STATE OF NORTH CAROLINA
COUNTY OF DURHAM

# CONTRACT BETWEEN THE CITY OF DURHAM AND WASTE INDUSTRIES, LLC FOR STATIONARY CONTAINER RENTAL

THIS CONTRACT FOR STATIONARY CONTAINER RENTAL (the "Contract") is made the 17th day of September, 2012, by the City of Durham, a North Carolina municipal corporation ("City") and Waste Industries, LLC, a limited liability company organized and existing under the laws of the State of North Carolina ("Contractor").

**Sec. 1. Background and Purpose.** The City and the Contractor are parties to a Contract for Servicing Stationary Container Sites dated September 14, 2009 (the "Initial Contract"). Effective September 4, 2012, the Initial Contract will terminate and be superseded by this Contract, under which the Contractor will cease servicing stationary containers for City, and instead shall lease stationary containers to the City.

**Sec. 2. Services and Scope To Be Performed.** The Contractor shall perform the services as specified in Attachment A, entitled "Scope of Service" and in accordance with the number and locations of stationary containers as specified in Attachment B, entitled, "Rental Inventory for Stationary Containers." Amendment of Attachment B during the course of this Contract to provide for additional stationary containers shall be accomplished by a letter from the City's Director of Solid Waste to Contractor requesting the additional stationary container and specifying its location, which letter shall be acknowledged by Contractor by signing this letter at the bottom and sending a copy of such signed letter back to the Director by fax or email attachment. In this Contract, "Work" means the services that the Contractor is required to perform pursuant to this Contract and all of the Contractor's duties to the City that arise out of this Contract.

**Sec. 3. Terms. Initial Term.** The initial term of the Contract shall commence on September 5, 2012 (Commencement Date) and shall expire after one year, at 11:59 p.m. on September 4, 2013 (the "Initial Term"). The City may, at its discretion, renew this Contract for two additional one-year terms, for a maximum of three years from the commencement date of September 5, 2012. Ninety days prior to the end of a Term, the City must provide notice of its intent to renew. The City and the Contractor will discuss any possible changes to the Contract.

**Sec. 4. Complete Work without Extra Cost.** Except to the extent otherwise specifically stated in this Contract, the Contractor shall obtain and provide, without additional cost to the City, all labor, materials, equipment, transportation, facilities, services, permits, and licenses necessary to perform the Work.

**Sec. 5 Compensation.** The City shall pay the Contractor for the Work as specified in Attachment A.

**Sec. 6. Contractor's Billings to City.** The Contractor shall send a report and invoice to the City no later than the 10th of each month, with details for the amounts to be paid pursuant to this Contract. Each invoice shall document, to the reasonable satisfaction of the City:

a. Location of each stationary container provided by Contractor
b. Serial number for each stationary container specifying its location
c. At a $24.87 cost per month for rental of each stationary container, the total owed for that invoice.

Within thirty days after the City receives an invoice, the City shall send the Contractor a check in payment for all undisputed amounts contained in the invoice.

**Sec. 7. Insurance Requirements**

Contractor shall maintain insurance not less than the following:

Commercial General Liability, covering

- premises/operations,
- products/completed operations; this coverage shall be maintained for 6 years following the date of acceptance of the completed building by the City,
- broad form property damage,
- explosion, collapse, and underground hazards if the hazards exist in the performance of this Contract,
- contractual liability
- independent Contractors, if any are used in the performance of this Contract,
- City of Durham must be named additional insured, and an original of the endorsements to effect the coverage must be attached to the certificate (if blanket endorsements, then agent may so indicate in the GL section, in lieu of an original endorsement), and
- Combined single limit not less than $2,000,000 per occurrence; aggregate limit not less than $2,000,000 per year.

**Automobile Liability Insurance**, covering

- owned, hired, and non-owned vehicles
- employee-non-ownership
- MCS-90 endorsement for transportation of hazardous materials, where

Applicable combined single limit not less than $1,000,000 per accident; aggregate limit not less than $2,000,000.

