

K23-026

AMENDMENT NO. 4 TO THE CONTRACT

BETWEEN

THE CITY OF NEW ORLEANS

AND

**KELLERMEYER BERGENSONS SERVICES, LLC (ASSIGNMENT FROM EMPIRE
JANITORIAL SALES & SERVICES, LLC)**

**BID PROPOSAL NO.: 3010-01748
FRENCH QUARTER AND DOWNTOWN DEVELOPMENT DISTRICT SANITATION
SERVICES**

THIS FOURTH AMENDMENT (the “Amendment” or “Amendment No. 4”) is entered into by and between the City of New Orleans, represented by LaToya Cantrell, Mayor (the “City”), and Kellermeyer Bergensons Services, LLC, represented by Charlie Lusco, President/Owner (the “Contractor”). The City and the Contractor are sometimes collectively referred to as “Parties”. The Amendment is effective as of **December 23, 2022** (the “Effective Date”).

RECITALS

WHEREAS, on and effective December 23, 2014, the City and the Contractor entered into a bid contract to provide daily sanitation services for the City in the French Quarter (“**FQ**”) and Downtown Development District (“**DDD**”) and other related areas (the “**Services**”) resulting from, but not limited to, special events, in a timely, efficient, and cost-effective manner (the “**Contract**”) pursuant to the City’s Invitation to Bid No. 3010-01748, issued November 19, 2014 (the “**ITB**”);

WHEREAS, the Contract provided for an initial term of Seven (7) years from the effective date (*i.e.*, December 23, 2014) with the ability to extend the term for no more than three (3) one (1) year periods;

WHEREAS, on October 9, 2019, and effective May 18, 2019, the City and the Contractor entered into an amendment to eliminate the curbside collection of plastic containers coded #3 through #7 and ferrous metal food containers (“**Amendment No. 1**”);

WHEREAS, on June 2, 2021, and effective January 1, 2021, the City and the Contractor entered into an amendment, memorializing the assignment from Empire Janitorial Sales & Services, LLC to Kellermeyer Bergensons Services, LLC and modifying and/or reaffirming certain terms and provisions (“**Amendment No. 2**”);

WHEREAS, on December 15, 2021, and effective December 23, 2021, City and the Contractor, each having the authority to do so, entered into an amendment to extend the duration of the Contract for the first of three (3) potential one (1) year extensions, and to modify and/or reaffirm the terms and conditions (“**Amendment No. 3**”); and

WHEREAS, the City and the Contractor, each having the authority to do so, desire to enter this Amendment to extend the duration of the Contract for the second of three (3) potential one (1) year extensions, and to modify and/or reaffirm the terms and conditions as set forth hereinunder.

NOW THEREFORE, for good and valuable consideration, the City and the Contractor amend the Contract as follows:

1. **Term.** In accordance with Section 10 of Attachment "B" to the ITB, which is fully incorporated into the Contract, the initial term of the Contract extended for seven (7) years from December 23, 2014, through December 22, 2021, and Amendment No. 1 extended the term from December 23, 2021, through December 22, 2022. In accordance with Section 12 of Attachment "B" to the ITB, the Parties agree and acknowledge that this Amendment shall extend the term of the Contract for an additional one (1) year from December 23, 2022, through December 22, 2023. This one (1) year extension is the second of three (3) additional one (1) year terms to extend the Contract at the option of the City.

2. **Price.** The City and the Contractor reaffirm the rates of compensation set forth in the Contractor's Bid dated December 16, 2014, submitted in response to the City ITB (the "Contractor's Bid"). The monthly cost per unit for Solid Waste Collection is reaffirmed at (Residential - \$21.10), (Commercial - \$52.00), and (Residential & Commercial - \$52.00). The monthly cost per unit for Recycling Collection is reaffirmed at (Residential, Commercial, and DDD - \$2.27).

3. **Maximum Amount.** Section 3 of Amendment No. 2 is deleted in its entirety and replaced, as follows:

3. **Maximum Amount.** The maximum aggregate amount payable by the City under this Contract is increased from \$31,628,616.00 by \$3,953,577.00 to a new maximum aggregate amount not to exceed \$35,582,193.00 through December 22, 2023.

