

Item No. 22

“To Be Delivered” Material

For

City of Sacramento

City Council

Financing Authority

Housing Authority

Redevelopment Agency

Agenda Packet

Submitted: 10/30/08

For the Meeting of: 11/6/08

The attached materials were not available at the time the Agenda Packet was prepared.

Title: WTE Report

Contact Information:



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REPORT TO COUNCIL

City of Sacramento

915 I Street, Sacramento, CA 95814-2604
www. CityofSacramento.org

Staff Report
November 6, 2008

**Honorable Mayor and
Members of the City Council**

Title: Agreement – Development of Waste-to-Energy Project

Location/Council District: Citywide

Recommendation: Adopt a **Resolution** authorizing: 1) approval of an Agreement Concerning the Development of Waste-to-Energy Facility; 2) the City Manager to execute such Agreement on behalf of the City; and 3) negotiate future agreements to govern development and operation of the Waste-to-Energy project, consistent with terms of the Agreement presented herein.

Contact: Tom Zeidner, Senior Development Project Manager, 808-1931

Presenters: Jim Rinehart, Citywide Economic Development Manager, Tom Zeidner, Senior Development Project Manager

Department: City Manager's Office

Division: N/A

Organization No: 0310

Description/Analysis

Issue: On February 26, 2008, the City Council adopted a resolution granting U.S. Science and Technology (USST) a 90-day, exclusive right to negotiate principles of agreement (POA) for development of a "waste-to-energy" (WTE) project. USST had earlier responded to a City request for qualifications (RFQ) to identify partners capable of constructing and operating a WTE facility to process City municipal solid waste (MSW). The WTE RFQ was issued by the City Manager's Office in August of 2007 with the intent of identifying entities with which the City could partner in developing such a facility that, once operational, could largely supplant the current practice of landfilling MSW. On May 27, 2008, the City Council approved a 90-day extension to the POA exclusive right to negotiate period with USST. That action was followed by the Council's approval on August 26, 2008 of: 1) the POA; 2) an extension, for an additional 90 days, of the exclusive right to negotiate period with USST; and 3) negotiation of definitive contractual terms with USST related to its development and operation of the

proposed WTE project.

The approved POA was intended to guide negotiation and drafting of future “Definitive Agreements” between the City and USST concerning the location and operation of a WTE facility. The POA is non-binding and subject to modification in the course of negotiations towards the Definitive Agreements. The key principles outlined in the POA include that USST will represent that it has the financial and technical capacity to construct and operate the WTE facility at no cost or liability to the City. The POA goes on to state: 1) that USST will bear sole responsibility for obtaining all required licenses and permits necessary to build and operate the facility; 2) USST’s acknowledgement that the City currently has in place a service agreement with BLT Enterprises governing handling of the City’s MSW; and 3) that the City will require guarantees from USST that it will provide, at a minimum, service levels currently enjoyed by the City through the existing service agreement.

In the period since the POA was approved on August 26th, City staff and representatives of USST have been negotiating general business terms under which the parties would agree to move forward with the project. Those are contained within the proposed Agreement Concerning the Development of Waste to Energy Facility, attached as Exhibit A. The Agreement begins with Recitals explaining the background of the parties’ involvement with the WTE project and spelling out that the objective of the document is to solidify the City’s and USST’s intentions to collaborate towards construction of the project, to the benefit of both parties. The Agreement is to bind the Parties to business terms and provisions to be reflected in more specific “future agreements” that will govern the ultimate development and operation of the WTE project in Sacramento.

The business terms and provisions enumerated within the proposed Agreement include the following:

- MSW Deliveries – The City shall provide USST with a reliable minimum stream of post-recyclable MSW equal to 2,100 tons per week, for a term of 25 years. Details concerning this commitment on the part of the City will be the subject of further negotiations between the Parties, and will be reflected in the Future Agreement, as will considerations and required amendments to the City’s existing MSW Service Agreement with BLT Enterprises (BLT).
- City’s “Put or Pay” Obligation – The proposed Agreement anticipates the City paying a minimum aggregate service fee to USST, whether or not the City meets the 2,100 per week “Minimum Delivery Requirement.” USST agrees that such obligation can be reduced to the extent it secures suitable MSW from other sources. This section of the proposed Agreement further anticipates that such obligation on the part of the City will be “excused” in the event of “acts of God, strikes, lockouts and labor troubles.”
- Corporate Headquarters – USST commits to maintain its corporate headquarters within the City of Sacramento.

