

City of Seattle
CONTRACT FOR SEATTLE STEAM at the SEATTLE AQUARIUM

This Contract ("Contract") is made effective 4/10/07 (the "Effective Date"), and entered into by and between the City of Seattle, a Washington municipal corporation ("City of Seattle"); and the Supplier, Seattle Steam Limited Partnership, an Illinois limited partnership ("Supplier"), authorized to do business in the State of Washington.

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|------------------------|--|
| Supplier Business | Seattle Steam Limited Partnership |
| Name of Representative | David Easton |
| Supplier Address | 1325 Fourth Avenue, Suite 1440 Seattle WA 98101 |
| Supplier Phone | 206-623-6336 |
| Supplier Fax | |
| Supplier E-mail | DEaston@seattlesteam.com |

WHEREAS, the purpose of this Contract is to provide thermal energy services ("Thermal Energy") to the Seattle Aquarium; and

WHEREAS, Supplier was selected by the Seattle Aquarium as an efficient source of long-term energy for the Seattle Aquarium, and was confirmed as a Sole Source by the City of Seattle, Purchasing Services Division.

NOW, THEREFORE, in consideration of the terms, conditions, and covenants, contained herein, as attached and made a part hereof, the City of Seattle and Supplier mutually agree as follows:

1. **Entire Agreement:** This Contract, including all Exhibits and subsequently issued Amendments, comprises the entire agreement between the City of Seattle and the Supplier.
2. **Term of Contract.** The term of this Contract ("Term") shall begin upon written notice by the City of Seattle to the Supplier of the intended "Start Date" (as indicated below), and shall continue thereafter without interruption for a period of five (5) years. This Contract shall be automatically renewed, under the same terms and conditions, and the Term extended for additional five-year periods, unless either party sends notice to the other of its intent not to renew at least three months prior to the end of the Term (as the Term may be extended by this Section 2). The planned Start Date is on or before June 1, 2007; however, the actual Start Date will be determined by the City of Seattle, who shall provide the Supplier advance written notice of the Start Date as early as practicable and at least 15 days prior to the scheduled Start Date. If the actual Start Date has not occurred on or before June 1, 2007, the Supplier may terminate this Contract prior to the occurrence of an actual Start Date, with 15 business days notice to the City of Seattle.
3. **Purchase and Sale of Thermal Energy.** Throughout the Term, the Supplier will produce and deliver for sale to the City of Seattle, and the City of Seattle will purchase and receive from the Supplier, Thermal Energy to the extent that the Seattle Aquarium requires such Thermal Energy for the properties set forth on Exhibit A (the "Properties") from the Supplier. The decision to use Thermal Energy for any use remains the provenance of the City of Seattle, without penalty or discussion. Nothing in this Contract shall prevent the City of Seattle from purchasing Thermal Energy or any energy supply from any other vendor.
4. **Charges and Payments.**

4.1 **Monthly Meter Rate (MMRate) Charge.** During the Term, the City of Seattle shall

pay to the Supplier the current charges set forth in Sections 4.1.1 and 4.1.2 as adjusted in accordance with Section 4.2.

4.1.1. Monthly Meter Rate (MMR) Charge. The City of Seattle shall pay to the Supplier monthly the greater of (1) an amount equal to the Initial MMR (or the Adjusted MMR as the case may be), multiplied by the number of Mlbs of steam actually provided to Customer during the applicable monthly invoice period or (2) \$50.00. The Initial MMR is set forth on Exhibit A.

4.1.2. Consumption Charge. The City of Seattle shall pay to the Supplier monthly an amount equal to the Consumption Charge, as adjusted pursuant to Section 4.2 below, multiplied by the number of Mlbs of steam actually provided to the City of Seattle during the applicable monthly invoice period. The initial Consumption Charge is set forth on Exhibit A.

4.2. **Adjustments.**

4.2.1. **Annual Adjustments to the MMRate.** The Supplier may adjust the MMR (the "Adjusted MMR") annually on January 1 of each year. These adjustments will be linked to material changes in the unit cost to provide energy and other production costs associated with the delivery of Thermal Energy and not adequately reflected by means of the adjustments pursuant to Section 4.2.2 below.

4.2.2. Adjustment to the Consumption Charge. The Consumption Charge will be increased or decreased by the sum of the charges set forth on Exhibit B. In addition, the Supplier may adjust the Consumption Charge with written notice to the City of Seattle from time to time for material changes in governmental taxes, assessments, permits, excises, levies and impositions associated with the delivery of Thermal Energy.

4.3. Fuel Discount. Within thirty (30) days after the successful completion and operation of, and the provision of sufficient Thermal Energy from, Supplier's planned wood-fueled boiler project (which shall be determined by Supplier, in its sole discretion), the Consumption Charge shall be adjusted to reflect a reduction of the Fuel portion of the Consumption Charge set forth on Exhibit B (the "Fuel Charge") by five percent (5.0%) (the "Discount"). No Discount shall have the effect of reducing the Fuel Charge below the initial base month/year of \$11.49 (the "Initial Base"); provided that, a Discount may reduce the Fuel Charge to the extent that, and for such time as, the adjusted Fuel Charge has been decreased by Cost Adjustments (set forth on Exhibit B) below the Initial Base.

