

**NON-EXCLUSIVE FRANCHISE AGREEMENT  
BETWEEN  
THE CITY OF SAN JOSE  
AND  
FRANCISCO TOCA, DBA TOCA DEBRIS BOX SERVICES**

This Agreement is made and entered into this 1st day of July, 2021 by and between the City of San José, a municipal corporation ("City"), and Francisco Toca, doing business as Toca Debris Box Services, a sole proprietor authorized to transact business in the State of California ("Franchisee") for the purpose of providing collection, transportation, and delivery services for residential clean-out material and construction and demolition debris in the City of San José.

**RECITALS**

This Agreement is entered into with reference to the following facts and circumstances:

- A. Franchisee has applied to City for a Non-Exclusive Franchise under San José Municipal Code, Chapter 9.10, Part 11 ("Franchise"); and
- B. On May 18, 2021 the City Council held a public hearing for the purpose of hearing persons in favor of or in opposition to the granting of such Franchise; and
- C. The City Council has determined that the grant of such Franchise to Franchisee is in the public interest; and
- D. The City and Franchisee desire to enter into a Non-Exclusive Franchise Agreement so that Franchisee may perform collection, transportation and delivery services for residential clean-out material and construction and demolition debris in the City of San José.

**NOW, THEREFORE**, for good and valuable consideration, the amount and sufficiency of which is hereby acknowledged, the City and Franchisee hereby agree as follows:

**SECTION 1. DEFINITIONS**

For the purpose of this Agreement, the definitions contained in this Section 1 will apply unless otherwise specifically stated. If a word or phrase is not defined in this Section 1,

the definition of such word or phrase as contained in Chapter 9.10 of the San José Municipal Code will control. When not inconsistent with the context, words used in the present tense include the future, words in the plural include the singular, and words in the singular include the plural. Use of the masculine gender includes the feminine gender.

A. Agreement

**“Agreement”** means this written document and all amendments thereto, between City and the Franchisee, governing the provision of services provided herein, including all exhibits hereto, as it may be amended from time to time Applicable Law.

B. Applicable law

**“Applicable law”** means all federal, state, and local laws, regulations, rules, orders, judgements, degrees, permits, approvals, or other requirements of any governmental agency having jurisdiction over the Collection, Transportation, Recycling, and Delivery of Construction and Demolition Debris and Residential Cleanout material that are enforced on the Effective Date as they may be enacted, issued, or amended during the Term of this Agreement.

C. Change in Law

**“Change in law”** means the adoption, promulgation, or modification of any generally applicable and enforceable federal, state, local joint power authority (JPA), or foreign rule, law, regulation, ordinance, order, judgement, decrees, permit or administrative agency guidelines (executing orders, judgement, and decrees specific to a particular facility) duly adopted and promulgated officially in writing for uniform application occurring after the Effective Date. Change in law does not include changes initiated by the Franchisee. Change in law shall not include laws enacted and adopted prior to the Effective date or laws particular to solid waste, recycling, C&D and residential cleanout material collection, hauling, and delivery industry that are enacted, adopted or approved prior to the Effective Date of this Agreement but initially become effective after such date.

D. City

“**City**” means the City of San José, California, a municipal corporation.

E. City-Certified C&D Facility

“**City Certified C&D Facility(ies)**” means a lawfully authorized and permitted facility by the City of San Jose, that will receive, process, bale, store, transfer, and otherwise recover and Recycle any Recyclable Material from Franchisee collected C&D Debris and Residential Clean-Out Material for reuse or sale to other processors or manufacturers. These facilities are part of San Jose’s CDDD program, are audited at least bi-annually, submit monthly reports, and meet the required minimum Diversion percentage set forth in regulations promulgated by the Director of Environmental Services.

F. City C&D Contract Manager

“**City C&D contract manager**” means the City representative who is the point of contact for this agreement.

G. Construction and Demolition Debris (“C&D Debris”)

“**Construction and Demolition Debris**” means:

Recyclable and non-recyclable waste building materials, packaging, and rubble resulting solely from construction, remodeling, repair and demolition operations on any house, residential property, commercial, building, pavement or other structure for which the City requires a building or demolition permit issued under Chapter 24.02 of San Jose municipal Code or from a non-permitted municipal project and pursuant to a temporary service agreement of no longer than (1) year; or

1. Rock, concrete, asphalt and dirt.
2. Construction and demolition debris may include materials that have been source separated

H. Construction and Demolition Diversion Program (CDD)

**“Construction and Demolition Diversion Program”** (CDD) is a two-pronged approach program that includes the Construction and Demolition Diversion Deposit (CDDD) and the Construction and Demolition Review and Final (CDD Review and Final).

1. “Construction and Demolition Diversion Deposit” (CDDD) is an incentive program to deter Customers from disposing of C&D Debris in landfills and it has the same meaning as defined in Chapter 9.10, Part 15 of the San Jose Municipal Code.
2. Construction and Demolition Review and Final (CDD Review and Final) is a process that responds to the State of California Green Building requirements for new construction (CalGreen) and has the same meaning as defined in San Jose Municipal Code Section 9.10.2480.

I. Customer

**“Customer”** means the person or persons initiating construction, remodeling, repair or demolition operations on any house, residential property, commercial building, pavement or other structure for which City requires a building or a demolition permit, who generates Construction and Demolition Debris or Residential Clean-Out Material, and who has arranged for collection services as provided under this Agreement. The definition of Customer also includes any agent, contractor, or other persons working on Customer’s behalf.

J. Director

**“Director”** means the Director of Environmental Services or designee.

K. Disposal or Dispose

**“Disposal or Dispose”** means the disposition of Construction and Demolition Debris and Residues at a disposal site or landfill.

L. Divert or Diversion

**“Divert or Diversion”** means the avoidance of Disposal at the landfill, or through “transformation” as defined by Public Resources Code Section 40201, of any materials collected pursuant to this Agreement, through processing.

M. Front-Load Container

**“Front-Load Container”** means a collection container designed to be emptied mechanically by a collection vehicle, is constructed of metal or plastic, and is one (1) to eight (8) cubic yards in size.

N. Incidental Contamination

**“Incidental Contamination”** means twenty (20) percent or less, by volume or weight, of solid waste. Incidental contamination is based on the Recyclable Material Processing facility weight tag classification of the material as “non-recyclable”, “trash”, “rubbish”, “MSW” or other name that indicates landfilling of the material. Incidental contamination is not based on application of the Recycling Material Processing Facility Diversion rate.

O. Liquidated Damages

**“Liquidated damages”** means the amounts due by Franchise to City for failure to meet specific quantifiable standards of performance as described in EXHIBIT A.

P. Recycle

**“Recycle”** means handling, separating, processing, sorting, cleansing, treating, and reconstituting material that would otherwise be disposed in a landfill and returning it to the economic mainstream in the form of raw material for new, reused, or reconstituted products which meet the quality standards necessary to be used in the marketplace. Recycling also includes any processing, energy conversion, beneficial reuse, or other activity deemed to be Recycling under the statutes or regulations enforced by the Department of Resources Recycling and Recovery (“CalRecycle”) with the exception that Recycle shall not include use as landfill alternative daily cover.

Q. Recyclable Material

**“Recyclable Material”** means glass, paper, cardboard, clean wood, concrete, aggregate, plastic, ferrous and non-ferrous metal, aluminum and any other materials that are capable of being Recycled. Recyclable Material also includes any materials defined in Chapter 9.10 of the Municipal Code or City regulation.