- USST Performance Guarantees – USST guarantees that it will process all of the City's post-recyclable MSW over the 25-year term. It will provide adequate redundant capacity within the WTE facility, or alternate disposal arrangements, in the event of partial or total shutdowns.
- USST Guaranty of No Increased Cost to City - USST guarantees no additional cost to the City in the event of USST's noncompliance with any of the performance guarantees contained within the proposed Agreement. The parties further agree that the fee paid by the City at commencement of its delivery of MSW to the WTE facility will not exceed that currently paid to BLT for its acceptance and processing of City MSW.
- USST Representations & Time for Performance – USST agrees, within 60 days, to provide information required by City for purposes of completing its due diligence analysis of the project prior to executing the future agreements.
- Participation Interest – USST agrees, in consideration of the City's involvement in and commitment of MSW to the project, that the Sacramento Employment and Economic Development (SEED) Corporation will acquire an ownership interest in the USST entity. The extent and nature of the SEED Corporation's interest will be negotiated in the context of drafting the future agreements. It will occur at no cost to the SEED Corporation and will include rights to participate in income generated overall by USST, both from the Sacramento facility as well as additional operations located beyond the City.
- City-generated Waste – The proposed Agreement provides for the City Council, at its discretion, to cause all post-recyclable commercial MSW currently handled by private haulers to be delivered to the WTE facility.
- Defense and Indemnity – USST will agree to indemnify the City for liabilities that may arise from its activities. The proposed Agreement also provides for City indemnity of USST for City-caused liabilities.
- Community Outreach – The City will develop a plan for community outreach that it deems appropriate related to development and operation of the facility. Costs of such outreach will be borne solely by USST.
- CEQA Matters – The parties acknowledge that development and operation of the facility will be conditioned upon completion of applicable proceedings under CEQA. The City will serve as "Lead Agency" through the CEQA proceedings.
- Neighborhood Workforce – USST will agree to use reasonable efforts to hire 30 percent of its workforce for the WTE facility from residents living within five miles of the facility.

It is these and other provisions contained within the proposed Agreement that are intended to be the basis for the more specific future agreements, all of which will be subject to review and approval by the City Council. The accompanying resolution

approves the Agreement, authorizes the City Manager to execute the Agreement on behalf of the City and directs staff to negotiate terms of the future agreements for consideration by the City Council.

Policy Considerations: The actions recommended in this report are consistent with Council actions specific to the WTE proposal on February 26, May 27 and August 26, 2008.

Environmental Considerations:

California Environmental Quality Act (CEQA): The specific actions recommended in this report are exempt from California Environmental Quality Act (CEQA) Guidelines Section 15262 as a planning activity for defining the project for possible future action. Environmental review will be performed as required in connection with specific projects that may result from the requested actions.

Sustainability Considerations: The WTE plant concept described in this report is consistent with the City's Sustainability Master Plan adopted by the City Council on December 18, 2007.

Commission/Committee Action: N/A

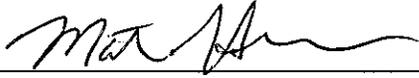
Rationale for Recommendation: The actions recommended in this report are consistent with earlier Council actions related to the proposed USST WTE project on February 26, May 27 and August 26, 2008.

Financial Considerations: The particular actions recommended in this report will have no direct financial impact upon the City. Financial ramifications of actually proceeding with development of a WTE facility will be discussed in future reports to the Council.

Emerging Small Business Development (ESBD): The specific actions recommended in this report do not entail the purchase of goods and/or services. ESBD considerations thus do not apply.

Respectfully Submitted by:  Econ. Dev. Mgr.
Name and Title

Recommendation Approved:



 Ray Kerridge
City Manager

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RESOLUTION NO.

Adopted by the Sacramento City Council

APPROVAL OF AGREEMENT CONCERNING DEVELOPMENT OF WASTE-TO-ENERGY FACILITY AND RELATED ACTIONS

BACKGROUND

- A. On February 26, 2008, the City Council adopted Resolution no. 2008-117 granting U.S. Science and Technology (USST) up to three months, an exclusive right to negotiate (ERN), through the City Manager's Office principles of agreement (POA) for development of a waste-to-energy (WTE) project.
- B. On May 27, 2008, the City Council adopted Resolution no. 2008-339 extending the ERN with USST for an additional 90 days, until the end of August, 2008.
- C. On August 26, 2008, the City Council adopted Resolution no. 2008-601 approving: 1) the POA; 2) extending the ERN with USST another 90 days, until the end of November, 2008; and direction to staff to negotiate contractual terms (Contractual Terms) under which the City of Sacramento (City) and USST will proceed with the WTE project and present the proposed Contractual Terms for Council consideration within the extended term of the ERN.
- D. The Contractual Terms are contained within the Agreement Concerning the Development of Waste-to-Energy Facility (Agreement), included as Exhibit A and presented to the City Council for approval.
- E. The Contractual Terms and the Agreement will serve as a basis for future agreements (Future Agreements) to be negotiated between the City and USST governing ultimate development and operation of the WTE project.

BASED ON THE FACTS SET FORTH IN THE BACKGROUND, THE CITY COUNCIL RESOLVES AS FOLLOWS:

- Section 1. The Agreement is approved and the City Manager is authorized to execute the Agreement on behalf of the City of Sacramento.
- Section 2. Staff is directed to negotiate the Future Agreements containing specific terms under which the City and USST will proceed with the WTE project and present the proposed Future Agreements to the Council for consideration.