5. **Measurement.** Steam service will be metered with a flow meter. The meter will be set, sealed, adjusted and controlled only by Supplier. In case the seal of the meter is broken, other than by the employees of the Supplier, or the meter fails to register with commercial accuracy, the amount of steam used and to be paid for (for the number of days the meter is not properly in service) shall be deemed to be the equivalent of the immediately prior (or if no prior, the next subsequent) equivalent number of days of properly metered use.

6. General

- 6.1. **City Installation and Maintenance.** Proper reducing and relief valves, piping, cooling coils, steam traps and all facilities necessary for utilizing the Thermal Energy ("Facilities") shall be properly installed and maintained by the City of Seattle at its expense. Supplier shall not be responsible for the installation, maintenance, inspection, or repair of any of the City of Seattle's Facilities. The City of Seattle Facilities are defined as those beyond the Seattle Steam service valve ("Service Valve") located at the Seattle Steam's main pipeline at a point mutually agreeable to both parties.
- 6.2. **Interconnection.** The City of Seattle shall be responsible for installing the interconnection at the City of Seattle's cost before the Start Date. The Service Valve will be located at the Facilities' main steam delivery line along the west face of the existing concrete wall along Alaskan Way and then entering the Seattle Aquarium. West of the interconnection, all such devices, piping, fittings and supports are the property of City of Seattle.
- 6.3. **License to enter Seattle Aquarium's Premises.** The Supplier's agents shall have free access to all parts of the Seattle Aquarium's premises where Supplier's Thermal Energy is used, and may inspect, repair, remove and replace any of Supplier's property. Except in the case of an emergency, Supplier shall provide a minimum of 24 hours notice to Seattle Aquarium, Robert Anderson (phone: 206-386-4359 -24 Hour Phone Number).

7. **Points of Delivery.** The "Point of Delivery" shall be the Service Valve. At the Point of Delivery, the City of Seattle agrees to take and accept the Thermal Energy, the sale of Thermal Energy shall be deemed to occur, and the risk of loss shall transfer to the City of Seattle.

8. **Payment/Payment Procedures.** The City of Seattle agrees to compensate as specified herein or attached, in consideration of the delivery of Thermal Energy. Payment shall only be made for Thermal Energy delivered, after receipt of the invoice, review and authorization by the City of Seattle. Such payment shall be paid thirty (30) days after receipt of invoice. All dollars referenced in this Contract and attachments are US Dollars.

9. **Invoices.** Invoices must show the quantity of Thermal Energy provided and price. **Invoices must specify the Name and Phone Number of the City employee that placed the order.**

10. Taxes, Fees and Licenses.

- 10.1. **Taxes:** Where required by state statute, ordinance or regulation, except as provided below, the Supplier shall pay for and maintain in current status all taxes that are necessary for Contract performance. Unless otherwise indicated, the City of Seattle agrees to pay State of Washington sales or use taxes on all applicable consumer services and materials purchased. No charge by the Supplier shall be made for federal excise taxes and the City of Seattle agrees to furnish the Supplier with an exemption certificate where appropriate.
- 10.2. **Fees and Licenses:** The Supplier shall pay for and maintain in a current status, any license fees, assessments, permit charges, etc., which are necessary for Contract performance. It is the Supplier's sole responsibility to monitor and determine any changes or the enactment of any subsequent requirements for said fees, assessments, or charges and to immediately comply with said changes during the Term. .
- 10.3. The Supplier is to calculate and enter the appropriate Washington State and local sales tax on the invoice.

11. **Contract Notices, Deliverable Materials and Invoices Delivery.** Official Contract notices shall be delivered to the following addresses (or such other address(es) as either party may

designate in writing):

If delivered by the U.S. Postal Service, it must be addressed to:

Nelson Park
City of Seattle Purchasing and Contracting Services
PO Box 94687
Seattle, WA 98124-4687

If delivered by other than the U.S. Postal Service, it must be addressed to:

Nelson Park
City of Seattle Purchasing and Contracting Services
Seattle Municipal Tower
700 5th Ave., #4112
Seattle, WA 98104-5042

Phone: 206-386-1760
Fax: 206-233-5155
E-Mail: parkn@Seattle.gov

Project work, requests for access, invoices and communications shall be delivered to the City Project Manager:

Seattle Aquarium
Attention: Robert Anderson
Address: Seattle Aquarium, Pier 59
Phone: 206-386-4332
E-Mail: Robert.Anderson@Seattle.gov

14. Independent Contractor.

It is the intention and understanding of the parties that the Supplier shall be an independent contractor and that the City of Seattle shall be neither liable for nor obligated to pay sick leave, vacation pay or any other benefit of employment, nor to pay any social security or other tax that may arise as an incident of employment. The Supplier shall pay all income and other taxes as due. Industrial or other insurance that is purchased for the benefit of the Supplier shall not be deemed to convert this Contract to an employment contract. It is recognized that the Supplier may or will be delivering Thermal Energy and/or performing work during the Term for other parties and that the City of Seattle is not the exclusive user of the Thermal Energy services that the Supplier provides.

