not relieve Contractor of its duty to indemnify City as a result of such noncompliance.

**2.4.3 City Intervention.** If the Contract Administrator for the City has reason to believe that Contractor will be unable or unwilling to timely comply with any City, county, state or federal law or regulation, or any permit requirement, or any directive of any nature from a state or federal regulatory agency, City may take whatever steps are necessary to comply with said law, regulation, permit requirement or directive up to and including taking over or subcontracting operation of the Landfill and/or collection of waste for whatever period of time it deems necessary. City shall give Contractor forty-eight (48) hours written notice of its intention to intervene prior to any intervention unless the delay would compromise the City's ability to effectively comply with said law, regulation, permit requirement or directive. Within that forty-eight hours, Contractor may present an alternative plan, hereinafter (the "Alternative Plan"), to the Contract Administrator for Contractor to avoid the scheduled intervention and to avoid being deemed in breach of this Agreement. If any local, state or federal regulatory agency initiates a compliance action of any nature, the Alternative Plan must meet the requirements and comply with any schedule or deadline imposed by such agency. The Contract Administrator shall have full discretion to accept or reject the Alternative Plan and shall reevaluate Contractor's performance in fulfilling the Alternative Plan and complying with the law, regulation, permit requirement or directive as often as he shall deem necessary and expedient.

In the event that the contract administrator determines, after implementation of the Alternative Plan, that it will not effectively resolve the compliance problem, he shall, again issue forty-eight hours written notice to Contractor of the City's intention to intervene.

City shall have the right to assess all reasonable costs of such interventions to Contractor. Intervention by City shall not relieve Contractor of its duty to indemnify City for the results of such noncompliance in accordance with Section 2.7 below.

**2.5 Reports.** Contractor will furnish to City annual operating statements, balance sheets and audits prepared and certified by a Certified Public Accountant, which reports shall be based on Contractor's fiscal year, and, shall be furnished to City within 150 days after the end of Contractor's fiscal year. In the event that Contractor's fiscal year changes during the term of this Agreement or any renewal thereof, Contractor shall notify City in writing of such change and shall submit the required reports within 150 days of the old fiscal year and again 150 days following the new fiscal year for the first year of such change to avoid any gaps in reporting.

**2.6 Taxes, Licenses, Permits and Utilities.** Contractor shall obtain and/or promptly pay the cost of all taxes, state and federal fees, passthroughs and special charges, licenses, permits, and utilities other than those expressly provided by City under this Agreement. Contractor warrants and represents that it is qualified to engage in the business of waste disposal. In the event that certain certification or



licensing is necessary as a result of local, state or federal law to perform the services to be provided, Contractor agrees to secure such certification or license within the prescribed time frame set by the certifying or licensing entity.

## **2.7 Indemnification.**

**2.7.1 General Indemnification.** Contractor agrees to and shall indemnify, save, hold harmless and defend City and its councilmembers, officials, agents, consultants, employees, guests and invitees from and against any and all suits, causes of action, claims, legal proceedings, demands, damages, losses, penalties, fines, expenses, liabilities of every kind, (including strict liability), encumbrances, liens, and costs including all expenses of litigation, court costs, judgments, and attorneys' fees, which may be brought, made or filed by reason of injury to, or death of, any person, or for damages to any property resulting from, or arising out of, or in any manner attributable to, any act of commission, omission, negligence or fault of Contractor, its agents or employees, or the joint negligence of Contractor and any other entity (except City), as a consequence of the execution or performance of this Agreement including the violation or alleged violation of any federal, state or local law, regulation or landfill permit requirement and any resulting injury, death or property damage, save and except for the loss of injury due to the sole negligence of the City, its councilmembers, officials, agents, consultants, employees, guests and invitees. In the event of joint or concurrent negligence of Contractor and City, responsibility, if any, shall be apportioned comparatively in accordance with the laws of the State of Texas.