4. **Assignability.** The Section entitled "Assignability" of the ITB, which is fully incorporated into the Contract, is deleted in its entirety, and replaced in accordance with Ordinance Calendar No. 33,935, as follows:

Assignability.

1. Neither a Contractor nor subcontractor may assign or transfer its rights, duties, or obligations under this Contract without the prior written consent of the City, which consent must be approved by a resolution of the City Council.
2. A transfer requiring the prior written consent of the City, as described in the preceding subsection, shall occur upon a change in ownership of the Contractor or subcontractor. A "change in ownership" shall occur on the date that any one person, or more than one person acting as a group, acquires, directly or indirectly, an aggregate ownership interest in the Contractor or subcontractor that

exceeds 50% of the fair market value of the Contractor or subcontractor or 50% of the total voting power of the Contractor or subcontractor. The foregoing shall not apply to the acquisition of additional ownership interests by a person whose ownership interest in the Contractor or subcontractor exceeds 50% of the fair market value of the Contractor or subcontractor or 50% of the total voting power of the contractor or subcontractor as of the effective date of the Contract.

5. **Additional Miscellaneous Provisions.** The following terms and conditions are reaffirmed and/or added to the Contract:

Living Wages. On July 1, 2021, the Council of the City of New Orleans adopted and the Mayor approved Ordinance 28718 M.C.S., amending and re-ordaining Section 70-806 and 7-813 of the Code of the City of New Orleans to increase the required living wage for city contracts. Article VI – Living Wages, which was agreed to in Amendment No. 3, is hereby reaffirmed, as follows:

VI - LIVING WAGES

A. Definitions. Unless otherwise expressly provided in this Amendment, Capitalized terms used but not defined herein, shall have the definition attributed to them in Article VIII, Section 70-802 of the City Code.

B. Compliance. To the fullest extent permitted by law, the Contractor agrees to abide by City Code Sections 70-801, *et seq.*, which requires, in pertinent part, the following:

1. Payment of an hourly wage to Covered Employees equal to the amounts defined in the City Code (“**Living Wage**”);

2. Receipt of at least seven (7) days per year of compensated leave for Covered Employees, as required by Section 70-807 of the City Code; and

3. Post notice in a prominent place regarding the applicability of the Living Wage Ordinance in every workplace in which Covered Employees are working that is within the Covered Employer's custody and control, as required by Section 70-810 of the City Code.

C. Living Wage. In accordance with the Living Wage Ordinance, Living Wage shall be as follows:

1. \$11.19 per hour for any work performed on or before December 31, 2021;

2. \$13.25 per hour for any work performed on or before December 31, 2022;
3. \$15.00 per hour for any work performed on or before December 31, 2023; and
4. \$15.00 per hour plus any adjustment provided in subsection D below for any work performed during calendar year 2024 or thereafter.

D. Adjusted Living Wage. In accordance with Section 70-806(2) of the City Code, the Living Wage shall be annually adjusted for inflation, as defined by the Consumer Price Index calculated by the U.S. Bureau of Labor Statistics as applied to the South Region, except that in no instance shall the Living Wage be adjusted downward. The first adjustment shall become effective on January 1, 2024, using the Consumer Price Index figures provided for the preceding year, and thereafter on an annual basis.

E. Subcontract Requirements. As required by Section 70-804 of the City Code, the Contractor, beneficiary, or other Covered Employer, prior to entering into a subcontract, shall notify subcontractors in writing of the requirements and applicability of Article VIII – The Living Wage Ordinance (“**Article**”). City contractors and beneficiaries shall be deemed responsible for violations of this Article by their subcontractors.

