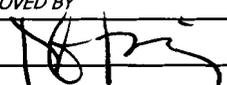




REPORT TO THE CITY COUNCIL

AGENDA ITEM NO.
COUNCIL MEETING
APPROVED BY
DEPARTMENT DIRECTOR 
CITY MANAGER

January 23, 2007

FROM: RENE A. RAMIREZ, Director   
Department of Public Utilities

BY: STEPHEN A. HOGG, Assistant Director   
Wastewater Management Division

SUBJECT: APPROVE INTERIM CONTRACT FOR THE BENEFICIAL REUSE OF A PORTION OF THE CITY BIOSOLIDS AND ENVIRONMENTAL FINDINGS

**KEY RESULT AREA**

One Fresno

**RECOMMENDATIONS**

Staff recommends that the City Council:

1. Adopt the resolution making necessary public health and safety findings under CEQA guidelines section 15269(c) exempting award of interim contract based on an emergency.
2. Approve a six-month interim contract with McCarthy Family Farms for the beneficial reuse of a portion of City biosolids.

**EXECUTIVE SUMMARY**

The Regional Wastewater Reclamation Facility (RWRF) continuously produces biosolid material at a rate of 120,000 wet tons per year. Material must be removed from the site on a regular basis and not allowed to accumulate for health and safety reasons. Prior to November 29, 2005 all of the biosolid material was processed by McCarthy Farms in Kern County. On November 29, 2005, staff requested Council to award two contracts for the removal, processing and beneficial reuse or disposal of biosolids. One contract to Earthwise Organics in Merced County was approved, but a second contract to Tully Ranches in Kern County was not due to a challenge by McCarthy Family Farms on inadequate CEQA. In the meantime, on December 13, 2005, the City Council adopted Resolution 2005-518 awarding an interim contract for removal of approximately 25,000 wet tons of biosolids to McCarthy Family Farms and on June 27, 2006 extended the contract an additional six months in order to solicit new proposals for the removal, processing, and beneficial reuse or disposal of biosolids that includes preparation of CEQA for proposals to be considered for award. A CEQA consultant has been retained and a notice of preparation posted. In the meantime until CEQA is completed, an interim contract for a portion of the biosolid material generated is recommended to continue to go to McCarthy Farms under a statutory exemption from CEQA for emergencies. McCarthy Family Farms will process biosolids for the beneficial reuse at a rate of \$25.50 per ton.

## REPORT TO THE CITY COUNCIL

Award of Interim Contract for City Biosolids and Environmental Findings

January 23, 2007

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### **KEY OBJECTIVE BALANCE**

The proposed contract balances the Key Objectives of Customer Satisfaction, Financial Management and Employee Satisfaction. The recommendation enhances Customer Satisfaction by providing a sound environmental and interim alternative for the reuse of the City's biosolids. It provides prudent Financial Management by eliminating the potential of fines and administrative penalties for the improper stockpiling and storage of biosolids on site if an interim alternative for the processing of the remaining half of the biosolids is not selected. Employee satisfaction is derived from providing the services needed for the employees to operate the reclamation facility in a safe and environmentally responsible manner.

### **ENVIRONMENTAL REVIEW**

Under CEQA, there is a statutory exemption from the requirements of CEQA for an emergency project, including a project to take specific actions necessary to prevent or mitigate an emergency (Public Resources Code § 21080(b)(4) and CEQA Guidelines § 15269(c)). Based on the facts below, Staff believes that this exemption can be met to enter into an interim contract for the beneficial reuse of a portion of the City's biosolids.

### **BACKGROUND**

The RWRF produces approximately 120,000 wet tons of biosolids a year with annual volume growth estimated between five to seven percent through 2025. The City must have a means of disposing of all biosolids produced at the RWRF each day. Biosolids are produced on a continuous basis and the City does not have the ability to store a large volume of material on site. Biosolids not removed from site on a regular basis and allowed to accumulate for more than a short period of time could present a potential health and safety problem. On November 29, 2005 the City Council adopted Environmental Assessment Number 05-38, Finding of Conformity, and awarded a contract to process for beneficial reuse approximately one-half of the biosolids produced at the RWRF to Earthwise Organics in Merced County. At the same meeting Council was also presented with a staff recommendation for the reuse of the remaining half of the biosolids to Tully Ranch, but made no award of contract due to a challenge of inadequate CEQA by McCarthy Family Farms, both of Kern County. Staff was directed to solicit additional proposals and staff is now in the process of preparing an EIR under CEQA. Staff reissued a Request for Proposals for the beneficial reuse of biosolids and has retained a CEQA consultant.

Staff recommends the approval of another six-month interim contract to McCarthy Family Farms for the removal and beneficial reuse of a portion of biosolids at a cost of \$25.50 per ton.

The approval of the six-month interim contract with McCarthy Family Farms would allow time for a consultant to complete the appropriate CEQA work for a viable long term removal and reuse of the biosolids. A full Environmental Impact Report (EIR) is being prepared after consultation with the City Attorney's Office. A contract for the CEQA work was awarded to Tetra Tech, EM Inc. as approved by City Council on October 30, 2006. A notice of preparation of the EIR has been drafted and was posted on January 16, 2007.

The City Attorney has signed the attached Resolution and approved the interim Agreement as to form.

### **FISCAL IMPACT**

The Wastewater Management Division has budgeted for the beneficial reuse of this material.