**2.7.2 Environmental Indemnification.** In addition to the general indemnification in Section 2.7.1 above, Contractor further agrees to and shall indemnify, save, hold harmless and defend City and its councilmembers, officials, agents, consultants, employees, guests and invitees from and against any and all claims and assessments brought by local, state or federal environmental agencies or private concerns in connection with or resulting from the handling, collection, transportation, storage, disposal, treatment, recovery, and/or reuse by any person of waste collected or landfilled pursuant to this Agreement or any cleanup costs associated with environmental contamination, whether such cleanup is of air, soil, ground water or surface water contamination. Contractor specifically agrees to and shall indemnify, hold harmless and defend City against all claims, damages and liabilities of whatever nature under CERCLA. Contractor shall be responsible and liable for any spill, underground pollution or any other environmental impairment incident caused by acts or omissions of Contractor regardless of when such incident is discovered. It is the intent of the parties that this section shall in no way limit the provisions of Section 2.7.1 as it may relate to any environmental claim, damage, loss or liability of any kind.

**2.7.3 Prospective Application.** The indemnity provided for in this Agreement shall survive the expiration of this Agreement and the discharge

of all other obligations owed by the parties to each other hereunder and shall apply prospectively not only during the term of this Agreement but thereafter so long as any liability (including but not limited to liability for closure and post closure costs) could be asserted in regard to any acts or omissions of Contractor in performing under this Agreement.

**2.7.4 Retroactive Application.** The indemnity provided for in this Agreement shall extend not only to claims and assessments occurring during the term of this Agreement but retroactively to claims and assessments that may have occurred during the term of previous agreements between City and Contractor. The indemnity provided shall specifically not extend to the pre-existing underground water problem currently under remediation with the Texas Commission on Environmental Quality.

**2.7.5 Application to Surrounding Property.** The indemnification provisions of this Agreement extend to claims and assessments relating to runoff, leachate, or other infiltration that may occur or has occurred at or near the site of landfills, transfer stations, or other solid waste facilities and surrounding areas which are or were used by the Contractor, during the term of this Agreement or previous agreements between City and Contractor. This section does not make Contractor liable for any site it has never used, closed, managed or monitored.

## **2.8 Insurance.**

**2.8.1 Types and Amounts.** Contractor shall carry and maintain in force continuously during the term of this Agreement the following types of insurance in at least the limits specified below:

<b><u>COVERAGE</u></b>	<b><u>LIMITS OF LIABILITY</u></b>
Workmen's Compensation with waiver of subrogation on behalf of City	Statutory
Employer's Liability	\$300,000.00
Bodily Injury Liability (except automobile)	\$1,000,000.00 Each Occurrence \$3,000,000.00 Aggregate
Property Damage Liability (except automobile)	\$1,000,000.00 Each Occurrence \$3,000,000.00 Aggregate
Automobile Bodily Injury Liability	\$1,000,000.00 Each Person \$3,000,000.00 Each Occurrence

Automobile Property Damages Liability	\$1,000,000.00 Each Occurrence
Environmental Impairment	\$10,000,000.00 Each Occurrence
Liability covering both sudden and non-sudden pollution occurrences	\$30,000,000.00 Aggregate

**2.8.2 Certificates of Insurance.** At the time of execution of this Agreement, Contractor shall furnish City with certificates of insurance as evidence that all of the policies required by this Agreement are in full force and effect and provide the required coverages and limits of insurance. The certificates shall provide that any company issuing an insurance policy shall provide not less than 30-days advance notice in writing of cancellation, nonrenewal or material change in the policy of insurance. In addition, Contractor shall immediately provide written notice to City upon receipt of notice of cancellation of an insurance policy, or of a decision to terminate or alter any insurance policy. All certificates of insurance shall clearly state that all applicable requirements have been satisfied including certification that the policies are of the "occurrence" type. Certificates of insurance and notices of any cancellations, terminations, or alterations shall be mailed in accordance with the notice provisions of this Agreement.