F. Reporting. On or before January 31st and upon request by the City, the Contractor shall identify (a) the hourly wage earned by the lowest paid Covered Employee and (b) the number of days of compensated leave received by Covered Employees earning less than 130% of the then-prevailing wage during the current term of the Contract, and provide the identified information to the following:

Office of Workforce Development
Living Wage - Compliance
1340 Poydras Street – Suite 1800
New Orleans, Louisiana 70112

G. Compliance Monitoring. Covered Employers under this Amendment are subject to compliance monitoring and enforcement of the Living Wage requirements by the Office of Workforce Development (the “**OWD**”) and/or the Chief Administrative Office (“**CAO**”). Covered Employers will cooperate fully with the OWD and/or the CAO and other City employees and agents authorized to assist in the administration and enforcement of the Living Wage requirements. Steps and actions include, but are not limited to, requirements that: (i) the Contractor will cooperate fully with the OWD and the CAO and other City employees and agents authorized to assist in the administration and enforcement of the Living

Wage requirements; (ii) the Contractor agrees that the OWD and the CAO and their designees, in the performance of their duties, shall have the right to engage in random inspections of job sites and to have access to the employees of the Contractor, payroll records and employee paychecks; and (ii) that the City may audit such records of the Contractor as he or she reasonably deems necessary to determine compliance with the Living Wage standards.

H. **Remedies.** If the Contractor fails to comply with the Living Wage requirements during the term of the Amendment, said failure may result in termination of the Contract or the pursuit of other remedies by the City, including, but not limited to, the penalties and enforcement mechanisms set forth in Section 70-811 of the City Code.

DECLARED DISASTER

A. **Declaration.** During the declaration of an emergency by federal, state, and/or local government, the Contractor shall provide support to the City on an as-needed and task-order-driven basis. Because of the uncertainty of the scale and/or type of emergency, the services to be provided by the Contractor will vary and may need to be adjusted as needs are identified. The Contractor may be requested to provide a range of services. Said services may need to be rendered on a continual basis (24 hours per day/7 days per week) during the declaration of an emergency.

B. **Task Order - Notification and Personnel.** Prior to or during the declaration of an emergency, the City will notify the Contractor via task order if the City requires the Contractor's support. Upon activation by task order, the Contractor will provide the City with contact information of personnel assigned to the task order; and coordinate with the City to identify any personnel available to meet the City's needs.

C. **Purchase Order.** Once services are identified, the City will issue a purchase order to the Contractor. The City will issue a subsequent purchase order in case of additional need for services or may issue a modified purchase order if changes are made to the initial purchase order.

D. **Timely Documentation.** The Contractor will ensure that the City is provided with timely and accurate reports and other documentation, as requested.

V- PERFORMANCE MEASURES

A. **Factors.** The City will measure the performance of the Contractor according to the following non-exhaustive factors: work performed in compliance with the terms of the Contract; staff availability; staff training; staff professionalism; staff experience; customer service;

communication and accessibility; prompt and effective correction of situations and conditions; timeliness and completeness of submission of requested documentation (such as records, receipts, invoices, insurance certificates, and computer-generated reports).

B. Failure to Perform. If the Contractor fails to perform according to the Contract, the City will notify the Contractor. If there is a continued lack of performance after notification, the City may declare the Contractor in default and may pursue any appropriate remedies available under the Contract and/or any applicable law. In the event of a notification of default, the City will invoice the defaulting contractor for any increase in costs and other damages sustained by the City. Further, the City will seek full recovery from the defaulting contractor.

VII - COMPLIANCE WITH CITY'S HIRING REQUIREMENTS - BAN THE BOX

A. The Contractor agrees to adhere to the City's hiring requirements contained in City Code Sections 2-8(d) and 2-13(a)-(f). Prior to executing this Contract, Contractor must provide a sworn statement attesting to its compliance with the City's hiring requirements or stating why deviation from the hiring requirements is necessary.

B. Failure to maintain compliance with the City's hiring requirements throughout the term of the Contract, or to provide sufficient written reasons for deviation, is a material breach of this Contract. Upon learning of any such breach, the City will provide the Contractor notice of noncompliance and allow Contractor thirty (30) days to come into compliance. If, after providing notice and thirty (30) days to cure, the Contractor remains noncompliant, the City may move to suspend payments to Contractor, void the Contract, or take any such legal action permitted by law or this Contract.

C. This section will not apply to any Contracts excluded from the City's hiring requirements by City Code Sections 2-8(d) or (g). Should a court of competent jurisdiction find any part of this section to be unenforceable, the section should be reformed, if possible, so that it is enforceable to the maximum extent permitted by law, or if reformation is not possible, the section should be fully severable, and the remaining provisions of the Contract will remain in full force and effect.