Attachment : Resolution

RESOLUTION NO. \_\_\_\_\_

A RESOLUTION OF THE COUNCIL OF THE CITY OF FRESNO, CALIFORNIA, ADOPTING FINDINGS REGARDING AN EMERGENCY EXEMPTION TO CEQA (PUBLIC RESOURCES CODE § 21080(b)(4) AND CEQA GUIDELINES SECTION 15269(c)) TO APPROVE AN ADDITIONAL SIX MONTH INTERIM CONTRACT TO MCCARTHY FAMILY FARMS FOR THE BENEFICIAL REUSE OF A PORTION OF THE CITY'S BIOSOLIDS

WHEREAS, the City of Fresno is the operator of the Fresno-Clovis Metropolitan Regional Wastewater Reclamation Facility ("Wastewater Facility") and as such the City collects and manages wastewater; and

WHEREAS, the City is subject to comprehensive federal and state regulatory and permitting requirements in its management and operation of its Wastewater Facility; and

WHEREAS, Biosolids are treated solid, semi-solid or liquid residues generated during the treatment of sewage from a wastewater treatment facility that meets certain federal and state requirements; and

WHEREAS, the City's treatment of wastewater at the Wastewater Facility creates Biosolids as a by-product of the wastewater treatment process; and

WHEREAS, the Wastewater Facility's processing and disposal of Biosolids is critical to the health and safety of the City of Fresno and its residents; and

WHEREAS, the Wastewater Facility currently produces approximately 120,000 wet tons of Biosolids annually with yearly growth estimated between 5 to 7 percent; and

WHEREAS, on January 1, 2006, the City entered into an interim contract with McCarthy Family Farms to take and beneficially reuse a portion of the Wastewater Facility Biosolids, and that interim contract expired on December 31, 2006; and

WHEREAS, as of January 1, 2007, the City will not have a contract with anyone to remove and beneficially reuse approximately one half of the Wastewater Facility Biosolids; and

WHEREAS, under the City's Wastewater Discharge Requirements as provided in Order No. 5-01-254 from the California Regional Water Quality Control Board, Central Valley Region (RWQCB), the City is not allowed to store Biosolids for more than a temporary period of time; and

WHEREAS, the City is not permitted under Federal Regulations (40 C.F.R. § 503), or any other Federal or State regulation, to store and dispose of Biosolids at the Wastewater Facility or on or at any other City property; and

WHEREAS, under Order No. 5-01-254, any temporary storage of Biosolids at the Wastewater Facility must be done in a manner that is confined to the Wastewater Facility property and conducted in a manner that minimizes leachate formation and precludes infiltration of waste constituents into soils in a mass or concentration that could potentially contaminate groundwater or violate groundwater limitations imposed by the RWQCB; and

WHEREAS, the City has no facilities at the Wastewater Facility that can be used to store the wet Biosolids that are produced each day at the Wastewater Facility and comply with the above requirements; and

WHEREAS, the City has no practical or legal means to store or reuse the daily tons of Biosolids that were the subject of the interim contract; and

WHEREAS, the accumulation of Biosolids at the Wastewater Facility, which does not have adequate facilities and improvements for storage of Biosolids, will create a clear, imminent, and serious hazard to the public's health, safety and welfare caused by, among other things, the leaching of pollutants into the groundwater; the attraction of various vectors, including rats and insects; and the pathogen content in the Biosolids presents a threat to public health; and

WHEREAS, based upon the above, the City, to avoid violating its RWQCB discharge requirements, violating other State and Federal laws and regulations, and causing public health, safety and welfare hazards, must enter into an interim contract with an individual or entity that is

legally permitted under Federal Regulations (40 C.F.R. § 503) and State Regulations to receive and process Biosolids beginning January 1, 2007; and

WHEREAS, the City has determined that it is in the City's best interest to enter into an interim contract with McCarthy Family Farms to continue to take approximately one half of Biosolids produced for an additional six month term; and

WHEREAS, there is insufficient time to complete adequate environmental review and adopt necessary findings under the California Environmental Quality Act ("CEQA"), Cal. Public Resources Act, §§ 21000, et seq. and CEQA Guidelines, §§ 15000, et seq. to approve an interim agreement to begin January 1, 2007; and

WHEREAS, the City intends to award a permanent contract under RFP No. 8821 for the long term disposition of Biosolids after conducting a new and thorough environment review in compliance with CEQA and completing the Request for Proposal process; and

WHEREAS, CEQA provides a statutory exemption (Public Resources Code § 21080(b)(4) and CEQA Guidelines § 15269) from the requirements of CEQA for an emergency project, including a project to take specific actions necessary to prevent or mitigate an emergency.

NOW, THEREFORE, BE IT RESOLVED by the Council of the City of Fresno, as follows:

1. The Council finds that entering into an interim contract with McCarthy Family Farms for a six month term is necessary to prevent or mitigate the clear and imminent danger which demanded immediate action to prevent or mitigate loss of or damage to life, health, and essential public services caused by the threatened accumulation of Biosolids at the Wastewater Facility after January 1, 2007.

2. The Council finds, based upon its independent judgment, that entering into an interim contract with McCarthy Family Farms for a six month term is an emergency project for

Mayor Approval/No Return: \_\_\_\_\_, 2007

Mayor Veto: \_\_\_\_\_, 2007

Council Override Vote: \_\_\_\_\_, 2007

REBECCA E. KLISCH  
City Clerk

BY: \_\_\_\_\_  
Deputy

JAMES C. SANCHEZ  
CITY ATTORNEY

By   
Senior Deputy/Deputy 6/16/07

NAA:cb [39560v3eb/naa] 01/16/07

**Agreement  
Receiving and Processing Services for Biosolid Materials  
City of Fresno, California**

THIS AGREEMENT for Receiving and Processing of Biosolid Materials ("Agreement") is made and entered into this 1<sup>st</sup> day of January, 2007, between the CITY OF FRESNO, a municipal corporation ("CITY"), and MCCARTHY FAMILY FARMS, INC., a California corporation ("CONTRACTOR"). CITY and CONTRACTOR are sometimes hereinafter referred to individually as a "Party" and collectively as the "Parties."