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Exhibit A

AGREEMENT CONCERNING THE DEVELOPMENT OF WASTE TO ENERGY FACILITY

This Agreement Concerning the Development of Waste to Energy Facility (the "Agreement") is entered into on _____, 2008, by and between the CITY OF SACRAMENTO, a charter municipal corporation (hereafter "City"), and USST HOLDINGS, INC. ("USST"), collectively referred to as (the "Parties") with respect to the following facts:

RECITALS

- A. City is a charter municipal corporation that is responsible for the collection, recycling and disposal of residential municipal solid waste. Pursuant to State of California mandates or the City's own diversion goals, the City diverts a certain percentage of material from the municipal solid waste stream for recycling purposes. Nothing in this Agreement is intended to inhibit or reduce the City's diversion goals.
- B. In 1998, the City entered into a service agreement (City Agreement No. 98-131, as amended) with BLT Enterprises of Sacramento, Inc. ("BLT") to provide for the transfer, transport, disposal, and processing of post-recyclable residential municipal solid waste ("BLT Service Agreement"). Pursuant to the BLT Service Agreement, City post-recyclable residential municipal solid waste ("post-recyclable MSW") is disposed of by BLT in various disposal sites approved by both City and BLT. The BLT Service Agreement provides a process for the addition of more disposal sites, including a waste to energy facility, to the list of approved disposal sites, and commencement of disposal of the City's post-recyclable MSW at such sites. The BLT Service Agreement currently expires in 2018.
- C. The City is exploring other options for disposal of post-recyclable MSW that are cost effective, technologically feasible and environmentally sound. To that end, in 2007, the City issued a Request for Qualifications for Development Partners to Process Municipal Solid Waste Utilizing Alternative Technologies Premised on Resource Recovery and Energy Creation. The City evaluated the eleven statement of qualifications received in response to the request for qualifications. Based on its evaluation, the City determined that the plasma arc gasification technology proposed by USST would best meet the City's goals. The City has entered into an exclusive right to negotiate with USST, currently set to expire at the end of November, 2008.
- D. USST is a Sacramento based project development company that has indicated to the City its interest in partnering with the City to construct and operate a plasma arc gasification facility (the "Facility") that will meet the City's needs. Previously, the City and USST entered into a Principles of Agreement to demonstrate their desire to further

explore the possibility of constructing the Facility that will mutually benefit both the City and USST.

E. This Agreement is intended to further solidify the City and USST's intentions to work together toward the construction of the Facility that will process City residential municipal waste in a mutually beneficial manner to both the City and USST. The parties anticipate that future agreements and accomplishment of many tasks will be required to bring the project to fruition, with appropriate environmental review taking place as required under applicable law, including, without limitation, the California Environmental Quality Act ("CEQA"). This Agreement binds the Parties to provisions that guide the negotiations over such future agreements and identifies tasks and responsibilities to be accomplished by one or both of the Parties in furtherance of development and construction of the Facility ("Project").

F. Subject to CEQA compliance as provided in Section 20 below and subject to compliance with all obligations in this Agreement, the Parties anticipate entering into an additional agreement that will include specific provisions detailing the contractual relationship between the Parties ("Final Agreement").

AGREEMENT

Now, therefore, in consideration of the foregoing and the mutual promises contained herein, City and USST hereby agree that the foregoing Recitals are incorporated and made a part of this Agreement and further agree as follows:

1. **Solid Waste Deliveries.** In order to successfully operate the Facility, USST or an affiliate needs the certainty of a stream of post-recyclable MSW as reliable feedstock for the Facility. The City agrees to provide USST or an affiliate with a reliable stream of post-recyclable MSW of 2,100 tons per week ("Minimum Delivery Requirement") for a twenty-five year period the ("Term"). The City's commitment to deliver the Minimum Delivery Requirement is subject to the Final Agreement being acceptable to City and USST regarding USST's handling of the City's post-recyclable MSW and appropriate amendments to the BLT Service Agreement. The City's obligation to deliver post-recyclable MSW to the Facility will be negotiated and reflected in greater detail in the Final Agreement and the Final Agreement will provide provisions protective of the City's and USST's interests. The City's performance of its delivery commitment may be delayed or excused by reason of acts of God, strikes, lockouts, and labor troubles.

The Parties further acknowledge that only post-recyclable MSW is available for use as a feedstock for the Facility and that any increase in the diversion requirement as mandated by federal or state law may result in a smaller stream of post-recyclable MSW available as a feedstock for the Facility. Failure by the City to deliver the Minimum Delivery Requirements, as said amount may be adjusted pursuant to the provisions of this Agreement and the Final Agreement, for any reason shall result in the imposition of

the service fee specified below in Section 2.