**2.8.3 Additional Insureds.** All insurance policies required herein shall be drawn in the name of Contractor, with City, its councilmembers, partners, officials, directors, agents, and employees named as additional insureds.

**2.8.4 Waiver of Subrogation.** Contractor shall require its insurance carrier, with respect to all insurance policies required herein, to waive all rights of subrogation against the City of San Angelo, its officers, agents, councilmembers and employees.

**2.8.5 Contractor Liability.** The procuring of any insurance policy required herein shall not be construed to be a limitation upon Contractor's liability or as a full performance on its part of the indemnification provisions of this Agreement. Contractor's obligations are, notwithstanding said policy of insurance, for the full and total amount of any damage, injury or loss caused by or attributable to its acts, omissions, negligence or fault as set forth in Section 2.5 and all subsections thereof.

**2.9 Financial Assurance.** Contractor and City agree that federal and state laws and regulations currently require financial assurance by owners and operators to demonstrate financial ability to perform operation, closure and post closure functions of a landfill site for thirty years after its closure.

**2.9.1 Closure Costs.** Contractor agrees to and shall perform, or cause to be performed, all landfill closure functions in accordance with state and federal laws and the Permit. Contractor agrees to submit to City the following documents and financial instruments to demonstrate that Landfill cells are being utilized and closed in a cost efficient manner, and to demonstrate Contractor's financial ability to carry out such functions.

**2.9.2 Schedule of Work for Development, Utilization and Closure of Landfill.** Contractor shall deliver to City within ninety days after execution of this Agreement, an initial Schedule of Work for Development, Utilization and Closure of the Landfill, (hereinafter the "Initial SOW") in a form acceptable to the City. The Initial SOW shall cover the period starting ninety days from the effective date of this Agreement and ending four years from that date. Thereafter, Contractor shall prepare and submit to City a new Schedule of Work for Development, Utilization and Closure of the Landfill for each two-year period thereafter. Each new SOW shall be submitted to the City ninety days before the expiration of the previous SOW.

The Initial SOW and each subsequent SOW submitted by Contractor shall:

1. outline the status and percentage of capacity used for each of the existing cells at the Landfill as of the beginning of the period covered by the SOW;
2. describe the number and location of any new cells that are being planned or developed for the period covered by the SOW;
3. describe the number and location of any cells that Contractor anticipates will be used during the period covered by the SOW; and
4. describe the number and location of any cells that Contractor anticipates will be closed during the period covered by the SOW.

**2.9.3 Estimate of Cost.** The Initial SOW and all subsequent SOW's shall contain an estimate of the cost of any closures anticipated within the period covered by the SOW. The cost estimate shall be determined by using the methodology set forth in 30 TAC §330.281(2000).

**2.9.4 Review of SOW and Estimate of Cost.** City shall review the Initial SOW and all subsequent SOW's and the City's Public Works' Director shall notify Contractor in writing within fifteen (15) days of receipt of the SOW and Cost Estimate whether the City approves of the SOW. If the City withholds approval of any SOW, the Public Works Director shall inform Contractor in writing at the time of the notice what specific items are not acceptable and Contractor shall have an additional thirty days to prepare a revised SOW.

**2.9.5 Corporate Guaranty.** Within thirty days of receiving the written approval of the Initial SOW or any subsequent SOW from the City, Contractor shall furnish to City a Corporate Guaranty in a form acceptable to the City, for the full amount of the cost estimate referenced in Section 2.9.3 above for the period covered by the SOW. The Corporate Guaranty shall be executed by a duly authorized officer of Republic Services, Inc., a Delaware corporation, (the "Guarantor") on behalf of Contractor, which is Guarantor's subsidiary.

**2.10 Nondiscrimination.** Contractor shall not discriminate against any person because of their race, sex, age, creed, color, religion, national origin, disability or any other impermissible basis.