**RECITALS**

WHEREAS, CITY desires the removal and beneficial reuse of a portion of CITY's generated Biosolid Materials over a sixth month period beginning January 1, 2007; and

WHEREAS, CONTRACTOR represents that it is qualified to perform such services under the permits of regulatory agencies of the State of California and the Environmental Protection Agency.

**AGREEMENT**

NOW, THEREFORE, in consideration of the mutual promises hereinafter enumerated, the Parties agree as follows:

**SECTION 1. DEFINITIONS**

For the purposes of this Agreement, the definitions and identifications set forth below are agreed upon by the Parties.

**1.1 Biosolid Material(s)**--shall mean treated solid, semi-solid or liquid residues generated by CITY during the treatment of sewage at its Regional Wastewater Reclamation Facility located at 5607 West Jensen, Fresno, California which process meets certain federal requirements for generating Class B residues in accordance with 40 CFR 503 (Process to Significantly Reduce Pathogen).

**1.2 CITY's Representative**--shall mean the Director of Public Utilities or his/her designee.

**1.3 Compost**--shall mean an end product of Biosolid Material Processing that meets or exceeds current market standards and the requirements of all applicable respective regulatory agencies including, without limitation, the Environmental Protection Agency and the California Integrated Waste Management Board.

**1.4 Process or Processing**--shall mean the method(s) by which CONTRACTOR prepares the Biosolid Material for storage, shipment, and/or for sale, application to land, Compost, mine reclamation or a combination thereof, or any other approved reuse program for the Material.

**1.6 Processing Facility**--shall mean the primary location where CONTRACTOR receives, stores, transfers, or Processes the collected Biosolid Material prior to storage, shipment, and/or for sale, application to land, Compost, and/or mine reclamation or a combination thereof, or any other approved reuse program for the Material. The location, for purposes of this Agreement, is at the address of San Joaquin Composting, Inc, 12421 Holloway Road, P.O. Box 5, Lost Hills, California 93249. The phone number at the Processing Facility is (661) 797-2914, and the fax number at the Processing Facility is (661) 797-2915.

1.7 Ton--shall mean 2,000 pounds avoirdupois.

1.8 Working Day(s)-- shall mean Sunday through Saturday, 6:00 a.m. to 6:00 p.m.. CONTRACTOR represents that such days and hours of operation comply with applicable laws, permits and regulations. CONTRACTOR may petition CITY to modify these working hours to meet the conditions of its permit; however, CITY shall be under no obligation to agree to any modification.

## **SECTION 2. TERM OF CONTRACT**

### **2.1 Term and Extension(s)**

The term of this Agreement shall be for a period of six months beginning on January 1, 2007 and ending June 30, 2007, unless terminated earlier as provided in this Agreement.

### **2.2 Termination by CITY for Non-appropriation**

In the event of non-appropriation relating to the Agreement, CITY shall have the right to terminate the Agreement at the end of any fiscal year of CITY, in the manner and subject to the terms specified in this subsection. CITY shall endeavor to give written notice of such termination not less than sixty (60) calendar days prior to the end of such fiscal year, and shall notify CONTRACTOR of any anticipated termination. For purposes of this subsection, "fiscal year" shall mean the twelve month fiscal period of CITY which commences on July 1 in every year and ends on the following June 30. For purposes of this subsection, "non-appropriation" shall mean the failure of CITY or CITY's governing body to appropriate money for any fiscal year of CITY sufficient for the continued performance of the Agreement by CITY.

### **2.3 Termination for Convenience**

CITY reserves the right to terminate this Agreement for any reason, upon sixty (60) days written notice to CONTRACTOR. In the event of such termination, CONTRACTOR shall be paid for satisfactory service performed to the date of termination.

## **SECTION 3. SCOPE OF SERVICES**

### **3.1 Non-exclusive Agreement**

CONTRACTOR shall receive, transport and Process on a timely basis its portion of Biosolid Material generated by CITY at CITY's Regional Wastewater Reclamation Facility located at 5607 West Jensen Avenue, Fresno, California.

CONTRACTOR understands and agrees that this is a non-exclusive Agreement and CITY is not obligated by this Agreement to deliver all Biosolid Material generated at its Regional Wastewater Reclamation Facility.

The Biosolid Material received and transported by CONTRACTOR during the 6-month term of this Agreement will include approximately 50% of the Biosolid Material generated over the 6-month term of this Agreement by the CITY's Regional Wastewater Reclamation Facility (approximately 25,000 Tons or more of Biosolid Material). CITY, however, makes no guarantee on tonnages of Biosolid Material to be anticipated by CONTRACTOR. Notwithstanding the foregoing, CITY retains the right to divert up to 10,000 Tons of Biosolid Material, annually, for the sole purpose of experimenting on other means of reuse or disposal of the Biosolid Material.

**3.2 Receiving of Biosolid Materials**

CONTRACTOR shall receive Biosolid Material at the CITY's Regional Wastewater Reclamation Facility on Working Days (between the hours of 6:00 a.m. to 6:00 p.m., Sunday through Saturday) and transport it to the Processing Facility.

Except as expressly provided in this subsection, CONTRACTOR will accept the Biosolid Material "as is" and will assume all risks in handling such material. Biosolid Material shall be received by CONTRACTOR's employees and transporting equipment in accordance with the rules and regulations of the CITY's Regional Wastewater Reclamation Facility, including the "Loading Standard Operating Procedure" which is provided in the silo area of said Facility. CITY shall ensure that CONTRACTOR's vehicles will not be unreasonably detained during receipt of the Biosolid Materials. CONTRACTOR acknowledges that other contractor vehicles may also be receiving Biosolid Materials and CONTRACTOR agrees to wait its turn until the other contractor's vehicle departs the loading area.