City of Durham must be named additional insured, and an original of the endorsement to effect the coverage must be attached to the certificate (if by blanket endorsement, then agent may so indicate in the GL section of the certificate, in lieu of an original endorsement)

**Workers' Compensation Insurance**, covering

- statutory benefits;
- covering employees; owners partners, officers, and relatives (who work on this Contract); certificate must specifically state who is covered by the policy)
- employers' liability, with a limit if not less than $1,000,000
- Waiver of subrogation in favor of the City of Durham

**Excess / Umbrella Liability**, covering

- commercial general liability
- automobile liability

**Insurance shall be provided by:**

- companies authorized to do business in the State of North Carolina
- companies with Best rating of A-VIII or better

All the above referenced coverage's shall be primary.

**Insurance shall be evidenced by a certificate:**

- providing notice to the City of not less than thirty days prior to cancellation or reduction of coverage
- certificates shall be addressed to:

  City of Durham, North Carolina
  Attention: Finance Director
  101 City Hall Plaza
  Durham, NC 27701
- both the insurance certificate and the additional insured endorsement must be originals and must be approved by the City's Finance Director before Contractor can begin any work under this Contract

**Sec. 8. Performance of Work by City.** If the Contractor fails to perform the Work in accordance with section 2 above, the City may, in its discretion, in order to bring the project closer to the schedule or Contract specifications, perform or cause to be performed some or all of the Work, and doing so shall not waive any of the City's rights and remedies. Before doing so, the City shall give the Contractor notice of its intention. The Contractor shall reimburse the City for additional costs incurred by the City in exercising its right to perform or cause to be performed some or all of the Work pursuant to this section.

**Sec. 9. Exhibits.** The following exhibits are made a part this Contract:

Exhibit A - Scope of Service containing 1 page,

Exhibit B – Rental Inventory for Stationary Containers, and

In case of conflict between an exhibit and the text of this Contract, excluding the exhibit, the text of this Contract shall control.

**Sec. 10. Termination for Convenience.** (a) *Procedure.* Without limiting any party's right to terminate for breach, the City may, without cause, and in its discretion, terminate this Contract for convenience by giving the Contractor written notice that refers to this section. Termination shall be effective at the time indicated in the notice. The City Manager may terminate under this section without City Council action.

(b) *Obligations.* Upon termination, all obligations that are still executor on both sides are discharged except that any right based on prior breach or performance survives, and the indemnification provisions and the section of this Contract titled Trade Secrets and Confidentiality, if any, shall remain in force. At the time of termination or as soon afterwards as is practical, the Contractor shall give the City all Work, including partly completed Work. In case of termination, the Contractor shall follow the City's instructions as to which subcontracts to terminate. (c) *Payment.* The City shall pay the Contractor an equitable amount for the costs and charges that accrue because of the City's decisions with respect to the subcontracts, but excluding profit for the Contractor. Within 20 days after termination, the City shall pay the Contractor a one hundred dollar termination fee and for all Work performed except to the extent previously paid for. Work shall be paid for in accordance with the method (unit prices, hourly fees, etc.) to be used for payment had the Work been completed except to the extent it would be inequitable to either party, and if Work was to be paid for on a lump-sum basis, the City shall pay the part of the lump sum that reflects the percentage of completion attained for that Work. The Contractor shall not be entitled to any payment except as stated in this section because of TFC, whether on the basis of overhead, profit, damages, other economic loss, or otherwise.

**Sec. 11.** Notice. (a) All notices and other communications required or permitted by this Contract shall be in writing and shall be given either by personal delivery, fax, or certified United States mail, return receipt requested, addressed as follows:

To the City:
Director
Solid Waste Management Department
City of Durham
101 City Hall Plaza
Durham, NC 27701
The fax number is (919) 560-1197.