**2.11 City Manager.** Contractor shall be directly responsible to the City Manager of the City in the performance of its obligations under this Agreement.

### **III. DUTIES OF CITY.**

**3.1 Maintenance of Alleys.** City shall have the sole responsibility for the maintenance of all public alleys within the corporate limits of the City, including alley surfaces, and the removal of overhanging brush and other obstructions in alleys which prevent Contractor's equipment from passing through the alleys. Contractor agrees to cooperate with City by notifying City of any problem areas in alleys. Contractor shall notify the City Manager in writing of any alley which is impassable, and, thereafter, Contractor shall be relieved of providing service in such alley until it is made passable by City.

### **3.2 Billing and Collection.**

**3.2.1 Residential Service Billing.** City agrees to submit along with its water bill each month, a bill to each residential customer and small business using residential waste collection services of Contractor based on rates established in accordance with ordinance or resolution of the City of San Angelo for services actually provided. The customer will then remit payment to the City through its Water Department.

**3.2.2 Payment to Contractor.** Subject to the deductions set forth in subsection 3.2.3 below, and exclusive of any sales taxes collected for waste collection service, City will pay over to Contractor within fifteen (15) days of the first of the month, all sums billed by City for waste collection service in the previous month.

### **3.2.3 Deductions.**

(1) The total of all waste collection bills remaining unpaid ninety (90) days after the date of the first billing to the customer.

(2) The amount of all sanitary inspection fees and state and local landfill surcharge fees billed for the previous month as provided by ordinance.

(3) Four per cent (4%) of the total amount billed for waste collection service in the previous month after it is reduced by the amounts withheld under Section (1) and (2) above, as the City's fee for billing and collecting.

(4) Four percent (4%) of the total amount billed for waste collection service in the previous month after it is reduced by the amounts withheld under Section (1) and (2) above, as a fee for granting the permit evidenced by this Agreement, which fee shall be in lieu of any permit fees authorized by City ordinance. The City, through its City Council, may from time to time after due notice to Contractor revise the permit fee, but in no event shall it exceed applicable state law. It is expressly understood that should the fee for granting such franchise permit by the City to the electrical, gas and cable companies increase, Contractor's fee shall then be raised by the same amount after thirty (30) days notice by City to Contractor, and that the City Ordinance setting applicable rates for trash collection shall be adjusted to reflect a pass through of such increase in permit fee. The City also reserves the right to provide for the addition of new fees as provided for by new state laws and/or City ordinances.

**3.2.4 Billing List.** City shall provide to Contractor upon signing, and annually thereafter on the anniversary date of this Agreement, a complete list of addresses of residential waste disposal customers. Thereafter, City shall provide to contractor a monthly list of additions and terminations of customer accounts (by address only) for the previous month. It is understood and agreed to by the parties hereto that City shall use this list as a basis for determining the total amount billed for the previous month and such amount shall be paid over to Contractor less the deductions set forth in Subsection 3.2.3.

**3.2.5 Retention for Default.** Should Contractor fail to carry out its obligations hereunder, then City may, at its option and after thirty (30) days written notice to Contractor, retain all waste collection fees collected and hold same in suspense until Contractor corrects its defaults under this Agreement.

**3.2.6 Adjustments in Rates.** Nothing contained in this Agreement shall limit the right of Contractor to request adjustments in its rates for services and to receive such adjustments as are justified in the discretion of the City Council of the City of San Angelo.