All CONTRACTOR vehicles shall wash off prior to departing for local roadways and all loads shall be tarped prior to departure from CITY's Regional Wastewater Reclamation Facility.

CONTRACTOR shall provide weight tickets from a State of California registered and certified scale at the CITY's Regional Wastewater Reclamation Facility. CONTRACTOR shall generate weight tickets which are to be signed by the respective CONTRACTOR vehicle driver and a hard copy deposited in the box provided by CITY in the loading area, or as otherwise designated by CITY, prior to the departure of CONTRACTOR's vehicle from the CITY's Regional Wastewater Reclamation Facility. CONTRACTOR shall prepare each weight ticket by assigning each a unique control number, identifying thereon the CITY's Regional Wastewater Reclamation Facility by name, and including thereon the following printed information:

- Inbound Date and Time, and Weighmaster
- Outbound Date and Time, and Weighmaster
- CONTRACTOR Truck Number
- Vehicle License Plate Number
- Description of material
- Gross Weight in pounds
- Gross Truck Tare Weight in pounds
- Net Weight in pounds
- Driver Signature

CONTRACTOR shall comply with all federal, state and local agency regulations.

**3.3 Processing of Biosolid Materials**

CONTRACTOR shall be responsible for the storage, Processing, transfer, sale and final disposition of CITY's Biosolid Materials at the Processing Facility in a manner ensuring compliance with permits issued by federal, state or local governmental bodies or agencies for the site of the Processing Facility. The end use of one hundred percent of CITY's Biosolid Materials received and Processed by CONTRACTOR as either Compost, biomass fuel, mine reclamation, land application, or as a soil amendment to be used by end users shall be subject to the approval of CITY's Representative. CONTRACTOR shall comply with all applicable federal, state and local laws, as well as with regulations of the Environmental Protection Agency for final disposition of Biosolid Materials.

CONTRACTOR must meet all federal, state and local laws, as well as the Environmental Protection Agency regulations and standards, for the methods of Processing of Biosolid Materials.

The storage of Biosolid Materials by CONTRACTOR after receipt from CITY is strictly prohibited for a period in excess of 48 hours.

### **3.4 Workmanship Guarantee**

The workmanship of the service to be performed for CITY by CONTRACTOR will be in accordance with that as specified in this Agreement, and where not expressly specified, in accordance with generally accepted standards.

### **3.5 Federal Immigration Reform and Control Act of 1986**

CONTRACTOR shall comply with all of the provisions of the Federal Immigration Reform and Control Act of 1986 (S.B.1200;H.REP.99-1000). This requirement includes compliance with all of the employee documentation provisions. Furthermore, CONTRACTOR will make any employee documentation required to comply with the Act immediately available to CITY, upon its request, for each individual employee performing services hereunder.

### **3.6 Performance and Working Conditions**

CONTRACTOR agrees that it shall assume sole and complete responsibility for all performance and working conditions and its employees/equipment/subcontractors during the provision of services under this Agreement, including safety of all persons and property and appropriate use of equipment and that this requirement shall apply continuously and not be limited to normal working hours.

### **3.7 Alternative Processing Facility Plan**

To ensure uninterrupted receiving and Processing of Biosolid Material in the event access to the Processing Facility is unforeseeably restricted (i.e., inclement weather, permitting issues, change in California laws or regulations), CONTRACTOR shall maintain a plan acceptable to CITY for immediate use of an alternative processing facility on a temporary basis while CONTRACTOR takes all reasonable steps to again provide access to the Processing Facility.

## **SECTION 4. COMPENSATION**

### **4.1 Compensation for Receiving and Processing of Biosolid Materials**

CONTRACTOR's sole compensation for performance of all the services required or rendered pursuant to this Agreement shall be a fee per Ton of Biosolid Materials received by CONTRACTOR at CITY's Regional Wastewater Reclamation Facility.

The amount of the fee shall be \$25.50 per Ton of Biosolid Materials received.

### **4.2 Payment**

CONTRACTOR shall invoice the City of Fresno in order to initiate the payment process. Invoices shall be submitted in a timely manner no later than the end of each calendar month.

Invoices shall conspicuously display CITY's purchase order number and shall be submitted to:

City of Fresno  
Fresno/Clovis Regional Wastewater Reclamation Facility  
ATTN: Reclamation Coordinator  
5607 W. Jensen Ave.  
Fresno, California 93706-9458

Except as otherwise provided herein, payment shall be made to CONTRACTOR no later than thirty (30) calendar days from receipt of an invoice and proper documentation of the respective weight tags for

each Ton of CITY's Biosolid Material received by CONTRACTOR at CITY's Regional Wastewater Reclamation Facility.

Payment for service shall be made by CITY to CONTRACTOR, in lawful money of the United States, by warrant of CITY issued and delivered to CONTRACTOR in the ordinary course of CITY business provided the specified service has been rendered by CONTRACTOR and accepted by CITY.

CONTRACTOR hereby agrees it will not assign the payment of any monies due it from CITY under the terms of this Agreement to any other individual(s), corporation(s) or entity(ies). CITY retains the right to pay any and all monies due CONTRACTOR directly to CONTRACTOR.

#### **4.4 Limitations on CITY's Obligations**

CITY's obligations to pay CONTRACTOR are subject to availability of revenue from sewer utility fees levied on CITY's customers, and this obligation is subordinate to the pledge of these revenues to any and all bonded indebtedness of CITY. In no event is CITY pledging or obligating under this Agreement any other revenues, including CITY's General Fund, or any real and personal property taxes, sales taxes or any other tax revenues. Further, neither the full faith and credit nor the taxing power of CITY is pledged to the funding of any obligations under this Agreement. The obligations of CITY in this Agreement does not constitute a liability or obligation of CITY for which CITY is obligated to levy or pledge any form of taxation or for which CITY has levied or pledged any form of taxation.