To the Contractor:
Waste Industries, LLC
ATT: William Davidson, General Manager
148 Stone Park Court
Durham, NC 27703
The fax number is (919) 598-1852

(b) Change of Address. Date Notice Deemed Given. A change of address, fax number, or person to receive notice may be made by either party by notice given to the other party. Any notice or other communication under this Contract shall be deemed given at the time of actual delivery, if it is personally delivered or sent by fax. If the notice or other communication is sent by United States mail, it shall be deemed given upon the third calendar day following the day on which such notice or other communication is deposited with the United States Postal Service or upon actual delivery, whichever first occurs.

"Contractor."

**Sec. 12. Indemnification.** (a) To the maximum extent allowed by law, the Contractor shall defend, indemnify, and save harmless Indemnitees from and against all Charges that arise in any manner from, in connection with, or out of this Contract as a result of acts or omissions of the Contractor or subcontractors or anyone directly or indirectly employed by any of them or anyone for whose acts any of them may be liable. In performing its duties under this subsection

"a," the Contractor shall at its sole expense defend Indemnitees with legal counsel reasonably acceptable to City. (b) Definitions. As used in subsections "a" above and "c" below -- "Charges" means claims, judgments, costs, damages, losses, demands, liabilities, duties, obligations, fines, penalties, royalties, settlements, and expenses (included without limitation within "Charges" are (1) interest and reasonable attorneys' fees assessed as part of any such item, and (2) amounts for alleged violations of sedimentation pollution, erosion control, pollution, or other environmental laws, regulations, ordinances, rules, or orders -- including but not limited to any such alleged violation that arises out of the handling, transportation, deposit, or delivery of the Items that are the subject of this Contract). "Indemnitees" means City and its officers, officials, independent contractors, agents, and employees, excluding the Contractor (c) Other Provisions Separate. Nothing in this section shall affect any warranties in favor of the City that are otherwise provided in or arise out of this Contract. This section is in addition to and shall be construed separately from any other indemnification provisions that may be in this Contract. (d) Survival. This section shall remain in force despite termination of this Contract (whether by expiration of the term or otherwise) and termination of the services of the Contractor under this Contract. (e) Limitations of the Contractor's Obligation. If this section is in, or is in connection with, a contract relative to the design, planning, construction, alteration, repair or maintenance of a building, structure, highway, road, appurtenance or appliance, including moving, demolition and excavating connected therewith, then subsection "a" above shall not require the Contractor to indemnify or hold harmless Indemnitees against liability for damages arising out of bodily injury to persons or damage to property proximately caused by or resulting from the negligence, in whole or in part, of Indemnitees.

**Sec. 13. <u>Miscellaneous</u>.**

(a) Choice of Law and Forum. This Contract shall be deemed made in Durham County, North Carolina. This Contract shall be governed by and construed in accordance with the law of North Carolina. The exclusive forum and venue for all actions arising out of this Contract shall be the North Carolina General Court of Justice, in Durham County. Such actions shall neither be commenced in nor removed to federal court. This section shall not apply to subsequent actions to enforce a judgment entered in actions heard pursuant to this section.

(b) Waiver. No action or failure to act by the City shall constitute a waiver of any of its rights or remedies that arise out of this Contract, nor shall such action or failure to act constitute approval of or acquiescence in a breach thereunder, except as may be specifically agreed in writing.

(c) Performance of Government Functions. Nothing contained in this Contract shall be deemed or construed so as to in any way estop, limit, or impair the City from exercising or performing any regulatory, policing, legislative, governmental, or other powers or functions.

(d) Severability. If any provision of this Contract shall be unenforceable, the remainder of this Contract shall be enforceable to the extent permitted by law.