D. The Contractor will incorporate the terms and conditions of this Article into all subcontracts, by reference or otherwise, and will require all subcontractors to comply with those provisions.

NON-DISCRIMINATION

A. Equal Employment Opportunity. In all hiring or employment made possible by, or resulting from this Contract, the Contractor (I) will

not be discriminate against any employee or applicant for employment because of race, sex, color, religion, gender, age, physical or mental disability, national origin, sexual orientation, gender identity, creed, culture, or ancestry, and (2) where applicable, will take affirmative action to ensure that the Contractor's employees are treated during employment without regard to their race, sex, color, religion, gender, age, physical or mental disability, national origin, sexual orientation, gender identity, creed, culture, or ancestry. This requirement shall apply to, but not be limited to the following: employment, upgrading, demotion or transfer, recruitment or recruitment advertising, layoff or termination, rates of pay or other forms of compensation, and selection for training, including apprenticeship. All solicitations or advertisements for employees shall state that all qualified applicants will receive consideration for employment without regard to race, sex, color, religion, gender, age, physical or mental disability, national origin, sexual orientation, gender identity, creed, culture, or ancestry.

B. Non-Discrimination. In the performance of this Contract, the Contractor will not discriminate on the basis, whether in fact or perception, of a person's race, color, creed, religion, national origin, ancestry, age, sex, gender, sexual orientation, gender identity, domestic partner status, marital status, physical or mental disability, or AIDS- or HIV-status against (1) any employee of the City working with the Contractor in any of Contractor's operations within Orleans Parish or (2) any person seeking accommodations, advantages, facilities, privileges, services, or membership in all business, social, or other establishments or organizations operated by the Contractor. The Contractor agrees to comply with and abide by all applicable federal, state and local laws relating to non-discrimination, including, without limitation, Title VI of the Civil Rights Act of 1964, Section V of the Rehabilitation Act of 1973, and the Americans with Disabilities Act of 1990.

C. Incorporation into Subcontracts. The Contractor will incorporate the terms and conditions of this Article into all subcontracts, by reference or otherwise, and will require all subcontractors to comply with those provisions.

D. The City may terminate this Contract for cause if the Contractor fails to comply with any obligation in this Article, which failure is a material breach of Contract.

FORCE MAJEURE

A. Event. An event of Force Majeure will include any event or occurrence not reasonably foreseeable by the City at the execution of this Contract, which will include, but not be limited to, abnormally severe and unusual weather conditions or other acts of God (including tropical weather events, tornados, hurricanes, and flooding); declarations of emergency;

shortages of labor or materials (not caused by City); riots; terrorism; acts of public enemy; war; sabotage; cyber-attacks, threats, or incidents; epidemics or pandemics; court or governmental order; or any other cause whatsoever beyond the reasonable control of City, provided such event was not caused by the negligence or misconduct of City, by the failure of City to comply with applicable laws, or by the breach of this Contract.

B. Notice. To seek the benefit of this Article, the City must provide notice in writing to the Contractor stating: (1) an event triggering this Article has occurred; (2) the anticipated effect of the Force Majeure event on performance; and (3) the expected duration of the delay, if the Contract is being suspended

C. Effect.

1. Upon the occurrence of a Force Majeure event, for which the City has provided required notice, the City may, at its sole discretion:

- a. Suspend this Contract for a duration to be set by the City, not to exceed 90 days. During such time of suspension, the Parties will not be liable or responsible for performance of their respective obligations under this Contract, and there will be excluded from the computation of such period any delays directly due to the occurrence of the Force Majeure event. During any such period of suspension, the Contractor must take all commercially reasonable actions to mitigate against the effects of the Force Majeure event and to ensure the prompt resumption of performance when so instructed by the City; or
- b. Terminate this Contract, either immediately or after one or more periods of suspension, effective on notice to Contractor and without any further compensation due.

2. Notwithstanding Section C(1) above, the obligations relating to making payments when due (for services or materials already provided) and those obligations specified to survive in the Contract will be unaffected by any suspension or termination.