#### **SECTION 5. LABOR, COSTS, AND PERFORMANCE BOND/LETTER OF CREDIT**

CONTRACTOR shall, at its sole cost and expense, furnish all labor, materials and equipment required for CONTRACTOR to perform the services pursuant to this Agreement.

Throughout the life of this Agreement, CONTRACTOR shall pay for and maintain in full force and effect a "Faithful Performance Bond" in the amount of \$400,000. This bond is to be issued by a corporate surety in a form acceptable to CITY and renewed annually.

In lieu of this bond, CITY may accept from CONTRACTOR an Irrevocable Standby Letter of Credit issued with the CITY named as the sole beneficiary. The Irrevocable Standby Letter of Credit is to be issued by a bank, and in a form, acceptable to CITY. This letter of credit shall otherwise comply with the same amount and terms as required of the bond as described above.

#### **SECTION 6. INDEPENDENT CONTRACTOR**

In the furnishing of the services provided for herein, CONTRACTOR is acting as an independent contractor. Neither CONTRACTOR, nor any of its officers, associates, agents or employees shall be deemed an employee, partner or agent of CITY for any purpose. However, CITY shall retain the right to verify that CONTRACTOR is performing its respective obligations in accordance with the terms of the Agreement.

#### **SECTION 7. CONTRACTOR'S RECORDS**

##### **7.1 Maintenance and Inspection of Documents and Records**

CONTRACTOR shall maintain all documents and records related to performance of services under this Agreement for a period of three years after final payment and for the period of time required by law. CONTRACTOR shall engage in accounting and reporting practices satisfactory to CITY. These include, but are not limited to, financial information, billing, volume by commodity, load and flow data, electronic transfer of data, AB939/SB1066 compliance and reporting, audit processes, and verification procedures.

Records of CONTRACTOR pertaining to the services hereunder shall be kept on a generally recognized accounting basis and shall be available to CITY or its authorized representatives, during regular business hours within forty-eight (48) hours of written request by CITY's Representative, throughout the life of the Agreement and for a period of three years after final payment and for the period of time required by law. In addition, all books, documents, papers, and records of CONTRACTOR pertaining to the Agreement shall be available for the purpose of making audits, examinations, excerpts, and transcriptions for the same period of time.

Unless an alternative is mutually agreed upon by the Parties, said records and documents shall be available at Contractor's local address indicated for receipt of notices in this Agreement or at the office of CITY's Wastewater Division.

Any record or document required to be maintained by CONTRACTOR, pursuant to this Agreement and related to any matter that is the subject of Sections 13 and 14 of this Agreement, shall be made immediately available for CITY inspection upon CITY's decision that access is needed because of the insufficiency of CONTRACTOR's response to CITY's written notice to CONTRACTOR. Said written notice shall specify CITY's concerns about CONTRACTOR's lack of performance or compliance with the terms and conditions of this Agreement and shall advise CONTRACTOR that it has twenty-four (24) hours to respond to said notice.

This subsection shall survive expiration or termination of the Agreement.

## **7.2 Reporting Requirements**

**7.2.1** CONTRACTOR shall submit to CITY a written Monthly Report for the preceding month that will include at least all of the following:

1. Tonnage summaries of all Biosolid Materials; and
2. Daily disposition of CITY's Biosolid Materials by end product, end use and final disposition by weight.

The Monthly Report is due to CITY fifteen (15) calendar days after the end of each month.

**7.2.2** CONTRACTOR shall submit to CITY a written Biannual Report that will include at least all of the following:

1. A collated summary of the information contained in the Monthly Reports for Biosolid Materials, and a summary of the tonnages of the Biosolid Material use and final disposition by month and by weight; and
2. A discussion of highlights and other noteworthy experiences.

A year will be January through December for purposes of preparing the Biannual Report. The Biannual Report is due to City within thirty (30) calendar days after the last day in the month of June.

**7.2.3 Reports and Records Required by Other Governmental Agencies** - CONTRACTOR shall procure, maintain and provide to CITY, with the next Monthly Report, copies of any and all records (including, but not limited to, any changes to Processing Facility permits) or information which are required of CONTRACTOR and/or CITY by any other governmental or regulatory agency.

7.2.4 All reports shall be submitted to:

City of Fresno  
Fresno/Clovis Regional Wastewater Reclamation Facility  
ATTN: Reclamation Coordinator  
5607 W. Jensen Ave.  
Fresno, California 93706-9458

7.2.5 Subsection 7.2 shall survive termination or expiration of this Agreement.

#### **SECTION 8. NON-ASSIGNMENT**

The Agreement is personal to CONTRACTOR and there shall be no assignment, transfer, sale, or subcontracting by CONTRACTOR of its rights or obligations under the Agreement without the prior written approval of CITY. Any attempted assignment, transfer, sale or subcontracting by CONTRACTOR, its successors or assigns, shall be null and void unless approved in writing by CITY.

#### **SECTION 9. PERMITS AND LICENSES**

CONTRACTOR, at its sole cost and expense, shall obtain and maintain through the initial term of this Agreement, and any extensions thereof, all permits, licenses and approvals necessary or required for CONTRACTOR to perform the work and services described herein, including, but not limited to, the operation of the Processing Facility.

In providing the services required by this Agreement, CONTRACTOR will have the responsibility of notifying CITY of any operational problems with the permitted Processing Facility, revocation of permits, issuance of documents requesting the "Cease and Desist" of the operation or any other regulatory agency's notices within two (2) hours of notification by said agency(ies).