2. **City to provide financial relief if waste stream is interrupted (“put or pay” obligation).** Unless performance is excused as provided above in Section 1, the City agrees that when the Facility begins accepting and processing post-recyclable MSW, it will pay a minimum aggregate service fee based on the Minimum Delivery Requirement, whether or not City meets such Minimum Delivery Requirement. The formula that will be used to calculate the amount of the minimum aggregate service fee to be paid by City will be negotiated and more fully described in the provisions of the Final Agreement. USST agrees that the City’s obligation to pay the minimum aggregate service fee will be reduced to the extent USST reasonably can obtain other materials for the Facility taking into consideration the financial burden to USST to obtain the other materials. Detailed provisions concerning the circumstances under which the City’s obligation to pay the minimum aggregate service fee may be reduced will be negotiated and more fully described in the Final Agreement.

3. **Corporate Headquarters.** USST acknowledges the City’s desire for USST to locate its corporate headquarters within the City. USST agrees that during the Term, USST shall maintain its corporate headquarters within the City in consideration of the City’s commitment to cause the delivery of its post-recyclable MSW to the Facility.

4. **Location of Facility Within City.** One of the primary motivations of the City to explore alternative disposal options, such as the Facility, is the City’s desire to reduce travel distances and the associated costs and environmental consequences. To that end, USST agrees to give first consideration to locations within the City and County of Sacramento to site the Facility.

5. **USST Site Acquisition.** USST or an affiliate will locate, design, construct, operate and own the Facility on land owned by USST or on land leased by USST or an affiliate. USST or an affiliate shall demonstrate that it has acquired such property interests, or the right or option to consummate the acquisition of such rights, to the satisfaction of the City. USST acknowledges that any site in which it or an affiliate obtains such interests may not be utilized for the Facility unless and until appropriate environmental review has taken place and as part of that environmental review, the City as lead agency may determine, in its sole discretion, based upon the matter presented for the consideration by the City as lead agency through the environmental review process to approve the project at another site or not proceed with the project.

6. **USST Compliance with Regulatory Requirements.** The Facility shall be designed, constructed, operated and owned by USST or an affiliate of USST, in USST’s sole discretion and at USST’s sole cost, subject to all applicable environmental review requirements, governmental approvals and permitting requirements. At the time of regulatory board approval, USST agrees to have performance measures to ensure compliance with environmental laws, including utilizing BACT (best available control technology) for air emissions.

7. **USST Performance Guarantees.** USST acknowledges the City's desire to have all of the City's post-recyclable MSW processed and disposed of for the Term and to have a facility that will be able to process and dispose of the City's post-recyclable MSW for the Term. Accordingly, subject to all applicable environmental review requirements, governmental approvals and permitting requirements, USST guarantees that it will be responsible for processing and disposal of all City post-recyclable MSW for the Term. Subject to all applicable environmental review requirements, governmental approvals and permitting requirements, USST will design and construct the Facility with the intent that the Facility will be able to accept, process and dispose of all City post-recyclable MSW for the Term. The City anticipates initial delivery of City post-recyclable MSW of 2,100 tons per week. The Parties agree and understand that the ultimate amount of City post-recyclable MSW may increase during the Term and that the City will notify USST of any increase of delivery of City post-recyclable MSW with reasonable lead time to allow USST sufficient time to increase the capacity of the Facility. The Final Agreement shall include specific provisions concerning increasing the capacity of the Facility to accommodate additional City post-recyclable MSW above 2,100 tons per week as provided for in this Section 7.

(a) In the Final Agreement, the parties shall establish performance standards (the "Performance Standards") to assure the City that the Facility will operate in a manner that facilitates the waste handling procedures, requirements and policies of the City and any entity providing solid waste processing, recovery, transfer or transport services to the City.

(b) In order to minimize the risk of non-compliance with the Performance Standards, including, without limitation, the City's throughput requirements, USST shall include in the design of the Facility redundancy lines with sufficient capacity to meet USST's obligation to accept all post recyclable MSW during scheduled maintenances or outages to primary or other lines or make other arrangements to dispose of the post-recyclable MSW which is not processed. USST shall provide City with thirty (30) days advanced written notice of any period of time when the processing capacity of the primary lines will be reduced or become unavailable as a result of scheduled maintenances or outages. The City must approve of any alternate disposal site.

(c) USST agrees that it will provide a bond to secure the costs of the removal of the Facility in the event USST does not complete construction of the Facility or begin operations at the Facility. Detailed provisions concerning this requirement will be negotiated and more fully described in a Final Agreement.

8. **USST Guaranty of no Increased Disposal Cost to City.** The parties agree that the City shall not suffer from the failure of USST to perform in compliance with the Performance Standards and, accordingly, USST shall hold the City harmless from all costs, losses and liabilities arising from such noncompliance, including, without limitation, the failure to meet City's throughput requirements, i.e. the timely acceptance of all City's post-recyclable MSW tonnage. USST shall demonstrate, to the satisfaction

of the City, its capacity, financially or otherwise to hold the City harmless from such costs, losses and liabilities. Specific provisions detailing the requirement for USST to demonstrate, to the satisfaction of the City, its capacity, financially or otherwise to hold the City harmless from such costs, losses and liabilities are to be negotiated and included in the Final Agreement. All costs, losses and liabilities shall include, but not be limited to, all additional transportation costs and all additional disposal costs.