(e) Assignment. Successors and Assigns. Without the City's written consent, the Contractor shall not assign (which includes to delegate) any of its rights (including the right to payment) or duties that arise out of this Contract. The City Manager may consent to an assignment without action by the City Council. Unless the City otherwise agrees in writing, the Contractor and all assignees shall be subject to all of the City's defenses and shall be liable for all of the Contractor's duties that arise out of this Contract and all of the City's claims that arise out of this Contract. Without granting the Contractor the right to assign, it is agreed that the duties of the Contractor that arise out of this Contract shall be binding upon it and its heirs, personal representatives, successors, and assigns.

(f) Compliance with Law. In performing all of the Work, the Contractor shall comply with all applicable law.

(g) City Policy. THE CITY OPPOSES DISCRIMINATION ON THE BASIS OF RACE AND SEX AND URGES ALL OF ITS CONTRACTORS TO PROVIDE A FAIR OPPORTUNITY FOR

MINORITIES AND WOMEN TO PARTICIPATE IN THEIR WORK FORCE AND AS SUBCONTRACTORS AND CONTRACTORS UNDER CITY CONTRACTS.

(h) EEO Provisions. During the performance of this Contract the Contractor agrees as follows: (1) The Contractor shall not discriminate against any employee or applicant for employment because of race, color, religion, sex, national origin, political affiliation or belief, age, or handicap. The Contractor shall take affirmative action to insure that applicants are employed and that employees are treated equally during employment, without regard to race, color, religion, sex, national origin, political affiliation or belief, age, or handicap. Such action shall include but not be limited to the following: employment, upgrading, demotion, transfer, recruitment or advertising, layoff or termination, rates of pay or other forms of compensation, and selection for training, including apprenticeship. The Contractor shall post in conspicuous places, available to employees and applicants for employment, notices setting forth these EEO provisions. (2) The Contractor shall in all solicitations or advertisement for employees placed by or on behalf of the Contractor, state that all qualified applicants will receive consideration for employment without regard to race, color, religion, sex, national origin, political affiliation or belief, age, or handicap. (3) The Contractor shall send a copy of the EEO provisions to each labor union or representative of workers with which it has a collective bargaining agreement or other contract or understanding. (4) In the event of the Contractor's noncompliance with these EEO provisions, the City may cancel, terminate, or suspend this Contract, in whole or in part, and the City may declare the Contractor ineligible for further City contracts. (5) Unless exempted by the City Council of the City of Durham, the Contractor shall include these EEO provisions in every purchase order for goods to be used in performing this Contract and in every subcontract related to this Contract so that these EEO provisions will be binding upon such subcontractors and contractors.

(i) SDBE. The Contractor shall comply with all applicable provisions of Chapter 26 of the Durham City Code (Equal Business Opportunities Ordinance), as amended from time to time. The failure of the Contractor to comply with that chapter shall be a material breach of contract which may result in the rescission or termination of this Contract and/or other appropriate remedies in accordance with the provisions of that chapter, this Contract, and State law. The Participation Plan submitted in accordance with that chapter is binding on the Contractor. Section 26-10(f) of that chapter provides, in part, "If the City Manager determines that the Contractor has failed to comply with the provisions of the Contract, the City Manager shall notify the Contractor in writing of the deficiencies. The Contractor shall have 14 days, or such time as specified in the Contract, to cure the deficiencies or establish that there are no deficiencies." It is stipulated and agreed that those two quoted sentences apply only to the Contractor's alleged violations of its obligations under Chapter 26 and not to the Contractor's alleged violations of other obligations.

(j) Prompt Payment to Subcontractors. (1) Within 7 days of receipt by the Contractor of each payment from the City under this Contract, the Contractor shall pay all subcontractors (which term includes subconsultants and suppliers) based on work completed or service provided under the subcontract. Should any payment to the subcontractor be delayed by more than 7 days after receipt of payment by the Contractor from the City under this Contract, the Contractor shall pay the subcontractor interest, beginning on the 8th day, at the rate of 1% per month or fraction thereof on such unpaid balance as may be due. By appropriate litigation, Subcontractors shall have the right to enforce this subsection (1) directly against the Contractor, but not against the City of Durham. If the City's Project Manager determines that it is appropriate to enforce this subsection (1), the City of Durham may withhold the sums estimated by the Project Manager to be sufficient to pay this interest from progress or final payments to the Contractor. (2) Nothing in this section shall prevent the Contractor at the time of invoicing, application, and certification to the City from withholding invoicing, application, and certification to the City for payment to the subcontractor for unsatisfactory job progress; defective goods,