**3.3 Landfill Site.** During the term of this Agreement and any extensions allowed hereunder, City agrees to lease the Landfill to Contractor in accordance with Section 1.2 hereof. In the event the Landfill is used up and exhausted during the term of this Agreement or the term of any renewals hereof, then the City may at its option provide another sanitary landfill complying with State and Federal laws. If City

does not provide another sanitary landfill, Contractor may, at its option, be released from providing any further services under this Agreement. Provided, however, any such release shall not be construed to be a release of Contractor from its duties under the indemnification provisions of this Agreement or any other provisions of this Agreement that expressly survive termination of the Agreement. Any alternative landfill site furnished by the City pursuant to this section shall be leased to Contractor for the remainder of the term of this Agreement or extensions hereof and shall be maintained by Contractor according to the provisions herein. The amount of the lease payments for such landfill site shall be negotiated between the City and Contractor. The lease of the new landfill site shall begin on the date that it becomes necessary for Contractor to begin utilization of such landfill for the disposal of garbage and refuse.

**3.4 Landfill Design and Costs.** City shall be responsible for designing the Landfill in accordance with applicable Federal, State and Local laws. Contractor shall not be responsible for performing the following functions and/or assuming the following costs associated with the Landfill:

1. Permit fees and permit modification fees, including the costs of engineers and consultants to obtain permits from TCEQ.
2. Ground water and methane gas sampling.
3. All costs of quality assurance, quality control, professionals and laboratory testing during planning, construction and testing.
4. Closure inspection and testing.
5. Site monitoring and maintenance after completion of closure of cells.
6. Leachate disposal costs during operation and after closure of cells.

**3.5 Compliance with Laws and Permits.** City warrants and represents that it shall timely perform all of its obligations hereunder and shall at no time knowingly request Contractor to take any action with regard to waste disposal services which would or could violate any federal, state, county and/or city statutes, ordinances, laws, regulations, licensing or permitting requirements. Further, City warrants and represents, that to its knowledge, it has taken all actions which are necessary and/or provided for in accordance with all federal, state, county, city, and/or local statutes, laws, ordinances, and regulations to legally enter into and execute this Agreement so as to render the same effective and binding upon the City under the terms and conditions stated herein. In the event that City learns that further action is necessary to comply with the meaning of this Section 3.5, City will take such action within a reasonable time.

#### IV. MISCELLANEOUS PROVISIONS.

**4.1 Assignment.** Contractor may not assign this Agreement or any rights, duties and obligations thereunder without the prior written consent of City and, in the event of an attempted assignment by Contractor of this Agreement without the express prior written consent of City, such attempted assignment shall be void and without effect. This prohibition of assignment by Contractor without consent shall extend to and include assignment of the proceeds as well as performance.

City may assign its rights and privileges under this Agreement by giving Contractor ninety (90) days notice of the assignment.

**4.2 Parties Bound.** This Agreement is binding on and inures solely to the benefit of the parties and their respective successors, legal representatives, heirs and permitted assigns, and no other person shall have any legal or equitable right, remedy or claim under or in respect of or by virtue of this Agreement or any provision herein contained.

**4.3 Construction.** The language of this Agreement shall be construed according to its fair meaning and not strictly for or against either party. All words in this Agreement refer to whatever number or gender the context requires. Headings are for convenience and reference and are not intended to define, limit or extend the scope of any provision of this Agreement. All the terms and words used in this Agreement, regardless of the number and gender in which they are used, shall be deemed and construed to include any other number (singular and plural) or any other gender (masculine, feminine or neuter) as the context or sense of this Agreement, or any section or cause hereof may require. The locative adverbs "herein," "hereunder," "hereto," "hereinafter," and like words wherever the same appear herein, mean and refer to this Agreement in its entirety and not to any specific paragraph, section or subsection hereof unless otherwise expressly designated in context.

**4.4 Governing Law/Venue.** This Agreement is made and performable in Tom Green County, Texas, and shall be interpreted in accordance with the laws of the State of Texas. Venue for any legal action arising out of this Agreement shall lie in any court of competent jurisdiction in Tom Green County, Texas.

**4.5 Incorporation by Reference.** All permits, ordinances, agreements, exhibits, attachments or annexes referred to herein whether or not attached hereto are incorporated by reference and made a part of this Agreement for all purposes, the same as if written in full in this Agreement.