9. **USST Representations.** USST has represented to the City and its governing body various matters that in part induced the City to negotiate exclusively with USST for the construction and operation of a plasma arc gasification waste to energy facility. Such representations and provisions designed to implement them shall be carried forward in the Final Agreement. Among the numerous representations made by USST are the following and USST agrees to demonstrate, to the satisfaction of the City, its ability to satisfy each of such representations:

(a) The operation of the Facility will not result in any post-gasification byproduct requiring disposal at a landfill.

(b) The operation of the Facility will be in compliance with all applicable air quality and emission standards and requirements.

(c) The slag byproduct generated by the Facility is environmentally sound.

(d) The synthetic gas output can be utilized to generate electricity or other forms of energy.

(e) USST shall have intellectual property or other legal rights to utilize and implement a plasma arc gasification process during the Term.

(f) The Facility (along with alternative storage and/or disposal facilities) can be designed and operated in such a manner to eliminate the interruption of the disposal of the City's post-recyclable MSW by reason of scheduled maintenance or required repairs to operating gasification lines.

(g) The City's post-recyclable MSW has the properties to generate sufficient energy to provide for the efficient operation of the gasification process in accordance with all applicable laws, rules and regulations.

(h) The proposed plasma arc gasification facility will be financially viable as an operating entity.

(i) The Facility will generate marketable energy byproducts, such as generation of electricity or production of ethanol or other similar byproducts in excess of the energy required for the operation of the Facility.

(j) The City's use of the Facility will not increase the City's overall costs to

transfer, process, transport and dispose of post-recyclable MSW when viewed against the City's current formula for costs as reflected in the BLT Service Agreement, primarily Article 18 "Service Fee" and Article 25 "Escalation".

(k) USST has the financial ability to provide for disposal of City post-recyclable MSW as contemplated by this Agreement.

(l) The Facility will produce a sufficient amount of carbon dioxide, to operate a related greenhouse. The terms of this amount of carbon dioxide to be generated and the operation of the greenhouse will be specified in greater detail in a separate agreement to be negotiated by the Parties.

10. **Disposal Service Fee and Facility Costs.** In the BLT Service Agreement, the City and BLT agreed to a certain formula to determine a service fee and escalation for the transfer, processing, transport and disposal of post-recyclable MSW by BLT. To the extent practical, the City and USST wish to utilize a similar type of formula as found in the BLT Service Agreement for establishing a service fee and escalation for the payment by City, BLT or another entity to USST to dispose of post-recyclable MSW at the Facility ("USST Service Fee"). Detailed provisions concerning the establishment of the USST Service Fee will be negotiated and more fully described in the Final Agreement.

(a) The Parties agree that the initial USST Service Fee paid by the City, BLT or another entity to USST for disposal of post-recyclable MSW at the Facility will not increase the then existing service fee paid by the City to BLT pursuant to the BLT Service Agreement.

(b) In 2018, the BLT Service Agreement is scheduled to expire, at that time, the City or another entity will either continue to pay USST the USST Service Fee for disposal of post-recyclable MSW or the Parties may mutually agree to establish a new service fee for disposal of post-recyclable MSW at the Facility.

(c) Except as otherwise expressly set forth in this Agreement, the parties agree that USST will bear sole responsibility for the costs of design, licenses, permits, any entitlements, construction and operation of the Facility and that the City is not responsible for any costs necessary for design, licenses, permits, other entitlements or any costs for construction and operation of the Facility. The term "costs" is to be broadly construed. USST's expenditure of time, capital and materials in furtherance of the development of the Property, whether such expenditures occurred prior to or subsequent to the date of this Agreement is in all respects voluntary and such expenditures were, are and will be made without the expectation of or right to any reimbursement by the City of all or any portion of such expenditures.

11. **Carbon Credits.** The parties anticipate that, at a future date, documented reductions in anticipated carbon output will be considered a marketable commodity.

Such reductions in anticipated carbon output are commonly referred to as “carbon credits”. The City and USST agree that any future carbon credits that result from reductions in anticipated carbon output will be divided between the City and USST in percentages to be determined in the future after the exchange and market for such carbon credits are implemented and the value of the credits can be established.

12. **Participation Interest.** USST agrees that the Sacramento Employment and Economic Development Corporation (“SEED Corporation”) or other City affiliate, in the sole discretion of its governing body, will have the right to participate in the income generated by USST (or its affiliate that owns the Facility) through the operation of this Facility and other USST-owned WTE facilities. The parties intend that the specific rights and obligations, including the extent of the SEED Corporation or other City affiliate’s participation, shall be subject to future negotiations and shall be determined by the provisions of future agreements between USST and the SEED Corporation or other City affiliate under terms acceptable to the governing body, as the case may be.