16. Affirmative Efforts for Utilization of Women and Minority Subcontracting and Employment, Non discrimination in providing services

A. Employment Actions: The Supplier shall not discriminate against any employee or applicant for employment because of race, religion, creed, age, color, sex, marital status, sexual orientation, gender identity, political ideology, ancestry, national origin, or the presence of any sensory, mental or physical handicap, unless based upon a bona fide occupational qualification. The Supplier shall take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their creed, religion, race, age, color, sex, national origin, marital status, political ideology, ancestry,

sexual orientation, gender identity, or the presence of any sensory, mental or physical handicap. Such action shall include, but not be limited to employment, upgrading, promotion, demotion, or transfer; recruitment or recruitment advertising, layoff or termination, rates of pay, or other forms of compensation and selection for training.

- B. In accordance with Seattle Municipal Code Chapter 20.42, The Supplier shall actively solicit the employment and subcontracting of women and minority group members when necessary and commercially useful for purposes of fulfilling the scope of work required for this Contract. The Supplier shall actively solicit subcontracting bids from subcontractors as needed to perform the work of this contract, from qualified, available and capable women and minority businesses. The Supplier shall consider the grant of subcontracts to women and minority bidders on the basis of substantially equal proposes in the light most favorable to women and minority businesses. At the request of the City of Seattle, Supplier shall promptly furnish evidence of the Supplier's compliance with these requirements.
- C. If upon investigation, the Director of Executive Administration finds probable cause to believe that the Supplier has failed to comply with the requirements of this Section, the Supplier shall notified in writing. The Director of Executive Administration shall give Supplier an opportunity to be heard, after ten calendar days' notice. If, after the Supplier's opportunity to be heard, the Director of Executive Administration still finds probable cause, s/he may suspend the Contract and/or withhold any funds due or to become due to the Supplier, pending compliance by the Supplier with the requirements of this Section.
- D. Any violation of the mandatory requirements of this Section, or a violation of Seattle Municipal Code Chapter 14.04 (Fair Employment Practices), Chapter 14.10 (Fair Contracting Practices), Chapter 20.45 (City Contracts – Non-Discrimination in Benefits), or other local, state, or federal non-discrimination laws, shall be a material of contract for which the Supplier may be subject to damages and sanctions provided for by the Vendor Contract and by applicable law. In the event the Supplier is in violation of this Section shall be subject to debarment from City contracting activities in accordance with Seattle Municipal Code Section 20.70 (Debarment).

17. Equal Benefits.

- A. Compliance with SMC Ch. 20.45: The Supplier shall comply with the requirements of SMC Ch. 20.45 and Equal Benefits Program Rules implementing such requirements, under which the Supplier is obligated to provide the same or equivalent benefits ("equal benefits") to its employees with domestic partners as the Supplier provides to its employees with spouses. At the City of Seattle's request, the Supplier shall provide complete information and verification of the Supplier's compliance with SMC Ch. 20.45. Failure to cooperate with such a request shall constitute a material breach of this Contract. (For further information about SMC Ch. 20.45 and the Equal Benefits Program Rules call (206) 684-0430 or review information at <http://cityofseattle.net/contract/equalbenefits/>.)
- B. Remedies for Violations of SMC Ch. 20.45: Any violation of this section shall be a material breach of Contract for which the City may:
 - a. Require the Supplier to pay actual damages for each day that the Supplier is in violation of SMC Ch. 20.45 during the Term; or
 - b. Terminate the Contract; or
 - c. Disqualify the Supplier from bidding on or being awarded a City contract for a period of up to five (5) years; or
 - d. Impose such other remedies as specifically provided for in SMC Ch. 20.45 and the Equal Benefits Program Rules promulgated thereunder.

18. Publicity. No news release, advertisement, promotional material, tour, or demonstration related to the City of Seattle's purchase or use of the Supplier's product or services performed pursuant to this Contract shall be produced, distributed, or take place, without the prior, specific written approval of the City's Project Manager or his/her designee, which approval shall not be unreasonably withheld or

delayed.

19. General Legal Requirements.

- A. **General Requirement:** The Supplier, at no expense to the City of Seattle, shall comply with all applicable laws of the United States and the State of Washington; the Charter and ordinances of the City of Seattle; and rules, regulations, orders, and directives of their administrative agencies and the officers thereof. Without limiting the generality of this paragraph, the Supplier shall specifically comply with the following requirements of this section.

- B. **Licenses and Similar Authorizations:** The Supplier, at no expense to the City of Seattle, shall secure and maintain in full force and effect during the Term all required licenses, permits, and similar legal authorizations and comply with all requirements thereof (except where the failure to secure, maintain, or compliance with such licenses, permits and similar legal authorizations would not have a material effect on the Supplier, the City, or either party's obligations under this Contract),.

- C. **Taxes:** The Supplier shall pay, before delinquency, all taxes, import duties, levies, and assessments arising from its activities and undertakings under this Contract; taxes levied on its property, equipment and improvements; and taxes on the Supplier's interest in this Contract.