**4.6 Entire Agreement.** This Agreement and the instruments called for and/or incorporated by reference in this Agreement contain all of the covenants, statements, representations and promises agreed to by the parties and supersede any commitment, agreement, memorandum, understanding, stipulation or representation previously made by the parties or their agents or employees. No



agent of either party has authority to make, and the parties shall not be bound by, nor liable for, any covenant, statement, representation or promise not set forth herein.

**4.7 Amendments.** No amendment to this Agreement shall be effective unless such is in writing and signed by both parties.

**4.8 Counterparts.** This Agreement may be executed in any number of counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument. This Agreement shall not become effective until executed by both parties.

**4.9 Severability.** In the event one or more provisions of this Agreement shall for any reason be held invalid, illegal, or unenforceable in any respect, as to any person or set of circumstances, such holding shall not affect the validity of any remaining provision of this Agreement or that provision's application to other persons not similarly situated or to other circumstances, and the Agreement shall be construed as if such invalid, illegal, or unenforceable provision had not been contained in it.

**4.10 Attorney's Fees and Costs.** If any action at law or in equity is necessary to enforce or interpret the terms of this Agreement, the prevailing party shall be entitled to reasonable attorney's fees, costs and necessary disbursements in addition to any other relief to which such party may be entitled.

**4.11 Notice.** Any formal notice required or permitted under this Agreement shall be deemed sufficiently given if it is in writing and personally delivered or deposited in the United States mail, postage prepaid and sent by registered or certified mail (return receipt requested) to the party to whom said notice is to be given. Notices delivered in person shall be deemed to be served effective as of the date the notice is delivered. Notices sent by registered or certified mail (return receipt requested) shall be deemed to be served seventy-two (72) hours after the date said notice is postmarked to the addressee, postage prepaid. Until changed by written notice given by one party to the other, the addresses of the parties shall be as follows:

Contractor: Lawrence Kennedy, Vice President  
Republic Waste Services of Texas,  
a Texas Limited Partnership, d.b.a.  
Trashaway Services  
1422 Hughes  
San Angelo, Texas 76903

City: City Manager  
City of San Angelo  
P.O. Box 1751  
San Angelo, Texas 76903

**4.12 Survival of Covenants and Conditions.** It is expressly agreed that all covenants and conditions regarding the rights and obligations of the parties subsequent to the termination of this Agreement shall survive the termination and shall continue in full force and effect in accordance with the terms of the specific provision.

**4.13 Payment.** All sums payable under this Agreement are payable in U.S. currency and shall be paid to Contractor or City at the places provided herein for service of notice to said party.

EXECUTED in duplicate originals at San Angelo, TX on the dates specified below.

CITY OF SAN ANGELO

BY: J. W. Lown  
J. W. Lown, Mayor

Date: July 6, 2004

ATTEST:

BY: Kathy Keane  
Kathy Keane, City Clerk

REPUBLIC WASTE SERVICES OF TEXAS  
a Texas Limited Partnership

BY: Kevin Kenech  
Name

Title Vice President

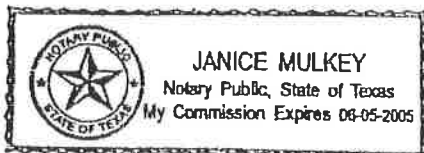
Date: 8-4-04

ATTEST:

BY: Janice Mulkey

Name: JANICE MULKEY

Title: CONTROLLER



## EXHIBIT B



1422 Hughes Ave  
San Angelo, TX 76903

A division of REPUBLIC SERVICES

### Account Summary

Account Number 3-0891-2403516  
Invoice Date December 31, 2011  
Invoice Number 0891-000387966  
Previous Balance \$84.58  
Payments/Adjustments -\$84.58  
Unpaid Balance \$0.00  
Current Invoice Charges \$86.01

### Pay This Amount

**\$86.01**

Due By: 01/20/12

### Contact Information

Customer Service (325) 653-6957

### Important Information

We now have a toll free phone number for you to use to pay your bill. It is called the IVR Bill Pay System. It is fast, easy to use and payments are posted within 24 hours. You can use your checking or savings, VISA, MasterCard, American Express, Discover or debit card. Please call 1(877)692-9729 and start using the free service today!