R. Recyclable Material Processing Facility

**“Recyclable Material Processing Facility”** means a lawfully authorized and permitted facility, selected by the Franchisee, that will receive, sort, process, bale, store, and otherwise recover and Recycle any Recyclable Material from Franchisee collected C&D Debris and Residential Clean-Out Material only for reuse or sale to other processors or manufacturers.

S. Residential Clean-Out Material

**“Residential Clean-Out Material”** means material resulting from the cleaning out of residential premises and collected in roll-off or front-load containers rented for a period of one (1) week or less.

T. Residue

**“Residue”** means the material remaining after Recycling that cannot be Recycled and is Disposed of in a landfill.

U. Process, Processed, or Processing

**“Process, Processed, or Processing”** (or any variation thereof) means an operation or a series of operations, whether involving equipment, manual labor, or mechanical or biological processes that sorts, enhances, upgrades, concentrates, decontaminates, packages or otherwise prepares Recyclable Material and returns marketable elements to the economic mainstream in the form of raw material for new, reused or reconstituted products.

V. Roll-Off Container

**“Roll-Off Container”** means a metal container that must be loaded on a collection vehicle. Roll-Off containers may have capacities up to forty (40) cubic yards. A Roll-Off Box may be open-topped or covered at the discretion of City with or without a compaction unit.

W. Source Separated

**“Source Separated”** means materials that have been segregated from Construction and Demolition Debris, for the purpose of Diversion, by or for the Customer at the service address at which the materials were generated.

X. Subcontractor

**“Subcontractor”** means a party who has entered into a contract, express or implied, with the Franchisee for the performance of an act for the Franchisee’s fulfillment of its obligations under this Agreement.

Y. Tonnage

**“Tonnage”** means the total weight in tons collected, Recycled, Diverted, or Disposed of, as the context requires, where a ton is equivalent to two thousand (2,000) standard pounds.

**SECTION 2. GRANT OF FRANCHISE**

Pursuant to the Ordinance approved by the City Council on May 18, 2021, City has granted to Franchisee a Non-Exclusive Franchise authorizing Franchisee to engage in the business of collecting, transporting and disposing of Residential Clean-Out Material and C&D Debris kept, accumulated or generated in the City of San José and to use the public streets and rights of way for such purpose.

Franchisee acknowledges that the Franchise granted in this Agreement is not exclusive and that Franchise is subject to the terms and conditions specified in Article XIII of the City Charter, the terms and conditions specified in the Ordinance, the provisions of

Chapter 9.10 of the San José Municipal Code, and the terms and conditions of this Agreement.

## **2.1. Representation and Warranties**

The Franchisee, by execution of this Agreement, represents and warrants the following to the City, for the purpose of inducing City to enter into this Agreement and to consummate the transactions contemplated hereby:

- A. **Corporate Status.** Franchisee is duly organized, validly existing and in good standing under the laws of the State. It is qualified to transact business in the City and State and has the power to own its properties and to carry on its business as now owned and operated and as required by this Agreement.
- B. **Authorization.** Franchisee has the authority to enter into this Agreement and to perform its obligations under this Agreement. The Council of Franchisee (or the shareholders, if necessary), sole proprietor, or partners have taken all actions required by law, its articles of incorporation, its bylaws, or otherwise, to authorize the execution of this Agreement. The Person signing this Agreement on behalf of Franchisee represents and warrants that they have authority to do so. This Agreement constitutes the legal, valid, and binding obligation of the Franchisee.
- C. **Agreement Will Not Cause Breach.** To the best of Franchisee's knowledge after reasonable investigation, the execution or delivery of this Agreement or the performance by Franchisee of its obligations hereunder does not conflict with, violate, or result in a breach: (i) of any law or governmental regulation applicable to Franchisee; (ii) any term or condition of any judgment, order, or decree of any court, administrative agency or other governmental authority; or, (iii) any Agreement or instrument to which Franchisee is a party or by which Franchisee or any of its properties or assets are bound, or constitute a default thereunder.
- D. **No Litigation.** To the best of Franchisee's knowledge after reasonable investigation, there is no action, suit, proceeding or investigation, at law or in equity, before or by any court or governmental authority, commission, board, agency or instrumentality decided, pending or threatened against Franchisee

wherein an unfavorable decision, ruling or finding, in any single case or in the aggregate, would:

1. Materially adversely affect the performance by Franchisee of its obligations hereunder;
  2. Adversely affect the validity or enforceability of this Agreement; or,
  3. Have a material adverse effect on the financial condition of Franchisee, or any surety or entity guaranteeing Franchisee's performance under this Agreement.
- E. **No Adverse Judicial Decisions.** To the best of Franchisee's knowledge after reasonable investigation, there is no judicial decision that would prohibit this Agreement or subject this agreement to legal challenge.
- F. **No Legal Prohibition.** To the best of Franchisee's knowledge after reasonable investigation, there is no Applicable Law in effect on the date Franchisee signed this Agreement that would prohibit Franchisee's performance of its obligations under this Agreement and the transactions contemplated hereby.
- G. **Franchisee's Statements.** Franchisee's application and any other supplementary information submitted to the City, which City has relied on in entering this Agreement, do not: (i) contain any untrue statement of a material fact; or, (ii) omit to state a material fact that is necessary in order to make the statements made, in light of the circumstances in which they were made, not misleading.
- H. **Franchisee's Investigation.** Franchisee has made an independent investigation (satisfactory to it) of the conditions and circumstances surrounding the Agreement and the work to be performed hereunder. Franchisee has considered such matters in entering this Agreement to provide services in exchange for compensation provided by the Customer under the terms of this Agreement.
- I. **Ability to Perform.** Franchisee possesses the business, professional, and technical expertise to Collect, Transport, and Deliver Construction and Demolition Debris and Residential Cleanout material generated by the permit holders in the City of San Jose. Franchisee possesses the equipment, and employee resources required to perform its obligations under this Agreement.

### **SECTION 3. TERM OF FRANCHISE**

#### **3.1 Effective Date**

Subject to Section 19 of this Agreement, the term of the Non-Exclusive Franchise granted to Franchisee is commencing on the Effective Date of July 1, 2021 through June 30, 2022.

The Director may, in the Director's discretion, extend the term of this Agreement and the Franchise for up to one year. Any such extension of the term of this Agreement and the Franchise will be given in writing and is not effective until accepted by Franchisee in writing.

#### **3.2 Conditions to Effectiveness of Agreement**

The obligation of City to permit this Agreement to become effective and to perform its undertakings provided for in this Agreement is subject to the satisfaction of all the conditions below, each of which may be waived, in written form, in whole or in part by City.

- A. **Accuracy of Representations.** The representations and warranties made in this Agreement are true and correct on and as of the Effective Date.
- B. **Absence of Litigation.** There is no litigation pending on the Effective Date in any court challenging the award or execution of this Agreement or seeking to restrain or enjoin its performance.
- C. **Furnishings of Insurance.** Franchisee has furnished evidence of the insurance required by Section 13 that is satisfactory to City.
- D. **Effectiveness of City Council Action.** The City Council's action approving the form of this Agreement shall have become effective and all Parties shall have signed the Agreement Pursuant Applicable law prior to or on the Effective Date, provided that no restraining order of any kind has been issued.