#### **SECTION 10. INSURANCE**

Throughout the life of this Agreement, CONTRACTOR shall pay for and maintain in full force and effect all policies of insurance required hereunder with an insurance company(ies) either (i) admitted by the California Insurance Commissioner to do business in the State of California and rated not less than "A-VII" in Bests Insurance Rating Guide, or (ii) authorized by the CITY's Risk Manager. The following policies of insurance are required:

- (1) COMMERCIAL GENERAL LIABILITY insurance which shall include contractual, products and completed operations coverages, bodily injury and property damage liability insurance with combined single limits of not less than \$2,000,000 per occurrence and \$4,000,000 aggregate.
- (2) COMMERCIAL AUTOMOBILE LIABILITY insurance, endorsed for "any auto," with combined single limits of liability of not less than \$1,000,000 per occurrence.
- (3) WORKERS' COMPENSATION insurance as required under the California Labor Code.
- (4) POLLUTION LEGAL LIABILITY insurance with limits of \$5,000,000 per loss and an annual aggregate limit of \$5,000,000.

The above described policies of insurance shall be endorsed to provide an unrestricted 30-day written notice in favor of CITY, of policy cancellation, change or reduction of coverage, except for the Workers' Compensation policy which shall provide a 10-day written notice of such cancellation, change or reduction of coverage. In the event any policies are due to expire during the term of this Agreement, CONTRACTOR shall provide a new certificate evidencing renewal of such policy not less than fifteen

(15) calendar days prior to the expiration date of the expiring policy(ies). Upon issuance by the insurer, broker, or agent of a notice of cancellation, change or reduction in coverage, CONTRACTOR shall file with CITY a certified copy of the new or renewal policy and certificates for such policy.

The General Liability, Pollution Legal Liability and Automobile Liability insurance policies shall be written on an occurrence form and shall name the City of Fresno, its officers, officials, agents, employees and volunteers as an additional insured. Such policy(ies) of insurance shall be endorsed so CONTRACTOR's insurance shall be primary and no contribution shall be required of CITY. Any Workers' Compensation insurance policy shall contain a waiver of subrogation as to CITY, its officers, officials, agents, employees and volunteers.

CONTRACTOR shall furnish CITY with the certificate(s) and applicable endorsements for ALL required insurance prior to CITY's execution of the Agreement. Such evidence of insurance coverage shall be provided to CITY at the address for CITY set forth on the signature page of this Agreement and at the following address:

City of Fresno  
Risk Management Division  
2600 Fresno Street  
Fresno, California 93721-3612

CONTRACTOR shall furnish CITY with copies of the actual policies upon the request of the CITY's Risk Manager at any time during the life of the Agreement or any extension.

If at any time during the life of the Agreement or any extension, CONTRACTOR fails to maintain the required insurance in full force and effect, all work under this Agreement shall be discontinued immediately, and all payments due or that become due to CONTRACTOR shall be withheld until notice is received by CITY that the required insurance has been restored to full force and effect and that the premiums therefore have been paid for a period satisfactory to CITY. Any failure to maintain the required insurance shall be sufficient cause for CITY to terminate this Agreement.

If CONTRACTOR should subcontract all or any portion of the work to be performed under this Agreement, CONTRACTOR shall require each subcontractor to provide insurance protection in favor of CITY, its officers, officials, employees, agents and volunteers in accordance with the terms of each of the preceding paragraphs, except that the subcontractor's certificates and endorsements shall be on file with CONTRACTOR and CITY prior to the commencement of any work by the subcontractor.

#### **SECTION 11. IDEMNIFICATION**

Except with regard to hauling services as provided in the paragraph below, CONTRACTOR shall indemnify, hold harmless and defend CITY and each of its officers, officials, employees, agents and volunteers from any and all loss, liability, fines, penalties, forfeitures, costs and damages (whether in contract, tort or strict liability, including but not limited to personal injury, death at any time and property damage) incurred by CITY, CONTRACTOR or any other person, and from any and all claims, demands and actions in law or equity (including attorney's fees and litigation expenses), arising or alleged to have arisen directly or indirectly out of performance of this Agreement. CONTRACTOR's obligations under the preceding sentence shall apply regardless of whether CITY or any of its officers, officials, employees, agents or volunteers are actively or passively negligent, but shall not apply to any loss, liability, fines, penalties, forfeitures, costs or damages caused solely by the active negligence or by the willful misconduct of CITY or any of its officers, officials, employees, agents or volunteers.

Specifically regarding hauling services, CONTRACTOR shall indemnify, hold harmless and defend CITY and each of its officers, officials, employees, agents and volunteers from any and all loss, liability, fines, penalties, forfeitures, costs and damages (whether in contract, tort or strict liability, including but not limited to personal injury, death at any time and property damage) incurred by CITY, CONTRACTOR or any other person, and from any and all claims, demands and actions in law or equity (including attorney's fees and litigation expenses), arising or alleged to have arisen directly or indirectly out of performance of this Agreement. CONTRACTOR's obligations under the preceding sentence shall apply regardless of whether CITY or any of its officers, officials, employees, agents or volunteers are actively or passively negligent, but shall not apply to any loss, liability, fines, penalties, forfeitures, costs or damages caused by the sole negligence or willful misconduct of CITY or any of its officers, officials, employees, agents or volunteers, except when such officers, officials, employees, agents or volunteers are under the direct supervision and control of CONTRACTOR.

If CONTRACTOR should subcontract all or any portion of the work to be performed under this Agreement, CONTRACTOR shall require each subcontractor to indemnify, hold harmless and defend CITY and each of its officers, officials, employees, agents and volunteers in accordance with the terms of the preceding paragraph.

This section shall survive termination or expiration of this Agreement.