20. Americans with Disabilities Act. The Supplier shall comply with all applicable provisions of the Americans with Disabilities Act of 1990 ("ADA") in performing its obligations under this Contract. Failure to comply with the provisions of the ADA shall be a material breach of, and grounds for the immediate termination of, this Contract.

21. OSHA/WISHA. The Supplier agrees to comply with conditions of the Federal Occupational Safety and Health Acts of 1970 (OSHA), as may be amended, and, if it has a workplace within the State of Washington, the Washington Industrial Safety and Health Act of 1973 (WISHA), as may be amended, and the standards and regulations issued thereunder and certifies that all items furnished and purchased under this order will conform to and comply with said standards and regulations. The Supplier further agrees to indemnify and hold harmless the City of Seattle from all damages assessed against the City of Seattle as a result of the Supplier's failure to comply with the acts and standards thereunder and for the failure of the items furnished under this order to so comply.

22. Prevailing Wage Requirements. This Contract is not found to be subject to prevailing wages requirements.

23. Indemnification. To the extent permitted by law, the Supplier shall protect, defend, indemnify and hold the City of Seattle harmless from and against all claims, demands, damages, costs, actions and causes of actions, liabilities, judgments, expenses and attorney fees, resulting from the injury or death of any person or the damage to or destruction of property, or the infringement of any patent, copyright, or trademark, or trade secret arising out of the work performed or goods provided under this Contract, or the Supplier's violation of any law, ordinance or regulation, except for damages resulting from the sole negligence of the City. As to the City of Seattle, the Supplier waives any immunity it may have under RCW Title 51 or any other Worker's Compensation statute. The parties acknowledge that this waiver has been negotiated by them, and that the contract price reflects this negotiation.

24. Limitation of Liability. Except in the case of willful misconduct or gross negligence, neither Supplier nor Customer, nor their respective officers, officials, partners, agents, employees, subsidiaries, parents or affiliates shall be liable to the other party, or their respective officers, officials, directors, partners, agents, employees, subsidiaries, parents or affiliates for claims for incidental, special, indirect or consequential damages of any nature, including lost profits and opportunity costs in

connection with or resulting from performance or non-performance of their respective obligations under or in connection with this Agreement. Nothing in this Section 22, however, shall limit either party's rights or remedies to recover any direct damages for a breach of this Agreement. If the Supplier is found liable to the City of Seattle for any damages, then the amount of any claim or settlement shall be limited to \$1,000,000 per claim or occurrence.

25. Insurance.

- a. The Supplier shall at all times during the term of this Contract maintain the insurance and/or self-insurance coverages in force as attached. If not attached, insurance specified below, shall apply.
- b. The Supplier shall specify any deductible or self-insured retention in excess of \$100,000. Payment of any such deductible or self-insured retention shall be the responsibility of the Supplier except to the extent to which the City of Seattle may be liable.
- c. Certification of insurance shall be issued to:
 - City of Seattle
 - Risk Management Division
 - P.O. Box 94669
 - Seattle, WA 98124-4669
 - Email: riskmanagement@seattle.gov
 - Fax: (206) 615-0065

Certification shall:

- Include either an additional insured endorsement or a copy of blanket additional insured policy wording that documents the City of Seattle's status as an additional insured (1); should third party legal liability insurance be self-insured, the Supplier shall disclose the self-insured retention(s), state that the City of Seattle would be protected under the self-insurance as an additional insured to the same extent as if a primary commercial liability insurance policy had been issued and shall provide the address to which a tender of claim should be directed.
 - State that coverage shall not be cancelable without forty-five (45) days prior written notice of cancellation, except ten (10) days notice with respect to non-payment of premium.
- d. The Supplier shall maintain at its own expense at all times during the Term the following insurance with limits of liability consistent with those generally carried by similarly situated enterprise:
 - (1) **Commercial General Liability** insurance, including premises/operations, products/completed operations, personal/advertising injury, contractual liability, fire legal/tenant liability, stop gap/employer's liability and independent Suppliers liability; of a minimum of \$1,000,000 per occurrence;
 - (2) **Worker's Compensation** ("Industrial Insurance") as required by Title 51 of the Revised Code of Washington.

The insurance as provided under item (1) above shall include by endorsement the City of Seattle as an additional insured per ISO form CG 20 10 or CG 20 26 or equivalent additional insured endorsement wording, or equivalent blanket additional insured policy wording; shall be primary insurance as respects the City, and any other insurance or self-insurance maintained by the City shall be excess of and non-contributory with the Supplier's insurance; and, shall be placed with insurers with not less than an A- VII A.M.

Best's rating unless insurance has been procured under the provisions of chapter 48.15 RCW (Unauthorized "Surplus Lines" Insurers).