To pay on-line or sign up for  
convenient auto pay, go to:  
[www.disposal.com](http://www.disposal.com)

## ACME IRON AND METAL

Invoice

Page 1 of 2

### Payments/Adjustments

Date	Description	Reference	Amount
12/28	Payment - Thank You	3396	-\$84.58

### Current Invoice Charges

Acme Iron And Metal 720 N Buchanan St (L1)  
San Angelo, TX

Contract: 9691011 (C11)

1 - Front Load (4 Yd) Scheduled Service (\$1)

Date	Description	Reference	Quantity	Unit Price	Amount
12/31	Basic Service 01/01/12-01/31/12		1.0000	\$80.67	\$80.67
	Total Fuel/Environmental Recovery Fee				\$16.72
	Total Franchise - Local				\$3.06
	Total Franchise Fee Tax				\$0.25
	Total State Tax				\$6.31
	Current Invoice Charges				\$86.01

A/P Received  
JAN 11 2012

*Handwritten note:* 01/11/2012

CURRENT	30 DAYS	60 DAYS	90+ DAYS
86.01	0.00	0.00	0.00

C A

- Visit our website, [www.disposal.com](http://www.disposal.com) to make your payment electronically or to sign up for our convenient automatic payment plan.
- Please see reverse side for terms and conditions

## EXHIBIT C

**Exhibit C**

**Calculation of estimated unauthorized amounts invoiced by Republic Waste Services of Texas, LTD to individual businesses, schools and institutions in excess of City Council approved Ordinance rates for Commercial Frontload and Commercial Rolloff Customers in the City of San Angelo, Texas since 2000 and using reported revenue from Republic audited financial statements for the years 2011 and 2012**

Year	Commercial Frontload Services				Commercial Roll off Services				Combined Commercial Services			
	Assumed Growth % (2)	Estimated Commercial Annual Ordinance Revenue (1)	Estimated Unauthorized Charges Per Year (3)	Estimated City Franchise Fee and Sales Tax Portion of Unauthorized Charges (4)	Assumed Growth % (2)	Estimated Annual Roll off Revenue (1)	Estimated Annual Unauthorized Charges (3)	Estimated City Franchise Fee and Sales Tax Portion of Unauthorized Charges (4)	Total Estimated Unauthorized Charges Per Year (3)	Estimated City Franchise Fee and Sales Tax Portion of Unauthorized Charges (4)		
1997		\$ 2,515,255	\$ 0	\$ 0	1.0%	\$ 1,038,586	\$ 0	\$ 0	\$ 0	\$ 0		
1998	1.0%	2,589,777	0	0	1.0%	1,069,358	0	0	0	0		
1999	1.0%	2,883,126	0	0	1.0%	1,190,486	0	0	0	0		
2000	1.0%	3,009,872	102,059	9,525	1.0%	1,242,821	42,142	3,933	144,200	13,459		
2001	1.0%	3,040,275	103,090	9,622	1.0%	1,255,375	42,567	3,973	145,657	13,595		
2002	1.0%	3,070,985	104,131	9,719	1.0%	1,268,055	42,997	4,013	147,128	13,732		
2003	1.0%	3,102,005	142,625	13,312	1.0%	1,280,864	58,892	5,497	201,517	18,808		
2004	1.0%	3,133,338	61,239	5,432	1.0%	1,347,270	26,331	2,336	87,570	7,767		
2005	1.0%	3,290,643	146,902	16,039	1.0%	1,414,907	63,165	6,896	210,067	22,935		
2006	1.0%	3,323,882	304,231	33,431	1.0%	1,429,199	130,813	14,374	435,044	47,805		
2007	1.0%	3,357,456	348,302	38,301	1.0%	1,443,636	149,763	16,469	498,065	54,770		
2008	1.0%	3,391,370	643,829	72,858	-12.0%	1,288,960	244,701	27,691	888,530	100,550		
2009	1.0%	3,425,626	436,114	49,352	1.0%	1,301,980	165,754	18,757	601,868	68,110		
2010	1.3%	3,468,989	627,023	70,956	1.3%	1,318,461	238,313	26,968	865,336	97,925		
2011	1.5%	3,521,816	837,200	94,741	1.5%	1,338,539	318,195	36,008	1,155,395	130,749		
2012	2.1%	3,579,359	978,500	110,731	2.1%	1,501,662	410,514	46,455	1,389,014	157,186		
2013	2.5%	3,419,976	1,128,345	127,688	2.5%	1,066,860	351,987	39,832	1,480,331	167,520		
thru 06-2014	2.8%	1,799,712	666,267	75,397	2.8%	561,169	207,749	23,510	874,016	98,907		
			<b>\$6,629,856</b>	<b>\$737,104</b>			<b>\$ 2,493,882</b>	<b>\$ 276,714</b>	<b>\$ 9,123,738</b>	<b>\$ 1,013,818</b>		