services, or construction not remedied; disputed work; third-party claims filed or reasonable evidence that such a claim will be filed; failure of the subcontractor to make timely payments for labor, equipment, and materials; damage to the Contractor or another subcontractor; reasonable evidence that the subcontract cannot be completed for the unpaid balance of the subcontract sum; or a reasonable amount for retainage not to exceed 10%. (3) The City's Project Manager may require, as a prerequisite to making progress or final payments, that the Contractor provide statements from any subcontractors designated by the Project Manager regarding the status of their accounts with the Contractor. The statements shall be in such format as the Project Manager reasonably requires, including notarization if so specified.

(k) No Third Party Rights Created. This Contract is intended for the benefit of the City and the Contractor and not any other person.

(l) Principles of Interpretation and Definitions. In this Contract, unless the context requires otherwise: (1) The singular includes the plural and the plural the singular. The pronouns "it" and "its" include the masculine and feminine. References to statutes or regulations include all statutory or regulatory provisions consolidating, amending, or replacing the statute or regulation. References to contracts and agreements shall be deemed to include all amendments to them. The words "include," "including," etc. mean include, including, etc. without limitation. (2) References to a "Section" or "section" shall mean a section of this Contract. (3) "Contract" and "Agreement," whether or not capitalized, refer to this instrument. (4) Titles of sections, paragraphs, and articles are for convenience only, and shall not be construed to affect the meaning of this Contract. (5) "Duties" includes obligations. (6) The word "person" includes natural persons, firms, companies, associations, partnerships, trusts, corporations, governmental agencies and units, and other legal entities. (7) The word "shall" is mandatory. (8) The word "day" means calendar day. (m) Modifications to Entire Agreement. A modification of this Contract is not valid unless signed by both parties and otherwise in accordance with requirements of law. Further, a modification is not enforceable against the City unless the City Manager or a deputy or assistant City Manager signs it for the City. This Contract contains the entire agreement between the parties pertaining to the subject matter of this Contract. With respect to that subject matter, there are no promises, agreements, conditions, inducements, warranties, or understandings, written or oral, expressed or implied, between the parties, other than as set forth or referenced in this Contract.

IN WITNESS WHEREOF, the City and the Contractor have caused this Contract to be executed under seal themselves or by their respective duly authorized agents or officers.

WASTE INDUSTRIES, LLC

BY: _____

TITLE: General Manager

State of NORTH CAROLINA

County of DURHAM

ACKNOWLEDGMENT BY

WASTE INDUSTRIES, LLC

I, a notary public in and for the aforesaid county and state, certify that WILLIAM RICHARD DAVIDSON JR personally appeared before me this day and stated that he or she is GENERAL MANAGER of Waste Industries, LLC, a North Carolina limited liability company, and that by authority duly given and as the act of the limited liability company, he or she signed the foregoing Contract with the City of Durham and the corporate seal was affixed thereto. This the 12th day of SEPT 20 12.

Notary Public

My commission expires:

12-22-14

OFFICIAL SEAL
Notary Public, North Carolina
County of Durham
CURTIS D. BEST
My Commission Expires 12-22-14

Attest:

D. Ann Gray
City Clerk

CITY OF DURHAM 1869 NORTH CAROLINA

CITY OF DURHAM

Wanda S. Page
Authorized City Manager Designee
Wanda S. Page
Deputy City Manager

BY: _____

This instrument has been pre-audited in the manner required by the Local Government Budget and Fiscal Control Act.