26. Audit. Upon request, Supplier shall permit the City of Seattle and any other government agency involved in the funding of this Contract to inspect all pertinent books and records of the Supplier, any subcontractor or any other person or entity the performed work in connection with or related to this Contract, at any and all times deemed necessary by the City of Seattle, or agency including up to 6 years after the final payment or release of withheld amounts has been made under this Contract. Such inspection and audit shall occur in King County, Washington or other such reasonable location as the City of Seattle selects. The Supplier shall supply the City of Seattle with or shall permit the City of Seattle to make copies of any books and records and any portion thereof. The Supplier shall ensure that such inspection, audit and copying rights of the City of Seattle and Agency is a condition of any subcontract, agreement or other arrangement under which any other person or entity is permitted to perform work or supply items under this Contract.

27. Contractual Relationship. The relationship of the Supplier to the City of Seattle by reason of this Contract shall be that of an independent contractor. This Contract does not authorize the Supplier to act as the agent or legal representative of the City of Seattle for any purpose whatsoever. The Supplier is not granted any express or implied right or authority to assume or create any obligation or responsibility on behalf of or in the name of the City of Seattle or to bind the City of Seattle in any manner or thing whatsoever.

28. Assignment and Subcontracting. The Supplier can not assign its obligations to a subcontractor without the prior written approval of the City of Seattle, which approval shall not be unreasonably delayed or withheld.

29. Involvement of former City employees. Supplier shall promptly notify the City of Seattle in writing of any person who is expected to perform any of the Work, and who, during the previous 12 months immediately prior to the expected commencement date of such work or subcontract was a City officer or employee. Supplier shall ensure that no work or matter related to the work is performed by any person (employee, subcontractor or otherwise) who was a City of Seattle officer or employee within the past 12 months; and as such was officially involved in, participated in, or acted upon any matter related to his Contract, or is otherwise prohibited from such performance by SMC 4.16.075.

30. Anti-Trust. The City of Seattle maintains that, in actual practice, overcharges resulting from antitrust violations are borne by the purchaser. Therefore the Supplier hereby assigns to the City of Seattle any and all claims for such overcharges that are reflected in the monthly amounts paid by the City of Seattle under this Contract except overcharges which result from antitrust violations commencing after the price is established under this Contract and which are not passed on to the City of Seattle under an escalation clause.

31. No Conflict of Interest. The Supplier confirms that the Supplier does not have a business interest or a close family relationship with any City of Seattle officer or employee who was or is in the Supplier's selection, negotiation, drafting, signing, administration, or evaluating the Supplier's performance.

32. No Gifts or Gratuities. The Supplier shall not directly or indirectly offer gifts and resources to any person employed by the City of Seattle that is intended, or may be reasonably intended, to benefit the Supplier by way of award, administration, or in any other way to influence purchasing decisions of the City of Seattle. This includes but is not limited to, City Purchasing office employees and City employees that do business with, order, purchase or are part of decision-making for business, contract or purchase decisions. The Supplier shall not offer meals, gifts, gratuities, loans, trips, favors, bonuses, donations, special discounts, work, or anything of economic value to any such City employees. This does not prohibit distribution of promotional items that are less than \$25 when provided as part of routine business activity such as trade shows. Any violation of this provision may result in termination of this Contract for cause. Nothing in this Contract prohibits donations to campaigns for election to City of Seattle office, so long as the donation is disclosed as required by the election campaign disclosure laws of the City of Seattle and of the State.

33. Proprietary and Confidential Information. Each party agrees that it will not permit the duplication or disclosure of any information designated in advance by the other party as "Confidential and Proprietary" to any person (other than its own employee, agent, or representative who must have such information for the performance of that party's obligations hereunder) unless such duplication, use or disclosure is specifically authorized in writing by the other party or is required by law. "Confidential and Proprietary" information does not include ideas, concepts, know-how or techniques related to information that, at the time of disclosure, is in the public domain unless the entry of that information into the public domain is a result of any breach of this Contract. Likewise, "Confidential and Proprietary" information does not apply to information that is independently developed, already possessed without obligation of confidentiality, or rightfully obtained from a third party without an obligation of confidentiality.

The Supplier's Understanding and Obligations

1. The Supplier understands that any records (including but not limited to bid or proposal submittals, the Contract, and any other contract materials) it submits to the City of Seattle, or that are used by the City of Seattle even if the Supplier possesses the records, are public records under Washington State law, RCW Chapter 42.56. Public records must be promptly disclosed upon request unless a statute exempts them from disclosure. The Supplier also understands that even if part of a record is exempt from disclosure, the rest of that record generally must be disclosed.
2. The Supplier must separate and clearly mark as "proprietary" information all records related to this Contract or the performance of this Contract that the Supplier believes are exempt from disclosure. The Supplier is to be familiar with potentially applicable public-disclosure exemptions and the limits of those exemptions, and will mark as "proprietary" only information that the Supplier believes legitimately fits within an exemption and will state the statutory exception upon which it is relying.
3. If the City of Seattle notifies the Supplier of a public disclosure request, and the Supplier believes records are exempt from disclosure, it is the Supplier's responsibility to make its own determination and pursue a lawsuit under RCW 42.56.540 to enjoin disclosure. The Supplier must obtain the injunction and serve it on the City of Seattle before the close of business on the fifteenth business day after the City of Seattle sent notification to the Supplier. It is the Supplier's discretionary decision whether to file the lawsuit.
4. If the Supplier does not timely obtain and serve an injunction, the Supplier is deemed to have authorized releasing the record.
5. [Notwithstanding the above, the Supplier must not take any action in connection with a public disclosure request that would affect (a) the City of Seattle's ability to use goods and services provided under this Contract or (b) the Supplier's obligations under this

Contract].