13. **Options for other waste streams at some future date.** It is the understanding and agreement of the parties that the Facility is intended for the processing and/or disposal of municipal solid waste. The parties acknowledge that USST may, in the future, utilize other forms of waste and materials for processing and/or disposal at the Facility. USST, at its sole cost and expense, shall be responsible for obtaining all approvals, permits, licenses, and land use entitlements as may be necessary to process and/or dispose materials other than municipal solid waste at the Facility.

14. **Options for other product outputs.** USST, in its discretion, will determine the type of byproducts (solid, liquid, gas or energy, including, but not limited to electricity), that will be generated, derived and sold from the operations of the Facility.

15. **Alternative Disposal Facilities.** In the event that the Facility ceases operation or is unable to accept and process all of the City’s tonnage of post-recyclable MSW described herein, USST shall be responsible for any costs incurred by City to dispose the post-recyclable MSW at another disposal facility that exceed the total cost to the City, including transfer costs, to dispose the post-recyclable MSW at the Facility. City agrees that USST’s obligation to pay any costs incurred by the City as described above in this Section 15 will be reduced to the extent City reasonably can dispose the post-recyclable MSW at another disposal facility taking into consideration the financial burden to City to dispose at another disposal facility. Detailed provisions concerning the circumstances under which USST’s obligation to pay the costs described above in this Section 15 may be reduced will be negotiated and more fully described in the Final Agreement.

In the event that the BLT Service Agreement expires and City is direct hauling post-recyclable MSW to the Facility, USST shall be required to designate alternate disposal facilities, subject to City’s approval, in order to guarantee continued processing and disposal of City post-recyclable MSW. The procedure for designating alternate disposal facilities will be negotiated and more fully described in the Final Agreement.

16. **City-generated waste.** In addition to delivery of post-recyclable MSW, in its sole discretion, the Sacramento City Council, may take steps to cause to be delivered all post-recyclable commercial municipal solid waste generated within City limits to the Facility, including requiring private haulers with which City may contract to deliver post-recyclable commercial municipal solid waste to the Facility, to the extent and as permitted by applicable law. The ability of the City to provide the waste as contemplated by this Section 16 shall be limited by the capacity of the Facility, including, but not limited to, commitments of USST to accept material for the Facility from other sources, and the ability of the Facility to process this waste.

17. **Defense and Indemnity.**

(a) USST Defense and Indemnification.

1. Indemnification during development and construction of the Facility. During the development and construction of the Facility, prior to transfer of any post-recyclable MSW to the Facility, USST shall indemnify and hold City, City's elected officials, officers, officials, employees, contractors, subcontractors, consultants, agents, assigns and volunteers ("City and City related Parties") harmless from and against any and all actions, damages, claims for damages, suits, losses, judgments, penalties, fines and expenses, including, but not limited to, any fees and/or costs reasonably incurred by City's staff attorneys or outside attorneys (hereafter collectively referred to as "Liabilities"), for personal injury, including death, or property damage, arising out of or relating in any way to action or activities related to the performance of this Agreement or the development and construction of the Facility, to the extent such Liabilities (1) are in whole or in part caused by or result from any negligent conduct or omission, or willful misconduct of USST, its officers, directors, shareholders, partners, agents, employees, contractors, subcontractors, consultants, licensees or invitees ("USST and USST related Parties") in connection with the performance or nonperformance of this Agreement or development and construction of the Facility, or (2) relate in any way to any allegation of infringement, violation or conversion of any patent, licenses, proprietary right, trade secret or other similar interest, in connection with the development and construction of the Facility, including Facility technology, processes, machinery or equipment; provided that if a final decision or judgment allocates liability by determining that any portion of damages awarded is attributable to a wrongful or negligent act, error or omission of the City and/or City related Parties, the City shall pay such portion of damages.

(2) Defense during development and construction of the Facility. Upon City's request, USST shall defend with legal counsel acceptable to the City, at USST's sole cost, any action, claim or suit which asserts or alleges any Liabilities, whether well founded or not, arising or resulting from, in whole or in part, directly or indirectly, any wrongful or negligent act, error or omission of USST and/or USST related Parties or of City and/or City related Parties performed or occurring under or in connection with this Agreement including development and construction of the Facility.

(3) Defense and indemnity during operation of the Facility. When construction of the Facility is completed and the Facility is ready to accept and process City post-recyclable MSW, USST agrees that it will provide City with the same level of indemnification and defense found in Exhibit 12.02 “Disposal Subcontract,” specifically Article X “Hold Harmless, Defense and Indemnification.”

(b) City Indemnification.

City shall indemnify and hold USST and USST related Parties harmless from and against all liabilities (as defined below in this subsection 17(b)) to which any of them may be subjected by reason of, or resulting directly or indirectly from, any wrongful or negligent act, error or omission of City and/or City related Parties performed or occurring out of or in connection with this Agreement; provided that a final decision or judgment determines such liabilities are attributable to a wrongful or negligent act, error or omission of the City and/or City related Parties.