III - THE SURETY'S OBLIGATIONS

A. The Performance and Payment Bonds. Travelers Casualty and Surety Company of America ("Surety") intervenes in this Contract and binds itself as surety for:

1. The faithful performance of all work required of the Contractor by this Contract in the full sum of Three Million Nine Hundred Fifty-Three Thousand Five Hundred Seventy-Seven Dollars and Zero Cents (\$3,953,577.00).

2. The full payment by the Contractor of all payments to be made by the Contractor under this Contract in the fully sum of Three Million Nine Hundred Fifty-Three Thousand Five Hundred Seventy-Seven Dollars and Zero Cents (\$3,953,577.00).

Each of these bonds is to be considered separate and distinct, and no payment made by the Surety under either bond shall in any way reduce the obligation of the Surety under the other.

B. Acknowledgment of Contract. The Surety represents and warrants that it has fully read and understands the terms of this Contract, including all incorporated documents.

C. Survival and Validity of Bond. The Surety's bonds shall remain in full force and effect, and shall survive the termination of this Contract, but shall become null and void if the Contractor: (1) well and faithfully performs all and singular the obligations assumed by the Contractor in this Contract; (2) promptly pays all wages of laborers, workmen, and mechanics to be employed by the Contractor for all work done or labor performed by the Contractor or by any subcontractors; or furnished to subcontractors, and used in the construction, erection, alteration, performance, or repairs of the work required by the Contract; (3) promptly pays for all materials or supplies furnished to the Contractor, or by any subcontractor, or to any subcontractor, and used in, or for use in machines used in, the construction, erection, alteration, performance, or repair of the work required by the Contract; (4) fully secures and protects the City, its legal successors and representatives, from all loss or expense of any kind, including premises, including all costs of Court and attorneys' fees, made necessary or arising from the failure, refusal, or neglect of the Contractor to comply with all of the obligations assumed by it; and (5) promptly delivers all the work required by the Contract to the City, free from any and all claims, liens, and expenses. The obligations of the Surety will not be affected in any way by any modifications, omissions, or additions in or to the terms of this Contract, the plans or specifications, or in the manner and mode of payment.

VIII - ADDITIONAL PROVISIONS

6. Ownership Interest Disclosure. The Contractor shall provide a sworn affidavit listing all persons, natural or artificial, with an ownership interest in the Contractor and stating that no other person holds an ownership interest in the Contractor via a counter letter. For the purposes

hereof, an "ownership interest" shall not be deemed to include ownership of stock in a publicly traded corporation or ownership of an interest in a mutual fund or trust that holds an interest in a publicly traded corporation. If the Contractor fails to submit the required affidavits, the City may, after 30 days' written notice to the Contractor, take such action as may be necessary to cause the suspension of any further payments until such the required affidavits are submitted.

7. **Subcontractor Reporting.** The Contractor shall provide a list of all persons, natural or artificial, who are retained by the Contractor at the time of the Contract's execution and who are expected to perform work as subcontractors in connection with the Contractor's work for the city. In regard to any subcontractor proposed to be retained by the Contractor to perform work on the Contract with the City, the Contractor must provide notice to the City within 30 days of retaining said subcontractor. If the Contractor fails to submit the required lists and notices, the City may, after 30 days' written notice to the Contractor, take such action as may be necessary to cause the suspension of any further payments until such the required lists and notices are submitted.

8. **Employee Verification.** The Contractor swears that (i) it is in compliance with La. R.S. 38:2212.10, and is registered and participates in a status verification system to verify that all employees in the State of Louisiana are legal citizens of the United States or are legal aliens; (ii) it shall continue, during the term of this Contract, to utilize a status verification system to verify the legal status of all new employees in the State of Louisiana; and (iii) it shall require all subcontractors to submit to the Contractor a sworn affidavit verifying compliance with items (i) and (ii) above. The Contractor acknowledges and agrees that any violation of the provisions of this paragraph may subject this Contract to cancellation and may further result in the Contractor being ineligible for any public contract for a period of 3 years from the date the violation is discovered. The Contractor further acknowledges and agrees that it shall be liable for any additional costs incurred by the City occasioned by the cancellation of this Contract or the loss of any license or permit to do business in the State of Louisiana resulting from a violation of La. R.S. 38:2212.10. The Contractor agrees to provide to the City a sworn affidavit attesting to the above provisions if requested by the City to do so; failure to provide such affidavit upon request shall give the City the option to cancel this Contract.