**Assumptions**

- (1) Customer Matrix information (container quantities, sizes and frequency of service) provided by City staff during the RFP process applied to current ordinance rates yields estimated annual frontload container service charges of \$3,419,976 and annual roll off container service charges of \$1,066,860. These numbers were used to estimate amounts invoiced for 2013 and through June 2014. Republic audited financial statements obtained on May 15th through an Open Records Request to the City of San Angelo show commercial revenue from accounts within the San Angelo City limits of \$3,579,359 and \$3,521,816 and roll off revenue of \$1,501,662 and \$1,338,539 for the years 2012 and 2011, respectively. Reported revenue was used to estimate amounts invoiced for years prior to 2011. Actual annual invoice amounts will not be known until there has been a complete audit or litigation discovery to determine the actual gross revenues from which the unauthorized overcharges and the excess portion of the franchise fees were derived.
- (2) Prior year billings back to 1997 were calculated based on estimated growth rates of 1% to 2.8% as provided by the San Angelo Chamber of Commerce. A -12% decrease was used for roll off services for the year 2008. These numbers are an estimate, as Plaintiff has no knowledge of actual billings other than those of the original Plaintiff and a few other companies in the market. These assumptions and calculations are intended to show one method for the calculation of total estimated unauthorized charges. Plaintiff believes the gross revenue, as well as the estimated overcharges to be greater than estimated above.
- (3) The rate ordinance adopted 8/3/04 appears to have allowed for a flat rate fuel surcharge to be charged to commercial customers based on container size and pickup frequency. Plaintiff has found no record of previous commercial rate ordinances, and subsequent rate ordinances have indicated no change to fuel surcharge rates. The flat rate monthly fuel surcharge allowed over the past ten years for a 4 cu.yd. container serviced once per week appears to be \$1.32 per month. This amount was deducted from the Fuel/Environmental Recovery Fees (FERF) amounts invoiced in order to calculate the percentage used to estimate the total unauthorized charges. This amount includes franchise fees and sales tax.
- (4) City of San Angelo franchise and sales tax overcharge portion of unauthorized charges was calculated using the authorized franchise fee % as approved by Ordinance and 8.25% sales tax. The amount of the franchise fee was 2% thru August of 2004, and 4% thereafter. The franchise fee was charged on all Fuel/Environmental Recovery Fee (FERF) overcharge amounts applied to invoices by Republic. Sales tax was applied on all FFERF overcharge amounts and to franchise fees beginning January 2008.