6. Subject to the above, the Supplier will fully cooperate with the City of Seattle, in identifying and assembling records in case of any public disclosure request.

The City of Seattle's Obligations

1. The City of Seattle will disclose those parts of records the Supplier has marked as "proprietary information" only to Authorized Persons unless:
 - (a) the City receives a public disclosure request, in which case steps 2 and 3 below will be exercised before release of the information; or
 - (b) the Supplier has given the City of Seattle express advance written permission to disclose the records. "Authorized Persons" means those City officers, employees, contractors and consultants for whom the proprietary information is necessary to perform their duties or obligations to the City of Seattle. The term "proprietary information" does not include ideas, concepts, know-how or techniques related to any information that, at the time of disclosure, is in the public domain, unless the entry of that information into the public domain is a result of a breach of this Contract.
2. If the City of Seattle receives a public disclosure request for records that the Supplier has marked as "proprietary information", the City of Seattle may promptly notify the Supplier of the request. The City of Seattle may postpone disclosing these records for fifteen business days after it has sent notification to the Supplier, in order to allow the Supplier to file a lawsuit under RCW 42.56.540 to enjoin disclosure. It is the Supplier's discretionary decision whether to file the lawsuit. The City of Seattle will fully cooperate with the Supplier in identifying and assembling records in case of any public disclosure request.
3. If the City of Seattle has notified the Supplier of a public disclosure request, and the Supplier has not obtained an injunction and served the City of Seattle with that injunction by the close of business on the fifteenth business day after the City of Seattle sent notice, the City of Seattle may disclose the record.
4. The City of Seattle has no other obligations concerning records the Supplier has marked as "proprietary information" under this Contract. The City of Seattle has no obligation to claim any exemption from disclosure. The City of Seattle is not obligated or liable to the Supplier for any records that the City of Seattle releases in compliance with this Section or in compliance with the order of a court of competent jurisdiction.

34. Termination.

- A. For Cause: Either party may terminate this Contract if the other is in material breach of any of the terms of this Contract, and such breach has not been corrected to the notifying party's reasonable satisfaction in a timely manner (which shall in no case be less than sixty (60) days after the breaching party's receipt of the written notice of breach).
- B. For Convenience: Either party may terminate this Contract at any time, without cause and for any reason including convenience, upon written notice to the other party. Such termination for convenience shall be effective thirty (30) days after the non-terminating party's receipt of the written notice of termination for convenience.
- C. Nonappropriation of Funds: Either party may terminate this Contract at any time without notice due to non-appropriation of funds, whether such funds are local, state or federal grants, and no such notice shall be required notwithstanding any notice requirements that may be agreed upon for other causes of termination. The City of Seattle shall notify the Supplier

immediately upon becoming aware that adequate funds for the payments hereunder have not, will not be, or are not likely to be appropriated.

- D. Acts of Insolvency: Either party may terminate this Contract by written notice to the other party if such party becomes insolvent, makes a general assignment for the benefit of creditors, suffers or permits the appointment of a receiver for its business or assets, becomes subject to any proceeding under any bankruptcy or insolvency law whether domestic or foreign, or is wound up or liquidated, voluntarily or otherwise.
- E. Actions Upon Termination: In the event of termination, the City of Seattle shall pay Supplier for the Thermal Energy delivered prior to the effective termination date, together with any reimbursable expenses then due, but in no event shall such compensation exceed the actual amount due – based solely on the thermal energy used prior to date of termination and accruing since last invoice was paid.

35. Force Majeure – Suspension and Termination.

In the event that either party is unable to perform any of its material obligations under this Agreement because of an event outside of such party's reasonable control, including but not limited to natural or man-made disasters, or an action or decree of a superior governmental body (hereinafter referred to as a "Force Majeure Event" or "Event"), the party that has been so affected immediately shall give notice to the other party and shall do everything reasonably possible to resume performance.

Upon receipt of such notice, the affected party shall be excused from such performance as is affected by the Force Majeure Event for the period of such Event.