## **SECTION 4. RECORD KEEPING AND REPORTING**

### **4.1 Retention Of Records**

- A. Franchisee must keep and maintain books of account and other records showing all business transactions conducted by Franchisee in connection with this Agreement. Such records must be kept at Franchisee place of business shown in Section 22 of this Agreement for receipt of notices, and must be kept for not less than three (3) years after the occurrence of the business transactions that are the subject of the records. Records and data shall be in chronological order and readily and easily interpreted.
- B. Franchisee agrees to require its Subcontractors, if any, who perform collection, transportation or delivery services of Residential Clean-Out Material and C&D Debris in connection with this Agreement to keep and maintain books of account and other records showing all business transactions conducted by such Subcontractors in connection with the non-exclusive franchise granted to Franchisee.

### **4.2 Inspection of Records**

All such books of account and other records will be subject to inspection and/or audit at Franchisee's place of business during normal business hours upon request or demand of the City Manager, City Auditor, City Attorney, City C&D contract manager, or their designated agent. The purpose of such inspection or audit may be for verification of the franchise fees paid by Franchisee, and the accuracy thereof; for the verification of Source Reduction and Recycling Fees collected and remitted by Franchisee, and the accuracy thereof; and for verification of the amounts of material disposed as reported by Franchisee pursuant to Section 4.5 of this Agreement.

In the event any audit conducted by City or by City's representative discloses that Franchisee has made any misrepresentation with respect to the franchise fees or the SRR Fees due to City, or discloses that Franchisee has underpaid franchise fees due to City, then in addition to any other remedies available to City, Franchisee shall reimburse

City for City's costs incurred in the performance of the audit and must pay all outstanding fees and late penalties due to City. Franchisee will pay for the audit costs when Franchisee has underpaid franchise fees due to City and the amount of franchise fees still due to City meets the following conditions:

1. The amount of franchise fees still due to City is greater than ten percent (10%) of the total franchise fees payable to City during the period covered by the audit, and
2. The amount of franchise fees still due to City is greater than One Thousand Dollars (\$1,000).

Franchisee must pay the City the delinquent franchise fees within thirty (30) days of the date City notifies Franchisee of the amount of City's costs.

#### **4.3. Record Security**

Franchisee shall maintain adequate record security to preserve records from events that can be reasonably anticipated such as fire, theft, and earthquake. Electronically maintained data and records shall be protected and backed-up.

#### **4.4. General Reporting Requirements**

The format of each report shall be designated by City. Franchisee agrees to submit all reports electronically, in a format prescribed by City, at no additional charge to City.

#### **4.5 Reports**

Franchisee must submit to City complete and accurate monthly reports prepared in an electronic format provided by the Director. Franchisee must submit a monthly report regardless of whether Franchisee provided service to any customers during the reporting period. The monthly report must include:

1. A listing of each customer address in the City of San José from which Franchisee collected Residential Clean-Out Material and/or C&D Debris during the reportable month;

2. A listing of each building San Jose permit number (where applicable) from which Franchisee collected Residential Clean-Out Material and/or C&D Debris during the reportable month;
3. A listing of each weight ticket(s) number associated with each customer address and permit number;
4. A listing of each ticket category as captured by the Recyclable Material Processing Facility on the weight ticket;
5. The level of service (size of container in cubic yards and number of collections) provided to each Customer during the reportable month;
6. The total volume (in cubic yards) by material category of Residential Clean- Out Material and C&D Debris collected in the City of San José during the reportable month;
7. The name of the Recyclable Material Processing Facility to which Franchisee delivered Residential Clean-Out Material and/or C&D Debris;
8. List of gross amount charged to Customer for collection services provided in San José during the reportable month;
9. Franchisee's gross receipts for collection services provided in San José during the reportable month;
10. An inventory of all containers that Franchisee owns or possesses, regardless of whether used that month, listed by the serial number Franchisee assigned to each container as required under Section 14; and
11. Such additional information as may be required by the Director.

On or before the last day of the calendar month immediately following the reportable month, Franchisee must file the monthly report per instructions provided by the City. For example, the report for the month of January, will be due on the last day of February. On March first, such report will be considered delinquent if not completed a day before. Upon request by City, Franchisee must submit a hard copy of the monthly report. Such hard copy report will be submitted within thirty (30) days of the request from the Director and must be mailed or personally delivered to:

Director  
City of San José  
Environmental Services Department  
200 East Santa Clara Street, 10th Floor  
San José, CA 95113

If the monthly report required under subsection A is not filed by the due date specified above, the report will be deemed delinquent. If the monthly report is incomplete or inaccurate, Franchisee may have up to 15 days to cure the submittal. Once the report is delinquent, Franchisee must pay to City a delinquent report charge in the amount set out in Chapter 9.10 of the San José Municipal Code. Such delinquent report charges will be in addition to any franchise fees or other charges payable by Franchisee for the same period of time.

#### **SECTION 5. FRANCHISE FEES**

- A. During the term of this Agreement, Franchisee must pay to City franchise fees for the privilege of engaging in the business of collecting and transporting Residential Clean-Out Material and C&D Debris kept, accumulated or generated in the City of San José.
- B. Franchisee must pay commercial solid waste franchise fees on all Residential Clean-Out Material and C&D Debris services performed by Franchisee in the City of San José. Such fees will be in the amount established for commercial solid waste services adopted by the City Council and in such other amounts as are set forth in any subsequent resolution that may be adopted by the City Council.
- C. Franchisee acknowledges that City has reserved the right to increase franchise fees payable by Franchisee at any time or to change the fee structure of this Agreement.

#### **SECTION 6. SOURCE REDUCTION AND RECYCLING FEES**

- A. Franchisee will bill, collect and remit to City the Source Reduction and Recycling Fee ("**SRR Fee**"), also known as AB 939 fee, imposed by City on solid waste generators for whom Franchisee performs services pursuant to this Agreement.

The invoice sent to the solid waste generator for trash loads must itemize the SRR Fee. The SRR Fee will be in the amount set forth for Commercial Solid Waste in the Schedule of Fees adopted by resolution of the City Council and any amendment thereto that may be adopted by the City Council. Any material collected that is not recycled but is Disposed of by landfilling or other non-recycling method will be subject to a SRR Fee for solid waste as set forth in a resolution adopted by the City Council.

- B. City will notify Franchisee in writing of any changes in the amount of the SRR Fee to be billed to solid waste generators and of the date any such changes are to be effective. Franchisee must implement such changes in Franchisee's billing system and shall begin billing any changes in the SRR Fee by the effective date specified in City's notice.
- C. SSR Fees shall be billed to the customer and paid to the City with the submission of the monthly report.
- D. For each month in which any generator fails or refuses to pay SRR Fees to Franchisee when such fees are due and payable, Franchisee must notify City of the generator's name, address, the amount due for SRR Fees, and account information (including the size of the containers and frequency of collection), and must provide documentation supporting Franchisee's claim (including documentation showing that Franchisee billed the generator for the SRR Fees). Such notification must be given at the time Franchisee submits the monthly report required by Section 4 of this Agreement. Franchisee, in lieu of providing the information required by this Paragraph, may pay to City the SRR fees which the generator failed or refused to pay.