For the purposes of this subsection 17(b), “liabilities” means liabilities, lawsuits, claims, judgments, demands, damages (whether in contract or tort, including personal injury, death at any time or property damage), costs, expenses, loss, penalties and other detriments of every nature and description whatsoever, whether under State or Federal law, including personal injuries, wrongful death and property damage of any kind resulting from the City, not including any entity hired by the City to transport City post-recyclable MSW, delivering City post-recyclable MSW to the Facility and penalties, fines and charges arising from City’s violation of applicable State or Federal law in connection with delivering City post-recyclable MSW to the Facility, provided that, as used in this Section “liabilities” shall not include any costs and expenses incurred by USST to defend City and/or City related Parties including costs and expenses of litigation or arbitration, attorneys fees (whether USST’s staff attorneys or outside attorneys) and court costs, which costs, expenses and fees shall be solely the responsibility of USST.

THE TERMS OF THIS SECTION 17, DEFENSE AND INDEMNITY, SHALL SURVIVE TERMINATION OF THIS AGREEMENT

18. **Insurance.** USST shall obtain and at all relevant times maintain the types of insurance coverage and policy amounts that the City’s Risk Manager, in his/her sole discretion, deems necessary, which may include, without limitation, general liability coverage and environmental claims coverage. USST shall procure the insurance from insurers approved by the City Risk Manager, licensed in California, rated not less than “A minus, VII” or better by A.M. Best Company, Inc. City shall be an additional insured under each policy.

19. **Community Outreach.** The parties recognize the importance and value of community input. City will develop and formulate a plan for community outreach that

the City deems is desirable and appropriate concerning the development of the Facility. Any third party engaged by USST to provide media and public relations services related to the development of the Facility shall be subject to City's prior written approval. The costs of such community outreach activities shall be borne solely by USST. Further, USST agrees to participate in outreach to a stakeholders group to be formed in the future.

20. CEQA Compliance.

(a) The parties acknowledge and agree that various future discretionary actions by the City and other agencies regarding the development of the Facility as contemplated by this Agreement are conditioned on the parties completing any applicable proceedings under CEQA and further conditioned on the expiration of the applicable period for any challenge to the adequacy of the parties' compliance with CEQA without any challenge being filed. Neither party shall be bound by future agreements contemplated herein, including the Final Agreement, unless and until compliance with CEQA is completed and the appeals period has expired.

(b) USST shall pay for and reimburse City for the costs of complying with CEQA, including consultant fees and expenses, administrative costs to prepare the required information and all costs of litigation defense, including attorney's fees. USST shall select a qualified environmental consultant acceptable to City to prepare the underlying documentation for City's review and consideration as may be required by CEQA and applicable law. Prior to the engagement of the environmental consultant, USST shall deposit with the City an amount of money estimated by the City to cover the cost of the consultant and preparation of supporting reports and analyses.

(c) The parties acknowledge that the preparation of an environmental impact report ("EIR") is a significant critical path item in the process of moving the Facility project forward. It is important that the schedule for the planning of the Facility and the entitlement process are closely coordinated. Regular meetings shall be held to share information, prepare or assist in preparing information, the project description, project conditions, mitigation measures, and other necessary tasks.

(d) City has no obligation to defend against any CEQA challenge whether or not USST undertakes such defense or elects not to defend against such actions, provided that City shall cooperate with USST in any such defense.

21. **CEQA Review.** City, as the "Lead Agency" under CEQA, must review the proposed project and Facility in accordance with CEQA prior to the taking of any substantive discretionary action, including, without limitation, the approval of any permits. In its sole and absolute discretion as the Lead Agency under CEQA, City retains the right, among other things, in connection with its environmental review of the Facility, to: (i) consider the environmental impacts of the Facility, (ii) adopt measures to mitigate potentially significant impacts, (iii) impose conditions that may modify the project which would require changes to site plan and building plan, (iv) study a full

range of reasonable and feasible alternatives to the project, and elect to select any of such alternatives, including a “no project” alternative; and (v) elect not to approve the Facility and the permits and not to proceed with any further actions to implement this Agreement.

Notwithstanding City's approval of this Agreement, City has not made any pre-commitments to approve agreements and actions relating to the Facility or any required permits, or the schedule as to when such permits may be approved. City, acting as a governmental entity in evaluating the application for the permits, will be acting in its capacity as a municipal land use regulatory authority and shall have no obligation whatsoever to exercise its discretion in any particular manner, and City reserves its full discretion in that regard. This Agreement shall not be construed as a development agreement within the meaning of Government Code Sections 65864 et seq.