36. Major Emergencies or Disasters: The following provision shall be in effect only during major emergencies or disasters when the City of Seattle (City) has activated its Emergency Operations Center and the Supplier has been given notice by the City that such activation has occurred. The City is committed to preparing thoroughly for any major emergency or disaster situation. As part of its commitment, the City is contracting with the Supplier under the following terms and conditions: Supplier shall provide to the City, upon the City's request, such goods and/or services at such time as the City determines. In the event the Supplier is unable to meet the delivery date commitment due to circumstances beyond the reasonable control of the Supplier, the Supplier shall make such delivery as soon as practicable. If the Supplier is prevented from making such delivery to the requested delivery location due to circumstances beyond its reasonable control, the Supplier shall immediately assist the City in whatever manner is reasonable to gain access to such goods and/or services. In the event that the Supplier is unable to provide such goods and/or services as requested by the City, the Supplier may offer to the City limited substitutions for its consideration and shall provide such substitutions to the City as required above, provided the Supplier has obtained prior approval from the City for such substitution. The Supplier shall charge the City the price determined in this Contract for the goods and services provided, and if no price has been determined, it shall charge the City a price that is normally charged for such goods and/or services (such as listed prices for items in stock). In the event that the City's request results in the Supplier incurring unavoidable additional costs and causes the Supplier to increase prices in order to obtain a fair rate of return, the Supplier shall charge the City a price not to exceed the cost/profit formula found in this Contract. The Supplier acknowledges that the City is procuring such goods and/or services for the benefit of the public. The Supplier, in support of public good purposes, shall consider the City of Seattle of first priority and shall make its best effort to provide to the City the requested goods and/or services in a timely manner. For purposes of this Contract, a "major emergency" or "disaster" shall include, but is not limited to a storm, high wind, earthquake, flood, hazardous material release, transportation mishap, loss of any utility service, fire, terrorist activity or any combination of the above.

37. Debarment.

In accordance with SMC Ch. 20.70, the Director of Executive Administration or designee may debar a vendor from entering into a contract with the City or from acting as a subcontractor on any contract with the City for up to five years after determining that any of the following reasons exist:

- a. The Supplier has received overall performance evaluations of deficient, inadequate, or substandard performance on three or more City contracts.
- b. The Supplier failed to comply with City ordinances or Contract terms, including but not limited to, ordinance or Contract terms relating to small business utilization, discrimination, prevailing wage requirements, equal benefits, or apprentice utilization.
- c. Supplier abandoned, surrendered, or failed to complete or to perform delivery of Thermal Energy in connection with this Contract.
- d. The Supplier failed to comply with the Contract provisions, including but not limited to safety standards.
- e. The Supplier submitted false or intentionally misleading documents, reports, invoices, or other statements to the City in connection with this Contract.
- f. The Supplier colluded with another contractor to restrain competition.
- g. The Supplier committed fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing the Contract for the City or any other government entity.
- h. Supplier failed to reasonably cooperate in a City debarment investigation.
- i. Supplier failed to comply in the manner set forth in this Contract with SMC 14.04, SMC Ch. 14.10, or SMC Ch. 20.45, or other local, State, or federal non-discrimination laws.

The Director may issue an Order of Debarment following the procedures specified in SMC 20.70.050. The debarment right of the City under these provisions are in addition to any other rights and remedies provided by law or under the Contract.

38. Recycle Products Requirements

Whenever practicable, the Supplier shall use reusable products, recyclable products and recycled-content products including recycled content paper on all documents submitted to the City.

Supplier is to duplex (2 sided copy) all materials that are prepared for the City under this Contract, whether such materials are printed or copied, except when impracticable to do so due to the nature of the product being produced. Supplier is to use 100% post consumer recycled content, chlorine-free paper in such products that are produced for the City, whenever practicable, and to use other paper-saving and recycling measures in business they conduct with and for the City. This directive is executed under the Mayor's Executive Order, issued February 13, 2005.

39. Workers Right to Know

"Right to Know" legislation required the Department of Labor and Industries to establish a program to make employers and employees more aware of the hazardous substances in their work environment. WAC 296.62.05412 requires among other things that all manufacturers/distributors of hazardous substances, including any of the items listed on this ITB, RFP or contract bid and subsequent award, must include with each delivery completed Material Safety Data Sheets (MSDS) for each hazardous material. Additionally, each container of hazardous material must be appropriately labeled with: the identity of the hazardous material, appropriate hazardous warnings, and the Name and Address of the chemical manufacturer, improper, or other responsible party.

Labor and Industries may levy appropriate fines against employers for noncompliance and

agencies may withhold payment pending receipt of a legible copy of the MSDS. OSHA Form 20 is not acceptable in lieu of this requirement unless it is modified to include appropriate information relative to "carcinogenic ingredients: and "routes of entry" of the product(s) in question.