## **SECTION 7. PAYMENT OF FRANCHISE AND SRR FEES**

- A. Franchise and SRR fees will be due and payable on the last day of the month immediately following the month in which collection services were provided. If fees are not paid by Franchisee at the times required by this Agreement, such fees will be delinquent and in addition to the fees, Franchisee must pay a late payment charge in an amount equal to ten percent (10%) of the fees that were

not timely paid by Franchisee. If Franchisee fails to pay delinquent fees within thirty (30) days of the date required by this Agreement, Franchisee must pay a second late payment charge in an amount equal to ten percent (10%) of the outstanding fees after such thirty (30) day period. Such second late payment charge is intended to be in addition to the first late payment charge. In addition, Franchisee must pay interest on all unremitted franchise and SRR Fees at the rate of ten percent (10%) per annum or the legal rate allowed, whichever is less, from the date the Franchise and SRR Fees were due to be remitted to the date actually remitted.

Each franchise fee payment must be accompanied by the summary of the monthly report, by a hard copy of the first page of the monthly report, with an original signature required under Section 4 of this Agreement and a written statement, verified by the person making the payment, or a duly authorized representative of the person, showing the calculation of the franchise fee payable in such form and detail as the City's Director of Finance may require and such other information as the City's Director of Finance may determine is material to a determination of the amount due. Franchisee must submit such documentation, together with the payment of all required franchise and SRR fees, to:

Payment Processing / Revenue Management  
Department of Finance  
City of San José  
200 East Santa Clara Street San José, CA 95113-1905

- B. If Franchisee remits franchise and SRR fees by personal delivery to City, such fees will be deemed timely paid only if delivered on or before the last day of the month immediately following the month in which the collection services were provided. If Franchisee remits fees by mail or other delivery service, such fees will be deemed timely only if (1) the envelope or wire transfer containing the fee payment bears a postmark or receipt showing that the payment was mailed or sent on or before the due date set forth in this Agreement; or (2) Franchisee

- submits proof satisfactory to the City's Director of Finance that the fee payment was in fact deposited in the mail or sent on or before said due date.
- C. Franchise and/or SRR fees equal to or exceeding \$10,000 must be paid by wire transfer or cashier's check.
  - D. In the event Franchisee believes that Franchisee has paid franchise and/or SRR fees in excess of the fees due to City, Franchisee may submit a written request for refund, together with documentation supporting the request, to the City's Director of Finance. If proof of overpayment is satisfactory to said Director, the Director will refund to Franchisee any overpayment. Franchisee will not apply any overpayment as a credit against any franchise fees, SRR fees, or other amounts payable to City unless specifically so authorized by the City's Director of Finance in writing.
  - E. Franchisee must report all SRR Fees separately from franchise fees and other charges paid by Franchisee to City.

#### **SECTION 8. COMMINGLING OF MATERIALS**

- A. Residential Clean-Out material and C&D Debris may only be collected as specified in writing by the Director.
- B. Nothing in this Agreement grants a Franchise to Franchisee for the collection of Commercial Solid Waste and Recyclables Materials Collection in the City of San José.
- C. Franchisee must keep all Residential Clean-Out Material and C&D Debris collected pursuant to this Agreement separate from other solid waste (especially organics) during any time the material is collected or transported by Franchisee. Franchisee must ascertain that all Residential Clean-Out material and C&D Debris stored, collected or transported by Franchisee pursuant to this Agreement is free of all but Incidental Contamination. In the event Franchisee collects Residential Clean-Out Material and/or C&D Debris that has been stored with other solid waste and is not free of all but Incidental Contamination, such collected material will be deemed to be commercial solid waste and will be

subject to all franchise fees, SRR Fees, and Liquidated Damages described in this Agreement.

## **SECTION 9. COLLECTION AND TRANSPORTATION OF MATERIALS**

- A. Franchisee must collect and transport all materials so that no materials spill out of the collecting or transporting container or vehicle. This obligation includes covering the container as specified in Chapter 9.10 of the San José Municipal Code. Franchisee must ensure that any of Franchisee's employees or contractors collecting or transporting Residential Clean-Out material and/or C&D Debris will immediately pick up all material that spills or is blown from the collecting or transporting container or vehicle and cleans the place onto which the material was spilled or blown.
- B. Except in the Central Business District and the Transit Mall Zone (as defined in Part 10 of Chapter 9.10 of the San José Municipal Code), Franchisee cannot collect, take, move or transport materials from any premise that is within three hundred (300) feet of any residential premise, except between the hours of 6:00 a.m. and 6:00 p.m. on any day. The Director may grant an exception to these limitations if Franchisee demonstrates to the satisfaction of the Director that such an exception will not create noise, impediment of traffic flow or other interference with the quiet enjoyment of the residential premises. In the event Franchisee violates this provision, in addition to any other remedies the City may have, the Director may charge Franchisee for City's costs of enforcement of this provision. Franchisee shall reimburse City for such costs within ten (10) days of the date of City's invoice for such costs.
- C. If Franchisee determines that material placed in any Container for collection is hazardous or unpermitted material that may not be legally handled at a Processing site, or presents a hazard to Franchisee's employees, Franchisee shall refuse to accept such material. Franchisee shall contact the Customer and request the Customer to arrange for proper Disposal. If Customer cannot be reached immediately, Franchisee shall, before leaving the service address, leave a tag at least eight and one half inches by eleven inches (8.5" x 11") in size,

which indicates the reason for refusing to collect the material and lists a phone number for obtaining information on proper Disposal of the hazardous or unpermitted material. Under no circumstances shall Franchisee's employees knowingly collect hazardous or unpermitted material.

#### **SECTION 10. DELIVERY OF MATERIAL**

- A. Franchisee agrees to make best effort to ensure that all C&D Debris collected pursuant to this Agreement is delivered to a City Certified C&D Facility for Recycling. In the event the Franchisee delivers collected materials to a non-City Certified C&D Facility, the Franchisee shall inform the Customer as this will impact Customer's compliance with the Construction and Demolition Diversion program, and may result in a non-compliance status or denial of the Customer's CDDD refund.
- B. Franchisee agrees that all Residential Clean-Out material collected pursuant to this Agreement will be delivered to a Recyclable Material Processing Facility which is lawfully authorized to accept such material. Franchisee may not Dispose of any material prior to delivery to a Recyclable Material Processing Facility.
- C. Franchisee shall under no circumstances transport the C&D Debris or Residential Clean-Out Material to a Disposal site or landfill, or otherwise Dispose of such material by depositing it on any land, whether public or private, or in any river, stream or other waterway, or in any sanitary sewer or storm drainage system.
- D. Nothing in this Agreement authorizes Franchisee to operate a landfill, recycling center, or other solid waste disposal facility.

#### **SECTION 11. ADDITIONAL SERVICES**

- A. Education Regarding CDD Program. Franchisee shall provide Customers with education, outreach, and technical assistance to aid them in complying with their obligations under the Construction Demolition and Diversion Program requirements under Chapter 9.10, Part 15 of the Municipal Code. Franchisee shall inform the Customer that Source Separating C&D Debris increases

chances of a better recovery rate and compliance with CDDD program requirements and potentially reduces the price of the debris box, if applicable. Franchisee shall understand the Construction and Demolition Diversion Program (CDD).

B. Education Regarding Recycling Requirements and Adequate Service Levels.

1. For each new San José Customer for which Franchisee provides services, Franchisee must offer to provide a list of services that Franchisee is authorized to offer pursuant to this Agreement and Franchisee must provide Customers with information for the exclusive collector of commercial solid waste and recyclables in San José if the Customer does not have commercial solid waste or recyclables collection service
2. For the purposes of this subsection B, “**new**” Customer means an entity for which Franchisee begins providing collection services during the term of this Agreement and for which Franchisee had not performed such services during the ninety (90) day period immediately preceding the commencement of such services.
3. City will maintain the information for the exclusive collector that performs solid waste and recyclables collection services in San José and will make this information available to Franchisee at no cost to Franchisee
4. Franchisee must maintain records of Customer contacts, including the date and the name of the person contacted, demonstrating Franchisee’s compliance with this subsection B. Such records must be maintained at Franchisee’s place of business shown in Section 22 of this Agreement for receipt of notices, must be in a format approved by the Director, must be kept for not less than three (3) years, and must be subject to inspection and audit by City upon the request of the Director, the City Manager, the City Auditor, the City C&D Contract Manager or their designated agent.