9. **Convicted Felon Statement.** The Contractor swears that it complies with City Code § 2-8(c). No Contractor principal, member, or officer has, within the preceding five years, been convicted of, or pled guilty to, a felony under state or federal statutes for embezzlement, theft of public funds, bribery, or falsification or destruction of public records.

10. **Non-Solicitation Statement.** The Contractor swears that it has not employed or retained any company or person, other than a bona fide employee working solely for it, to solicit or secure this Amendment. The Contractor has not paid or agreed to pay any person, other than a bona fide employee working for it, any fee, commission, percentage, gift, or any other consideration contingent upon or resulting from this Amendment.

11. **Prior Terms Binding.** Except as otherwise provided by this Amendment, the terms and conditions of the Contract remain in full force and effect.

12. **Counterparts.** This Amendment may be executed in one or more counterparts, each of which shall be deemed to be an original copy of this Amendment, but all of which, when taken together, shall constitute one and the same agreement.

13. **Cost Recovery.** In accordance with Section 2-8.1 of the Municipal Code entitled "Cost recovery in contracts, cooperative endeavor agreements, and grants," to the maximum extent permitted by law, the Contractor shall reimburse the City or disgorge anything of value or economic benefit received from the City if the Contractor fails to meet its contractual obligations."

14. **Electronic Signature and Delivery.** The Parties agree that a manually signed copy of this Amendment and any other document(s) attached to this Amendment delivered by facsimile, email or other means of electronic transmission shall be deemed to have the same legal effect as delivery of an original signed copy of this Amendment. No legally binding obligation shall be created with respect to a party until such party has delivered or caused to be delivered a manually signed copy of this Amendment.

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[SIGNATURES CONTAINED ON NEXT PAGE]

IN WITNESS WHEREOF, the City, the Contractor, and the Surety through their duly authorized representatives, execute this Amendment.

CITY OF NEW ORLEANS

BY: [Signature] FOR
LATOYA CANTRELL, MAYOR

Executed on this 8th of March, 2023.

CITY OF NEW ORLEANS, CITY COUNCIL

BY: [Signature]
COUNCIL PRESIDENT

FORM AND LEGALITY APPROVED:
Law Department

By: [Signature]

Printed Name: Tracy Lyb

KELLERMEYER BERGENSONS SERVICES, LLC

BY: _____
CHARLIE LUSCO, PRESIDENT

TAX I.D.

TRAVELERS CASUALTY AND SURETY COMPANY OF AMERICA

BY: _____
SURETY REPRESENTATIVE, AGENT OR ATTORNEY-IN-FACT

PRINT NAME, TITLE: _____

TAX I.D.

[ORIGINAL POWER OF ATTORNEY MUST BE ATTACHED TO THIS
AMENDMENT.]

IN WITNESS WHEREOF, the City, the Contractor, and the Surety through their duly authorized representatives, execute this Amendment.

CITY OF NEW ORLEANS

BY: _____
LATOYA CANTRELL, MAYOR

Executed on this _____ of _____, 2023.

CITY OF NEW ORLEANS, CITY COUNCIL

BY: _____
COUNCIL PRESIDENT

FORM AND LEGALITY APPROVED:
Law Department

By: _____

Printed Name: _____

KELLERMEYER BERGENSONS SERVICES, LLC

BY: Paul Forge
PAUL FORGE, CHIEF FINANCIAL OFFICER

TAX I.D. _____

TRAVELERS CASUALTY AND SURETY COMPANY OF AMERICA

BY: Derek J. Elston
SURETY REPRESENTATIVE, AGENT OR ATTORNEY-IN-FACT

PRINT NAME, TITLE: Derek J. Elston, Attorney-in-Fact

TAX I.D. _____

**[ORIGINAL POWER OF ATTORNEY MUST BE ATTACHED TO THIS
AMENDMENT.]**