## **SECTION 12. LIQUIDATED DAMAGES**

**12.1** From the nature of the services to be rendered, CITY and CONTRACTOR agree that it is extremely difficult to fix actual damages which may result from failure on the part of CONTRACTOR to perform any of its obligations herein and a resulting loss to CITY. Therefore, both Parties agree that CONTRACTOR's liability shall be limited to the fixed amount stated in this section, as liquidated damages and not as a penalty, and may be deducted automatically by CITY from CONTRACTOR's compensation for the period following the period in which liquidated damages are assessed. The decision of CITY is final with respect to any assessment of liquidated damages. CITY may rely on information supplied by CONTRACTOR, by the public or by staff, as well as by other means in determining assessment of liquidated damages.

**12.2** Liquidated damages may be assessed at the rate of ten thousand dollars (\$10,000.00) per day for each individual incident of "no service" occurring through the fault of CONTRACTOR. Additionally, without limiting other grounds for termination, CITY may terminate this Agreement for default when the total number of "no service" days equals three (3) calendar days within any ten (10) calendar day period. CITY shall notify CONTRACTOR, by telephone followed up in writing or as otherwise provided in this Agreement, of each Subsection 12.2 "no service" day within one (1) Working Day of said incident. CITY's decision as to the occurrences of a "no service" incident shall be final. CITY may rely on information supplied by CONTRACTOR, the public, staff, or by other means, in determining of an incident has occurred. Provisions of this section shall not prevent CITY from terminating the default pursuant to the provisions of Sections 13 and 14 of this Agreement. An incident of "no service" shall not have occurred if such "no service" is caused by, or is the result of, forces beyond CONTRACTOR's control, including without limitation, earthquakes, floods, fires and/or acts of nature.

**12.3** Failure of CITY to assert any right which it has under this Agreement, or to assess any liquidated damage as provided herein, shall not act as a waiver as to CITY's rights to enforce the provisions of this Agreement, or to assess liquidated damages in the future, or otherwise except as specified herein.

**12.4** The assessment of liquidated damages and/or deductions as provided under this Agreement shall in no way relieve CONTRACTOR of its obligation to provide sufficient service, or to meet any of the terms of this Agreement.

### **SECTION 13. EVENTS OF DEFAULT**

The occurrence of any of the following events shall constitute an immediate and material default and breach of the Agreement by CONTRACTOR:

**13.1** The abandonment, vacation or discontinuance of receiving, transporting, Processing and beneficial reuse of Biosolid Material by CONTRACTOR, as required by the Agreement, for a period in excess of twenty-four (24) consecutive hours after written notice by CITY, provided that such abandonment, vacation or discontinuance is not caused by forces beyond CONTRACTOR's reasonable control, including without limitation, earthquakes, floods and acts of nature.

**13.2** CONTRACTOR's becoming insolvent, or the making by CONTRACTOR of any general arrangement or any assignment for the benefit of creditors.

**13.3** The filing by or against CONTRACTOR of a petition to have CONTRACTOR adjudged bankrupt or a petition or reorganization or arrangement under any law relating to bankruptcy (unless, in the case of a petition filed against CONTRACTOR, the same is dismissed within sixty (60) calendar days).

**13.4** The transfer of the majority controlling interest of CONTRACTOR to persons other than those who are in control at the time of the execution of this Agreement without prior written approval thereof by CITY.

**13.5** The discovery by CITY that any weight tags or invoices required by this Agreement to be submitted to CITY by CONTRACTOR, contains a material misrepresentation of facts.

**13.6** The failure by CONTRACTOR to obtain, pay for, and maintain in full force and effect at all times during the life of this Agreement, without any lapse in coverage, such insurance or bonds or Letter of Credit as shall be required of CONTRACTOR under this Agreement.

**13.7** The failure of CONTRACTOR to keep, perform and observe all other promises, covenants, conditions and terms set forth in this Agreement, when such failure continues for more than one (1) calendar day after written notice from CITY for correction thereof, provided that where such failure cannot be cured within such one (1) calendar day, shall not constitute breach of this Agreement, if CONTRACTOR shall have commenced such action required to cure the particular default within the one (1) calendar day after such notice, and continues such performance diligently until completed.

### **SECTION 14. FAILURE TO CORRECT DEFAULT/TERMINATION**

**14.1** If CONTRACTOR, defaults pursuant to Subsections 13.1, 13.2, 13.3, 13.4, 13.5 or 13.6 or fails to correct a default as provided above in Subsection 13.7, CITY, without further notice, shall immediately have all, but not limited to, the following rights and remedies which CITY may exercise solely or in combination:

- (1) The right to declare that this Agreement, together with all rights granted CONTRACTOR, hereunder, is terminated effective upon such date as CITY shall designate.
- (2) The right to license others to perform the services required of CONTRACTOR, hereunder, or to perform such services itself.

**14.2** Within thirty (30) calendar days of termination of this Agreement, CONTRACTOR shall submit to CITY a final invoice for the period from the last immediately preceding monthly invoice to the date of termination. CITY shall pay to CONTRACTOR or CONTRACTOR shall pay to CITY, whichever is applicable, the following net amount: (1) any remaining unpaid compensation under Section 4 of this Agreement, prorated to the date of termination for services satisfactorily performed; (2) less any damages suffered by CITY because of CONTRACTOR's default where such amounts are not recoverable by CITY under the terms of the performance bond or Letter of Credit. Where CONTRACTOR is paying CITY, CONTRACTOR shall pay to CITY any unpaid amount including liquidated damages assessed.

**14.3** Remedies available to CITY under this section shall be cumulative of all rights/remedies available to CITY in law or equity.