C. Operational Transparency. In the event Franchisee provides collection services for C&D Debris, Franchisee must record Customer’s building permit number with the order details, inform the Customer where the C&D Debris will be delivered for

processing, and provide to the Customer accurate and properly labeled documentation substantiating the weight of the C&D Debris.

- D. Cooperate with City-Initiated Studies. Franchisee shall cooperate with and assist City or its agent with the performance of City-initiated studies of C&D Debris such as, but not limited to, waste characterization and composition studies.

## **SECTION 12. FRANCHISEE'S SUBCONTRACTOR RECORDS**

Franchisee must keep and maintain books of account and other records showing all business transactions conducted by Franchisee as described in Section 4.

- A. Franchisee agrees to require its Subcontractors, if any, who perform collection or transportation services of Residential Clean-Out Material and C&D Debris in connection with this Agreement to keep and maintain books of account and other records showing all business transactions conducted by such Subcontractors in connection with the non-exclusive franchise granted to Franchisee.
- B. Franchisee shall include in their required monthly reports the addresses serviced by their Subcontractor and provide the information requested under Section 4.5. Reporting.
- C. Franchisee is responsible to inform the Subcontractor of the CDD program.
- D. All Subcontractor books of account referenced in D above and other records will be subject to inspection and/or audit at Franchisee's place of business during normal business hours upon request or demand of the City Manager, City Auditor, City Attorney, City C&D Contract Manager, or their designated agent. The purpose of such inspection or audit may be for verification of the franchise fees paid by Franchisee, and the accuracy thereof; for the verification of Source Reduction and Recycling Fees collected and remitted by Franchisee, and the accuracy thereof; and for verification of the amounts of material disposed as reported by Franchisee pursuant to Section 4 of this Agreement.
- E. In the event any audit conducted by City or by City's representative discloses that Franchisee has made any misrepresentation with respect to the franchise fees or the SRR Fees due to City or discloses that Franchisee has underpaid franchise fees due to City then in addition to any other remedies available to City,

Franchisee shall reimburse City for City's costs incurred in the performance of the audit and must pay all outstanding fees and late penalties due to City. Franchisee will pay for the audit costs when Franchisee has underpaid franchise fees due to City and the amount of franchise fees still due to City meets the following conditions:

1. The amount of franchise fees still due to City is greater than ten percent (10%) of the total franchise fees payable to City during the period covered by the audit, and
2. The amount of franchise fees still due to City is greater than One Thousand Dollars (\$1,000).

Franchisee must pay the City the delinquent franchise fees within thirty (30) days of the date City notifies Franchisee of the amount of City's costs.

### **SECTION 13. INSURANCE REQUIREMENTS**

Franchisee must obtain and maintain throughout the term of this Agreement, at Franchisee's sole cost and expense, insurance against claims for injuries to persons or damages to property which may arise from or in connection with the performance of work pursuant to this Agreement by Franchisee, its agents, representatives, employees or contractors.

- A. Franchisee at Franchisee's own expense throughout the Term of Franchise, as extended, shall comply with the insurance requirements attached hereto as EXHIBIT B and incorporated by reference herein. The procuring of the policy or policies of insurance required by EXHIBIT B shall neither be construed to limit Franchisee's liability hereunder nor to fulfill the indemnification provisions and requirements of this AGREEMENT. Notwithstanding the policy or policies of insurance, Franchisee shall be obligated for the full and total amount of any damage, injury or loss caused by its negligence or willful misconduct arising out of this AGREEMENT.
- B. Franchisee shall deposit with City, on or before the Term of Franchise, certificates of insurance and the required endorsements in forms reasonably satisfactory to City, indicating compliance with the insurance provisions of this

AGREEMENT. Franchisee shall keep the insurance in effect, and the certificates evidencing the insurance on deposit with City, during the Term of the AGREEMENT and as the same may be extended.

- C. All Coverages. Each insurance policy required by this Agreement must be endorsed to state that coverage may not be suspended, voided, canceled, or reduced in limits except after thirty (30) days prior written notice has been given to City's Risk Manager, except that ten (10) days prior written notice will be sufficient in the event of cancellation for non-payment of premium.
- D. Placement of Insurance. Insurance must be placed with insurers with an A.M. Best's rating of A-. VII or better.
- E. Proof of Insurance. Franchisee must furnish City with certificates of insurance and with original endorsements affecting coverage required by this Agreement. The certificates and endorsements for each insurance policy are to be signed by a person authorized by that insurer to bind coverage on its behalf. Upon City's request, Franchisee agrees to provide copies of insurance policies. Proof of insurance must be mailed or personally delivered to the following address or to such other address as may be directed in writing by City's Risk Manager:

Certificate Holder  
City of San José – Finance Department  
Risk & Insurance  
200 East Santa Clara St., 14th Floor  
San Jose, CA 95113-1905

In addition, Proof of insurance shall be emailed in pdf format to:

[Riskmgmt@sanjoseca.gov](mailto:Riskmgmt@sanjoseca.gov):

**FRANCHISEE ACKNOWLEDGES THAT UNDER SAN JOSE MUNICIPAL CODE SECTION 9.10.1670, AS MAY BE AMENDED, THE NON-EXCLUSIVE FRANCHISE GRANTED TO FRANCHISEE WILL NOT BECOME EFFECTIVE, AND FRANCHISEE WILL HAVE NO AUTHORITY TO PERFORM COLLECTION OF RESIDENTIAL CLEAN-OUT MATERIAL AND CONSTRUCTION AND DEMOLITION DEBRIS IN THE CITY OF SAN JOSE, UNLESS FRANCHISEE PROVIDES SATISFACTORY PROOF OF INSURANCE WITHIN TWENTY (20) DAYS FROM THE DATE OF THE CITY**

## **COUNCIL'S ADOPTION OF THE ORDINANCE GRANTING SAID FRANCHISE.**

- F. Subcontractors. Franchisee must include all Subcontractors as insureds under Franchisee's policies or must obtain separate certificates and endorsements for each subcontractor.
- G. Modification of Insurance Requirements. These insurance requirements may be modified by City's Risk Manager if the Risk Manager finds that the exposure to City warrants such modifications.

### **SECTION 14. EQUIPMENT**

- A. Franchisee may collect Residential Clean-Out Material in Roll-Off Containers or Front-Load Containers. Franchisee may collect C&D Debris in Roll-Off Containers, Front-Load Containers, or other containers that meet the criteria listed below. For the purpose of this Agreement, roll-off, front-load, and other containers must meet the following requirements:
  - 1. Roll-Off Containers: All Roll-Off containers must have reflectors at each outside corner and be watertight. Upon request, Franchisee will provide Customers with a cover, such as a tarp, for all Roll-Off Containers to prevent storm water intrusion into the roll-off container.
  - 2. Front-Load Container: All front-load containers must have a permanent lid which closes tightly and prevents water from intruding into the container.
  - 3. Other containers: If only used for C&D Debris, Franchisee may utilize other types of receptacles composed of durable plastic or metal (such as carts and woven polypropylene bags) that are also designed to collect solid waste material.
- B. Container Maintenance. Franchisee must maintain all containers in accordance with the following:
  - 1. Containers must comply with and are subject to all requirements under Chapter 9.57 of the San José Municipal Code.