Lynette M. McRae / Deputy Finance Officer

**Attachment A**

Scope of Service

The Contractor will:

1. Provide 8 yard stationary containers upon request to the City. All parts must be in good working condition.
2. provide additional containers within 24 hours of being notified
3. ensure the dumpster(s) have no visible damage and are in good working order;
4. ensure the dumpster(s)have all required hardware properly attached;
5. The doors open and close with reasonable physical force;
6. all lids are secure, open and close properly, and have no damage;
7. all rods and holders are free of any visible defects;
8. ensure drain plugs are properly secured and operational;
9. provide all maintenance, upkeep and repairs of any and all containers,
10. deliver, replace or remove containers as requested by the City;
11. provide additional stationary containers within 48 hours of notice;
12. provide a staff person to work with the City to complete an inventory of stationary containers in use within two weeks of Contract execution.
13. repair or replace any containers that have visible defects, ripped or torn lids, damaged or crushed parts.
14. Only bill the City $24.87 per month per stationary container that is rented.

**Attachment B**

Rental Inventory for Stationary Containers

| [illegible] | [illegible] | [illegible] | [illegible] |
|---|---|---|---|
| 1. Durham Amory | 212 Foster St. | 1 | |
| 2. General Services | 101 City Hall Plaza | 1 | 1 |
| 3. Brown Water Treatment Plant | 1615 Infinity Rd. | 1 | 1 |
| 4. Calvary Ministries of the West End Community | 1313 Halley St. | 1 | 1 |
| 5. Campus Hills Recreation Center | 200 S. Alston Ave. | 1 | |
| 6. City of Durham Communication | 1830 Camden Ave. | 1 | |
| 7. Edison Johnson Recreation Center | 600 Murray Ave. | 1 | |
| 8. Eno Pumping Station | Denfield St. | 1 | |
| 9. Fire Department Training Center | Camden Ave. | 1 | 1 |
| 10. General Services Department | 2011 Fay St. | 2 | 1 |
| 11. Fleet Maintenance Department | 1832 Camden Ave | 1 | 1 |
| 12. Lick Creek Pumping Station | Stalling Rd. | 1 | |
| 13. Maplewood Cemetery | Maplewood Ave. | 1 | |
| 14. Northside Waste Treatment | 1900 E.Club Blvd. | 3 | |
| 15. Police Department | 505 W.Chapel Hill St. | 1 | 1 |
| 16. Public works Department | 1100 MLK Parkway | 1 | 1 |
| 17. Signal Shop | 1100 N. Alston Ave. | 1 | |

| [illegible] | [illegible] | [illegible] | [illegible] |
|---|---|---|---|
| 18. Southeast Water Reclamation | 6605 Farrington Rd. | 1 | |
| 19. W.D. Hill Recreation Center | 1308 Fayetteville St. | 1 | |
| 20. Water & Sewer Engineering | 3464 Third Fork Rd. | 1 | 1 |
| 21. Water Management Plant | 8513 NC 751 | 1 | |
| 22. Water Resources | 1405 Hillandale Rd. | 1 | 1 |
| 23. Water Resources | 1600 Mist Lake Dr. | 1 | 1 |
| 24. Durham Arts Council | 120 Morris St. | 2 | |
| 25. Durham City Transit Co., Inc. | 911 Faye St. | 1 | 1 |
| 26. Solid Waste Management | 1833 Camden Ave. | 1 | |
| 27. Solid Waste Mgt – Eno Commons | 100 Hillock Pl. | 1 | |
| 28. Solid Waste Management | Rigsbee & Mangum Sts-Parking Lot | 1 | 1 |
| 29. Solid Waste Management | Ramseur St. (behind Kimbrells Furniture Co.) | 2 | 2 |
| 30. Solid Waste Management -- The Valley | 1700 Chapel Hill Rd. | 1 | |
| 31. Solid Waste Mgnt Management - Dunbarton Place | 1 Dunbarton Circle | 3 | |
| Total Containers | | 36 | 15 |