22. Time for Performance. Within sixty days (60) of execution of this Agreement, USST shall provide the following to the City:

- (a) a revised business plan detailing the specific components, procedures and requirements of the Facility;
- (b) a detailed pro forma containing items and amounts to the satisfaction of the City;
- (c) articles of incorporation for USST and all parents or subsidiaries of USST;
- (d) a project description to be utilized for environmental review purposes;
- (e) a waste characterization for a sample of City post-recyclable MSW;
- (f) letters of intent or conditional commitments providing sufficient financial certainty, to City satisfaction, of USST's ability to construct and operate the Facility;
- (g) financial statements for USST and all parents or subsidiaries of USST, including balance sheets and income statements;
- (h) emissions data from the plasma arc gasification facility in Utashinai, Japan;
- (i) such documents and information to demonstrate to the satisfaction of the City USST's ability to satisfy the representations made in Section 9; and
- (j) any other documentation that the City, in its sole discretion, reasonably requires in order to determine USST's ability to perform under this Agreement and determine the feasibility and desirability of the Facility.

Failure of USST to provide the required documentation and information to the

satisfaction of the City as determined in the sole discretion of the City Manager within sixty days (60) of execution of this Agreement will result in termination this Agreement.

23. **Entire Agreement.** This Agreement constitutes the entire understanding and agreement of the parties and supersedes all negotiations and all other previous agreements between the Parties with respect to all or any part of the subject matter hereof; provided however, that the terms and conditions of the Agreement between the City of Sacramento and U.S. Science and Technology Corporation Concerning Disclosure of Proprietary Information in Relation to Potential Development of a Waste to Energy Project and the terms and conditions of the Reimbursement Agreement Regarding USST Waste to Energy Project shall remain in effect.

24. **Amendments.** Any and all amendments hereto must be in writing and signed by the appropriate authorized representatives of the parties.

25. **Dispute Resolution.** Except for disputes where there is a risk of imminent injury or death, or for which emergency relief (including injunctive relief) is sought, the parties will first seek to resolve a dispute informally through the person(s) directly involved.

26. **Notice.** All notices, requests, demands, or other communication hereunder, shall be in writing and shall be effective upon receipt. A notice shall be deemed to be duly given and received: (i) if delivered in person; or (ii) as of the day following deposit with a national overnight courier, charges prepaid; or (iii) as of the date of receipt as reflected on a written receipt obtained by the U.S. Postal Service; or (iv) on the next business day following delivery by confirmed facsimile by United States, so long as such notice is confirmed by another method of notice provided herein. Notices shall be sent to the following addresses:

If to City: City of Sacramento
City Manager's Office
915 I Street, 5th Floor
Sacramento, CA 95814
Attn: Marty Hanneman

If to USST: 4366 Auburn Boulevard
Sacramento, CA 95841
Attn: William J. Ludwig

or to such other address or addresses as may be furnished in writing by either party.

27. **Governing Law.** The laws of the State of California shall govern the interpretation and enforcement of this Agreement.

28. **Assignment.** Neither party shall assign any right or obligation pursuant to this Agreement without the prior written consent of the other party. Either party may grant

or withhold its consent in its sole and absolute discretion. Any attempted or purported assignment without the other party's written consent shall be void and of no effect.

29. **Successors and Assigns.** The terms, covenants, agreements and conditions of this Agreement shall be binding upon, inure to the benefit of, and apply to, the respective successors and assigns of the parties.

30. **No Waiver.** The failure or delay by either party in asserting its rights or remedies to any condition precedent, default or breach shall not operate as a waiver of any condition precedent, default or breach or of any rights or remedies under this Agreement or deprive either party of its right to institute and maintain any action or proceedings which it may deem necessary to protect, assert, or enforce any such rights or remedies.

31. **Relationship of Parties.** Nothing herein contained shall be in any way construed as expressing or implying that the parties hereto have joined together in any joint venture or partnership.

32. **Counterparts.** This Agreement may be executed in counterparts, each of which shall be deemed an original, but all of which shall constitute one original document.

33. **Headings.** The descriptive captions and headings used in this Agreement are for convenience only and shall not control or affect the meaning or construction of any of its provisions.

34. **Exhibits.** All of the exhibits referenced in this Agreement and attached hereto are incorporated herein by this reference.

35. **Intellectual Property.** Nothing in this Agreement is intended to transfer, convey, license, or assign any intellectual property (whether registered or unregistered) from USST to the City.

36. **Neighborhood Work Force and Minority Hiring.** USST agrees to use reasonable business efforts to provide that at least thirty percent of its work force, as of the date of hire, is living within a three mile radius of the Facility. The Parties agree to develop an outreach program to all aspects of the community, including all ethnic and cultural minorities that should provide for hiring of ethnic and cultural minorities to the extent allowed by then existing law.

37. **City Council Approval.** This Agreement is subject to approval by the Sacramento City Council.

CITY OF SACRAMENTO:

USST HOLDINGS, INC.:

By: _____
Ray Kerridge, City Manager

By: _____
William J. Ludwig
Chief Executive Officer

ATTEST:

City Clerk

APPROVED AS TO FORM:

Deputy City Attorney