2. Franchisee must remove, or cause to be removed, graffiti from Franchisee's containers within forty-eight (48) hours after notification from customer or City that there is graffiti on the container.
3. Franchisee is responsible for the general repair and upkeep of all containers.
4. Franchisee must ensure that all containers are watertight and designed and constructed to eliminate spillage during normal use.
5. Franchisee must repair or replace all containers that are not serviceable within five (5) business days of being notified by the customer, the City, or observing the damaged container, whichever is earlier in time. If the repair or replacement cannot be completed within five (5) business days, Franchisee must provide the customer a container that is the same size or larger.
6. City may inspect Containers at any time to determine compliance. Franchisee shall make Containers available to City at any frequency it requests. City has the right to prohibit the use of any Container that fails to comply with the provisions in this Section.

C. Container Labeling. Franchisee must properly label, operate, and maintain all containers in accordance with the following:

1. Containers must comply with all requirements under Chapter 9.10 of the San José Municipal Code.
2. Containers must be marked with Franchisee's name, telephone number, and material type in letters that are four inches (4") or more in height and that can be easily read by the general public.
3. Containers must have necessary safety messaging and reflectors.
4. Container must be marked with a visible and legible serial number that is four (4") inches or more in height and that can be easily read by the general public. Franchisee may assign the serial number for each container, but the assigned a serial number must be different for each container. Serial numbers may be a series of numbers, letters, or a combination of both.

5. All containers must be clearly labeled with letters three inches (3") or more in height and state "Clean Up Spills."
  6. All signage must be located on each long side of the Container and may be affixed with labels, magnets, hot stamps, paint, or other format approved by City.
  7. Franchisee acknowledges that the City may issue labels to Franchisee for placement on any containers that Franchisee uses in the City of San José. If the City issues labels to Franchisee, Franchisee agrees to affix the labels to its containers as requested by the City.
- D. Franchisee may not place any containers used for collection in any places such that the container impedes normal vehicular traffic, public transportation, or pedestrian or wheelchair access to the public rights-of-way except when staging the container for immediate collection and during the six (6) hours immediately following collection.
- E. Vehicle Maintenance. Franchisee must ensure that all vehicles used to perform collection of Residential Clean-Out Material and C&D Debris comply with the following:
1. All vehicles must comply with vehicle standards established by federal, state, and local laws including, but not limited to, state emission standards and reporting requirements relating to such standards.
  2. Franchisee may not idle vehicles in parking lots or other locations adjacent to residential premises, or stage vehicles in parking lots or other locations adjacent to residential premises unless the vehicle engine is turned off.
  3. All vehicles must be marked at a minimum with Franchisee's name, telephone number, and vehicle number in letters that are four inches (4") or more in height and that can be easily read by the general public. Signage may be affixed with labels, magnets, hot stamps, paint, or other format approved by City.
  4. Franchisee must notify the City in writing of any changes to Franchisee's collection vehicle fleet information, as identified in Franchisee's application for a franchise, within thirty (30) calendar days of the change.

5. City may inspect vehicles at any time to determine compliance with the requirements of this Agreement. Franchisee shall make vehicles available to City for inspection at any frequency City reasonably requests. Franchisee shall maintain, at its local business offices, a record of daily vehicle inspection reports for all collection-related vehicles and shall make such reports available to the City C&D Contract Manager for review at all times.

## **SECTION 15. ABANDONED CONTAINERS**

- A. For the purpose of this Section, “**abandoned**” includes:
  1. Franchisee’s failure to remove the container within the time period specified by the City Council upon termination of the Non-Exclusive Franchise pursuant to Chapter 9.10 of the San José Municipal Code.
  2. Franchisee’s failure to remove the container within ten (10) working days after the expiration of the Non-Exclusive Franchise granted to Franchisee, except in the case where Franchisee has been granted an extension of the term of said Franchise or Franchisee has been granted a subsequent franchise authorizing Franchisee to collect and transport the type or types of material for which the container was used pursuant to this Agreement.
  3. Franchisee’s failure to dispose of the contents of the container within five (5) days after City’s Director of Environmental Services issues written notice of Franchisee to dispose of the contents.
  4. Franchisee’s failure to remove the container within five (5) working days after the termination of the agreement between Franchisee and the customer.
- B. If Franchisee abandons any container used to provide collection of Residential Clean-Out Material or C&D Debris under the Non-Exclusive Franchise, City may remove the container and/or dispose of the contents of the container.
- C. If City removes a container abandoned by Franchisee and/or Disposes of the contents of any container abandoned by Franchisee, City may charge Franchisee for City’s costs incurred in such removal/Disposal and for City’s costs of storage

of the container. Franchisee agrees to reimburse City for such costs within ten (10) days of the date of City's invoice for such costs.

**SECTION 16. COMPLIANCE WITH LAW**

Franchisee shall perform all collection, transportation and delivery operations in accordance with applicable federal, state, and local law, including Chapter 9.10 of the San José Municipal Code, in accordance with all regulations promulgated under such laws, and in accordance with the terms and conditions of this Agreement. To the extent that the terms and conditions of this Agreement are in conflict with Chapter 9.10 of the San José Municipal Code, the San José Municipal Code shall govern.

City reserves the right and Franchisee expressly acknowledges City right to include modified or additional requirements including, but not limited to, any changes that are required or deemed necessary by City due to a Change in Law.

**SECTION 17. PERMITS AND LICENSES**

Franchisee must obtain and maintain, at Franchisee's sole cost and expense, all permits and licenses applicable to Franchisee's operations under the Non-Exclusive Franchise that are required of Franchisee by any governmental agency.

**SECTION 18. INDEMNIFICATION**

Franchisee shall indemnify and hold harmless City, City's contractors, and City's public officials, officers, directors, employees, agents and other contractors of each of them, from and against any and all claims, costs, losses and damages (including but not limited to all fees and charges of engineers, architects, attorneys and other professionals as well as all Court or other dispute resolution costs), liabilities, expenditures or causes of action of any kind (including negligent, reckless, willful or intentional acts or omissions of Franchisee, any subcontractor, any supplier, any person or organization directly or indirectly employed by any of them to perform or furnish any services or anyone for whose acts any of them may be liable), arising from, relative to or caused by the performance of the services under this Agreement. This indemnity

includes but is not limited to claims attributable to bodily injury, sickness, disease or death and to injury or destruction of tangible property. Franchisee agrees, at Franchisee expense, after written notice from the City Attorney, to defend any action against City that falls within the scope of this indemnity, or City, at City's option, may elect not to tender such defense and may elect instead to secure its own attorneys to defend any such action and the reasonable costs and expenses of such attorneys incurred in defending such action shall be payable by Franchisee.

## **SECTION 19. LIQUIDATED DAMAGES, TERMINATION, AND SUSPENSION**

### **A. Liquidated Damages.**

1. In the event Franchisee fails to comply with the term of this Agreement, Franchisee agrees to pay liquidated damages in the amounts specified in EXHIBIT A.
2. Franchisee agrees to pay any and all liquidated damages to the City on or before the date specified in the notice of breach provided by City. Prior to imposing liquidated damages, City must give Franchisee written notice of any acts or omissions of Franchisee that City contends may give rise to the imposition of liquidated damages under this Agreement and allow Franchisee to respond under any cure provisions in this Agreement or to present additional information for consideration by City.
3. City's right to collect liquidated damages will not prevent City from exercising any other right or remedy, as set forth in this Agreement, including the right to terminate this Franchise, for Franchisee's failure to comply with this Agreement.