40. Miscellaneous Provisions.

- A. Amendments: No modification of this Contract shall be effective unless in writing and signed by an authorized representative of each of the parties hereto, except as otherwise authorized herein.
- B. Conflict: In the event of conflict between contract documents and applicable laws, codes, ordinances or regulations in effect on the date hereof, the most stringent or legally binding requirement shall govern and be considered a part of this Contract to afford the City of Seattle the maximum benefits.
- C. Liens, Claims and Encumbrances: All materials, equipment, or services shall be free of all liens, claims or encumbrances of any kind and if the City of Seattle requests a formal release of same shall be delivered to the City of Seattle.
- D. Binding Contract: This Contract shall not be binding until signed by both parties. The provisions, covenants and conditions in this Contract shall bind the parties, their legal heirs, representatives, successors, and assigns.
- E. Applicable Law/Venue: This Contract shall be construed and interpreted in accordance with the laws of the State of Washington. The venue of any action brought hereunder shall be in the Superior Court for King County, Washington
- F. Remedies Cumulative: Rights under this Contract are cumulative and nonexclusive of any other remedy at law or in equity.
- G. Captions: All titles, including sections or subsections, are for convenience only and do not define or limit the contents.
- H. Severability: Any term or provision of this Contract found to be prohibited by law shall be ineffective to the extent of such prohibition without invalidating the remainder of the Contract.
- I. Waiver: No covenant, term or condition or the breach thereof shall be deemed waived, except by written consent of the party against whom the waiver is claimed, and any waiver of the breach of any covenant, term or condition shall not be deemed to be a waiver of any preceding or succeeding breach of the same or any other covenant, term or condition. Neither the acceptance by one party of any performance or payment by the other party after the time the same shall have become due nor payment to the first party shall constitute a waiver by the first party of the breach or default of any covenant, term or condition unless otherwise this is expressly agreed to by the first party, in writing. Neither party's failure to insist on performance of any of the terms or conditions herein or to exercise any right or privilege or such party's waiver of any breach hereunder shall not thereafter waive any other term, condition, or privilege, whether of the same or similar type.
- J. Entire Contract: This document, along with any attachments and work orders, constitutes the entire agreement between the parties with respect to the matters herein. No verbal agreement or conversation between any officer, agent, associate or employee of the City of Seattle and any officer, agency, employee or associate of the Supplier prior to the execution of this Contract shall affect or modify any of the terms or obligations contained in this Contract.
- K. Negotiated Contract: The parties acknowledge that this is a negotiated Contract, that they

EXHIBIT A

CUSTOMER'S PROPERTIES:

Seattle Aquarium
Pier 59, East End
Seattle, WA 98101

CUSTOMER ADDRESS FOR NOTICE AND BILLING:

Seattle Aquarium
1483 Alaskan Way
Seattle, WA 98101

Account #30093

Monthly Meter Rate (MMRate) Charge - Per 1000 pounds (Mlbs.)

| | | |
|--------------|-----------------|---------|
| First | 100 MLBS..... | \$8.686 |
| Next | 300 MLBS..... | \$7.706 |
| Next | 800 MLBS..... | \$6.796 |
| Next | 1,800 MLBS..... | \$6.516 |
| Balance..... | | \$6.236 |

INITIAL CONSUMPTION CHARGE:

\$12.264 per Mlb.

EXHIBIT B

CONSUMPTION CHARGE ADJUSTMENT

The Consumption Charge will be increased or decreased (an "Adjustment") based on the following costs: (1) fuel costs; (2) water costs; (3) sewer costs; (4) chemical costs; (5) electricity costs; and (6) environmental costs. Such Adjustment increases or decreases shall be determined on a rolling basis to the closest one cent (\$0.01).

The Consumption Charge Adjustments are set forth in the following table.

| Cost Category | Adjustment Period | Base Month/Year* | Cost Adjustment |
|----------------------|---------------------------------|-------------------------|--|
| Fuel | Monthly | \$11.49 | One-cent (\$0.01) per thousand pounds of steam (Mlb) per month for each increase or decrease of fifty-six hundredths of a cent (\$0.0056) of the weighted average of the delivered cost of one million BTUs of the (i) "as-fired" cost of oil and (ii) the actual rates for natural gas delivered to the Supplier's steam plants in Seattle, Washington from the Base Month. Such delivered costs will be determined on the last day of Supplier's regular monthly meter reading period and the adjusted Consumption Charge derived from such determination will be applicable to Thermal Energy used by Customer during the succeeding month. |
| Water | Monthly | \$0.56 | Adjusted by the percentage increase or decrease in the published Seattle City water rate for the current month from the Base Month. |
| Sewer | Annual | \$.038 | Total of all sewer charges associated with the production of steam in the current month divided by the Mlbs sold in the current month. |
| Chemical | Annually | \$0.060 | Adjusted by the percentage increase or decrease of Supplier's actual cost of chemicals per 1000 lbs. of steam for the calendar year from the Base Year. |
| Electricity | Monthly | \$0.06 | Adjusted by the percentage increase or decrease of the published Seattle City Light electric rate for the current month from the Base Month. |
| Environmental | Annually | \$0.056 | Adjusted by the percentage increase or decrease of the actual cost of environmental charges per 1000 lbs. of steam for the calendar year from the Base Year. |
| | Total Consumption Charge | \$12.264 | |

* For the purposes of the above, the "Base Year" represents the Consumption Charge per 1,000 lbs. of steam in the calendar year immediately prior to the commencement of the Term and the "Base Month" represents the Consumption Charge in the calendar month immediately prior to the commencement of the Term.

Only gas, oil, water, sewer, chemical, electricity, or environmental charges actually used or assessed in the applicable period will be included in the Adjustment. Such costs will be determined on the last day of Supplier's regular monthly or annual meter reading period, as applicable, and the adjusted Consumption Charge derived from such Adjustment determination will be applicable to Thermal Energy used by Customer during the succeeding month or year, as applicable.