**SECTION 15. DELIVERY OF SERVICES**

If CONTRACTOR is delayed providing services by (i) any acts or neglect of CITY or its employees, or others acting under authority of CITY by contract or otherwise, (ii) acts of God which CONTRACTOR could not reasonable have foreseen and provided for, (iii) illegal strikes, boycotts or like illegal obstructive action by employee or labor organizations, or (iv) any illegal general lockouts or other defensive action by employers, whether general or by organizations of employers; CONTRACTOR shall have no claim for damages against CITY for such delay, but shall be entitled to an extension of time occasioned thereby, upon application to the CITY's City Manager for such extension, provided that CONTRACTOR had previously notified the CITY's Purchasing Manager, in writing, within one week after the commencement or occurrence of the condition or event expected to cause a delay in delivery and the actual or estimated number of days of delay anticipated on account thereof. The decision of said City Manager as to the number of additional days, if any, to be allowed for completion of delivery of services on account of such condition or event, shall be given in writing to CONTRACTOR.

**SECTION 16. NOTICES**

Any notice required or intended to be given to either Party under the terms of this Agreement shall be in writing and shall be deemed to be duly given if delivered personally, by facsimile confirmed by telephone, or deposited into the United States certified mail, return receipt requested, with first class postage prepaid, addressed to the Party to which notice is to be given at the Party's address set forth on the signature page of this Agreement or at such other address as the Parties may from time to time designate by written notice.

**SECTION 17. GENERAL PROVISIONS**

**17.1 General Laws**

This Agreement shall be construed according to its fair meaning as if prepared by both Parties hereto. This Agreement shall be governed and interpreted, and the rights and duties of the Parties (both procedural and substantive) shall be determined by the laws of the State of California. Venue for purposes of the filing of any action regarding the enforcement or interpretation of this Agreement and any rights and duties hereunder shall be Fresno County, California.

**17.2 Titles and Captions**

Titles and captions are for convenience only and shall not constitute a portion of this Agreement.

### **17.3 Waivers**

The waiver by CITY of any breach by CONTRACTOR of any term, covenant, or condition contained herein shall not operate as a waiver of any subsequent breach of the same or any other term, covenant or condition contained herein.

### **17.4 Modifications**

CITY reserves the right to add to, modify, or delete requirements from, the Agreement. Any alterations, change or modification of or to this Agreement, in order to become effective, shall be made in writing and in each such instance shall be executed by or on behalf of each Party hereto.

### **17.5 Severability**

If any term, provision, condition or covenant of this Agreement shall, to any extent, be held invalid or unenforceable, the remainder of this Agreement shall not be affected thereby and each term and provision of this Agreement shall be valid and enforceable to the fullest extent permitted by law.

### **17.6 Binding**

Once this Agreement is signed by all Parties, it shall be binding upon, and shall inure to the benefit of, all Parties, and each Party's respective heirs, successors, assigns, transferee, agents, servants, employees and representatives.

### **17.7 Compliance With Law**

In providing the services required under this Agreement, CONTRACTOR shall at all times comply with all applicable laws of the United States, the State of California and CITY, and with all applicable regulations promulgated by Federal, State, regional, or local administrative and regulatory agencies, now in force and as they may be enacted, issued, or amended during the life of this Agreement.

### **17.8 Interpretation**

CONTRACTOR acknowledges that the Agreement in its final form is the result of the combined efforts of the parties and that, should any provision of the Agreement be found to be ambiguous in any way, such ambiguity shall not be resolved by construing the Agreement in favor or against any Party, but rather by construing the terms in accordance with their generally accepted meaning.

### **17.9 Attorney's Fees**

If either Party is required to commence any proceeding or legal action to enforce or interpret any term, covenant or condition of this Agreement, the prevailing Party in such proceeding or action shall be entitled to recover from the other Party its reasonable attorney's fees and legal expenses.

### **17.10 Merger of Prior Agreements and Understandings**

This Agreement contains the entire understanding between the Parties relating to the Processing Services for Biosolid Materials and all prior or contemporaneous agreements, understandings, representations and statements, oral or written are hereby merged herein and shall be of no further force and effect.

### **17.11 No Third Party Beneficiaries**

The rights, interests, duties and obligations defined within this Agreement are intended for the specific parties hereto as identified in the preamble of this Agreement. Notwithstanding anything stated to the contrary in this Agreement, it is not intended that any rights or interests in this Agreement benefit or flow to the interest of any third parties.

## **SECTION 18. RECYCLING PROGRAM**

In the event CONTRACTOR maintains an office or operates a facility(ies), or is required herein to

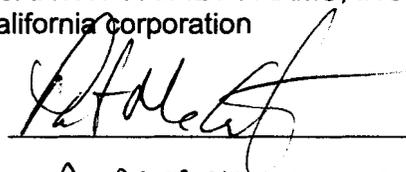


IN WITNESS WHEREOF, the Parties have executed by their duly authorized representatives this Agreement at Fresno, California on the day and year first above written.

CITY OF FRESNO,  
a municipal corporation

MCCARTHY FAMILY FARMS, INC.,  
a California corporation

By: \_\_\_\_\_  
Rene Ramirez, Director  
Department of Public Utilities

By:   
Name: R. PATRICK MCCARTHY

ATTEST:  
REBECCA E. KLISCH  
City Clerk

Title: PRESIDENT

By: \_\_\_\_\_  
Deputy

By: \_\_\_\_\_

Name: \_\_\_\_\_

APPROVED AS TO FORM:  
JAMES C. SANCHEZ  
City Attorney

Title: \_\_\_\_\_

By:   
Senior Deputy 1-18-07

Addresses:

TO CITY:  
City of Fresno  
Attn: Stephen A. Hogg, Manager  
Wastewater Management Division  
5607 W. Jensen  
Fresno, California 93706-9458  
Telephone: (559) 621-5110  
Facsimile: (559) 498-1700

TO CONTRACTOR:  
McCarthy Family Farms, Inc.  
Attn: R. Patrick McCarthy, President  
1601 Skyway Drive, Ste. 205  
Bakersfield, California 93308  
Telephone: (661) 391-5840  
Facsimile: (661) 391-5844