### **B. Termination.**

1. The City Council may terminate the Non-Exclusive Franchise in accordance with Chapter 9.10 of the San José Municipal Code.
2. Franchisee may, in writing, terminate the Non-Exclusive Franchise. If Franchisee elects to terminate the Non-Exclusive Franchise, Franchisee waives any public hearing under San José Municipal Code Section 9.10.1690.

3. In the event the Non-Exclusive Franchise is terminated, then within the time period specified by the City, Franchisee must remove all of Franchisee's collection containers, and all containers used by Franchisee's subcontractors in performance of collection services under this Agreement, from all of Franchisee's collection service locations and will properly dispose of all materials in such containers.
4. In the event the Non-Exclusive Franchise is terminated or expires pursuant to Section 3 without an extension of the term and without a grant of a subsequent franchise allowing Franchisee to continue performing such services, then within ten (10) days of such termination or expiration Franchisee must either:
  - a. Submit to Director a list of the names and addresses in San José for which Franchisee provided services as of the date of termination or expiration (i.e., Franchisee's San José customer list); or
  - b. Send written notification to all Customers for which Franchisee provided Residential Clean-Out Material and C&D Debris collection services that Franchisee is no longer authorized to provide such services in San José. Such notification must be in the form provided by the Director and must be personally delivered or sent by first class mail, postage prepaid, to the Customers' billing addresses. Franchisee must submit to the Director an affidavit, signed under penalty of perjury, stating that the required notification has been provided by Franchisee to all of Franchisee's San José Customers.
5. Subject to Chapter 9.10 of the San José Municipal Code, Franchisee acknowledges City may terminate this Agreement and the Non-Exclusive Franchise in writing no less than sixty (60) days in advance of the effective date. Franchisee agrees to cooperate with City or other haulers as requested by City. Cooperation may include providing information, attending meetings, removing containers, and other types of coordination needed to ensure a seamless transition.

C. Suspension.

1. The Non-Exclusive Franchise granted to Franchisee is automatically suspended, without notice to Franchisee, upon the occurrence of any event described in Chapter 9.10 of the San José Municipal Code.
2. The Non-Exclusive Franchise granted to Franchisee may be suspended by the Director if Franchisee fails to submit timely, complete, and accurate reports as described in Chapter 9.10 of the San José Municipal Code and in Section 4 of this Agreement and Franchisee fails to cure such default within fifteen (15) days after written notice to Franchisee of such default.

D. In the event the Non-Exclusive Franchise is terminated or suspended in accordance with this Section, or expires pursuant to Section 3:

1. Franchisee will have no right or authority to engage in collection or transportation of Residential Clean-Out Material or C&D Debris in the City of San José.
2. Franchisee will, however, remain liable to City for any and all franchise fees that would otherwise be payable by Franchisee, for any and all late payment charges and interest assessed pursuant to Section 7 of this Agreement, for any SRR Fees collected by Franchisee, and for any and all delinquent report charges assessed pursuant to Section 4 of this Agreement.
3. Franchisee will have a continuing obligation to submit to City all reports required by Section 4 of this Agreement which relate to Residential Clean-Out Material and C&D Debris activities performed by Franchisee up to and including the date of termination, suspension or expiration.
4. Franchisee must allow customers served by Franchisee to arrange for Residential Clean-Out Material or C&D Debris collection services with a collector authorized to perform such services, without penalty or liability for breach of contract on the part of the customer, for such period of time as Franchisee is not authorized to perform such services.

## **SECTION 20. GIFTS**

- A. Franchisee represents that Franchisee is familiar with City's prohibition against the acceptance of any gift by a City officer or designated employee, which prohibition is found in Chapter 12.08 of the San José Municipal Code.
- B. Franchisee agrees not to offer any City officer or designated employee any gift prohibited by said Chapter, as amended.
- C. The offer or giving of any gift prohibited by Chapter 12.08, as amended, will constitute a material breach of this Agreement by Franchisee. In addition to any other remedies City may have in law or equity, City may terminate this Agreement as provided in Section 19 of this Agreement.

## **SECTION 21. DISQUALIFICATION OF FORMER EMPLOYEES**

Franchisee represents that Franchisee is familiar with the provisions relating to the disqualification of former officers and employees of City in matters which are connected with former duties or official responsibilities as set forth in Chapter 12.10 of the San José Municipal Code ("**Revolving Door Ordinance**"). Franchisee will not utilize either directly or indirectly any officer, employee, or agent of Franchisee to perform services under this Agreement, if in the performance of such services, the officer, employee, or agent would be in violation of the Revolving Door Ordinance.

## **SECTION 22. NOTICES**

Except as otherwise provided in this Agreement, whenever either party desires to give notice to the other, the notice must be in writing and given as provided in this Section. For the present, the parties designate the following as the respective persons and places for giving notice.

To City:

Director of Environmental Services  
City of San José  
200 East Santa Clara Street, 10<sup>th</sup> Floor  
San José, CA 95113

Kerrie.Romanow@sanjoseca.gov

To Franchisee:

Francisco Toca, dba Toca Debris Box Services  
270 Hillshore Blvd  
San Francisco, CA 94080

Notices will be effective two days following their deposit in the U.S. mail, postage prepaid, or when personally delivered to the address specified above or to such address as designated by a party by providing written notice of a change in address. Notice may also be sent by electronic mail (“**e-mail**”) transmission and will be effective when received, provided e-mail transmissions received after 4:30pm Pacific Time or on weekends or Holidays will be deemed received the next business day. The original of items that are transmitted by e-mail must also be mailed or personally delivered as provided above within three (3) business days of the e-mail transmission.

**SECTION 23. MISCELLANEOUS PROVISIONS**

- A. Inspection by City. City, or its designated representatives, shall have the right to observe and review Franchisee operations and enter Franchisee’s premises for the purposes of such observation and review during reasonable hours without advance notice.
- B. Controlling Law. This Agreement will be governed and construed by and according to the laws of the State of California.
- C. Entire Agreement. This Agreement contains all of the terms and conditions entered into and made by and between the Parties and may not be modified orally, or in any manner, other than by an amendment to this Agreement in writing signed by both City and Franchisee or their respective successors-in-interest.
- D. Authority to Bind Franchisee. Franchisee must submit a copy of any corporate resolution, if requested by City, which authorizes any director or officer to act on behalf of Franchisee to bind Franchisee to this Agreement or which authorizes Franchisee to enter into this Agreement.

- E. Severability. If a court of competent jurisdiction finds or rules that any provision of this Agreement is void or unenforceable, the remaining provisions of this Agreement will remain in effect, providing the Parties' original intent when entering into this Agreement can still be met.
- F. Franchisee is Not an Agent of City. Franchisee is not an agent, contractor or employee of City, and nothing in this Agreement, nor may any action of Franchisee, be construed in any way to constitute Franchisee as an agent, contractor, or employee of the City for any purpose.
- G. Time of Essence. Time is of the essence in this Agreement and each of its provisions, and failure to comply with this provision will be a material breach of this Agreement.
- H. Venue. In the event that suit shall be brought by either Party hereunder, the Parties agree that venue shall be exclusively vested in the state courts of California in the County of Santa Clara or if federal jurisdiction is appropriate, exclusively in the United States District Court in the Northern California.
- I. Interpretation. The Parties agree that this Agreement has been prepared equally by both Parties, and its individual provisions may not be construed or interpreted more favorably for one Party on the basis that the other Party prepared it.
- J. Execution in counterparts. This Agreement may be executed in any number of counterparts and by each party in separate counterparts, each of which when so executed and delivered shall be deemed to be an original and all of which taken together shall constitute one and the same instrument.
- K. Use of electronic signatures. Unless otherwise prohibited by law or City policy, the parties agree that an electronic copy of a signed contract, or an electronically signed contract, has the same force and legal effect as a contract executed with an original ink signature. The term "electronic copy of a signed contract" refers to a writing as set forth in Evidence Code Section 1550. The term "electronically signed contract" means a contract that is executed by applying an electronic signature using technology approved by the City.

**WITNESS THE EXECUTION OF THIS AGREEMENT ON THE DATE WRITTEN  
BELOW EACH SIGNATURE:**

APPROVED AS TO FORM:

\_\_\_\_\_  
MARK J. VANNI  
Senior Deputy City Attorney

“City”

CITY OF SAN JOSE, a municipal  
corporation

By \_\_\_\_\_  
TONI J. TABER, CMC  
City Clerk  
Date: \_\_\_\_\_

“Franchisee”

Francisco Toca, doing business as Toca  
Debris Box Services

By \_\_\_\_\_  
Francisco Toca/ Owner  
[toca7777@aol.com](mailto:toca7777@aol.com)

Date: \_\_\_\_\_

## EXHIBIT A

### LIQUIDATED DAMAGES

It shall be the duty of Franchisee to perform services under this Agreement in such a manner as to implement practices, policies, and procedures designed to achieve the goals set forth in the Agreement.

Franchisee agrees its failure to perform the services as set forth in the Agreement would cause City damage. City and Franchisee mutually agree that making a precise determination of the amount of City's damage as a result of Franchisee's failure would be impractical and/or extremely difficult. Therefore, the parties agree that, in the event such a failure, Franchisee shall pay to City as liquidated damages the amounts listed below.

1.	Failure to keep collected material separate pursuant to Section 8	\$500 per incident
2.	Failure to properly cover material in collection vehicles pursuant to Section 9	\$500 per incident
3.	Failure to cleanup spills or litter during the course of collection pursuant to Section 9	\$100 per incident
4.	Failure to deliver any collected material to a Recyclable Material Processing Facility pursuant to Section 10	\$2500 first offense; \$5000 each subsequent offense
5.	Failure to remove graffiti from any container pursuant to Section 14	\$100 per incident
6.	Failure to maintain equipment as provided in Section 14	\$500 per incident
7.	Failure to reasonably resolve any complaint within five (5) business days pursuant to Section 15	\$100 per incident
8.	Failure to perform Public Education and Outreach for each activity required by Section 11 of this Agreement	\$500 per incident

## **EXHIBIT B**

### **INSURANCE REQUIREMENTS**

Franchisee shall procure and maintain for the duration of the contract insurance against claims for injuries to persons or damages to property which may arise from, or in connection with, the performance of the work hereunder by the Franchisee, his agents, representatives, employees or subcontractors. The cost of such insurance shall be included in the Franchisee's bid.

#### **I. Minimum Scope of Insurance**

Coverage shall be at least as broad as:

1. The coverage provided by Insurance Services Office Commercial General Liability coverage ("occurrence" form CG 0001) including products and completed operations; and
2. The coverage provided by Insurance Services Office form number CA 0001 covering Automobile Liability. Coverage shall be included for all owned, non-owned and hired automobiles; and
3. Workers' Compensation insurance as required by the Labor Code of the State of California and Employers Liability insurance; and

There shall be no endorsement reducing the scope of coverage required above unless approved by the City's Risk Manager.

#### **II. Minimum Limits of Insurance**

Franchisee shall maintain limits no less than:

1. Commercial General Liability: \$2,000,000 per occurrence for bodily injury, personal injury and property damage. If Commercial General Liability Insurance or other form with a general aggregate limit is used, either the general aggregate limit shall apply separately to this project/location or the general aggregate limit shall be twice the required occurrence limit.
2. Automobile Liability: \$1,000,000 combined single limit per accident for bodily injury and property damage.
3. Workers' Compensation and Employers Liability: Workers' Compensation limits as required by the Labor Code of the State of California and Employers Liability limits of \$1,000,000 per accident.

Any limits requirement may be met with any combination of primary and excess coverage so long as the excess coverage is written on a "follow form" or umbrella basis.

### **III. Deductibles and Self-Insured Retentions**

Any deductibles or self-insured retentions must be declared to, and approved by, the City.

### **IV. Other Insurance Provisions**

The policies are to contain, or be endorsed to contain, the following provisions:

1. General Liability and Automobile Liability Coverages
  - a. The City, its officials, employees, agents and contractors are to be covered as additional insureds as respects: liability arising out of activities performed by, or on behalf of, the Franchisee; products and completed operations of the Franchisee; premises owned, leased or used by the Franchisee; or automobiles owned, leased, hired or borrowed by the Franchisee. The coverage shall contain no special limitations on the scope of protection afforded to the City, its officials, employees, agents and contractors.
  - b. The Franchisee's insurance coverage shall be primary insurance as respects the City, its officials, employees, agents and contractors. Any insurance or self-insurance maintained by the City, its officials, employees, agents or contractors shall be excess of the Franchisee's insurance and shall not contribute with it.
  - c. Any failure to comply with reporting provisions of the policies shall not affect coverage provided to the City, its officials, employees, agents, or contractors.
  - d. Coverage shall state that the Franchisee's insurance shall apply separately to each insured against whom claim is made or suit is brought, except with respect to the limits of the insurer's liability.
  - e. Coverage shall contain a waiver of subrogation in favor of the City, its officials, employees, agents and contractors.

#### 2. Workers' Compensation and Employers' Liability

Coverage shall contain a waiver of subrogation in favor of the City, its officials, employees, agents and contractors.

3. All Coverages

Each insurance policy required by this clause shall be endorsed to state that coverage shall not be suspended, voided, canceled, reduced in coverage or in limits except after thirty (30) days' prior written notice has been given to the City; except that ten (10) days' prior written notice shall apply in the event of cancellation for non-payment of premium.

**V. Acceptability of Insurance**

Insurance is to be placed with insurers acceptable to the City's Risk Manager.

**VI. Verification of Coverage**

Franchisee shall furnish the City with certificates of insurance and endorsements affecting coverage required by this clause. The certificates and copies of endorsements for each insurance policy are to be signed by a person authorized by that insurer to bind coverage on its behalf.

Copies of all the required ENDORSEMENTS shall be attached to the CERTIFICATE OF INSURANCE which shall be provided by the Franchisee's insurance company as evidence of the stipulated coverages.

Proof of insurance shall be emailed in pdf format to: [Riskmgmt@sanjoseca.gov](mailto:Riskmgmt@sanjoseca.gov):

Certificate Holder  
City of San Jose – Finance Department  
Risk & Insurance  
200 East Santa Clara St., 14th Floor  
San Jose, CA 95113-1905

**VII. Subcontractors**

Franchisee shall include all subcontractors as insureds under its policies or shall obtain separate certificates and endorsements for each subcontractor.

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