

AN ORDINANCE 2012 - 09 - 06 - 0685

AUTHORIZING AN AGREEMENT WITH MARTIN MARIETTA MATERIALS SOUTHWEST, INC. TO PROVIDE FOR TEMPORARY USE OF THE CITY'S CNG FACILITY FOR A TERM ENDING NOVEMBER 30, 2012.

* * * * *

WHEREAS, the City of San Antonio ("City") has constructed a facility at its Northeast Service Center - Toolyard site, which is located at 10303 Toolyard, San Antonio, Texas 78233, and from which CNG fuel is dispensed for its vehicles that operate on and consume this type of fuel (the "City CNG Facility"); and

WHEREAS, Martin Marietta Materials Southwest, Inc. ("MMMSW") is testing a CNG fueled ready mix truck (the "MMMSW CNG Vehicle") as part of its aggregates operations and is in need of CNG fuel on a short-term basis in order to conduct this testing; and

WHEREAS, MMMSW desires to utilize the City CNG Facility to fuel the MMMSW CNG Vehicle on a short-term basis, for a period ending November 30, 2012; and

WHEREAS, MMMSW has executed an Agreement For Use Of CNG Facilities with the City ("Agreement") that provides terms and conditions under which CNG fuel will be sold to MMMSW to fuel the MMMSW CNG Vehicle for a term ending November 30, 2012, and also provides adequate safeguards and protections to the City and the City CNG Facility with regard to MMMSW's use of the City CNG Facility during the term of the Agreement; and

WHEREAS, City Staff has recommended that the City enter into the Agreement with MMMSW; and

WHEREAS, the City Council, upon consideration of and deliberation on such recommendation, desires to accept City Staff's recommendation; **NOW THEREFORE:**

BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF SAN ANTONIO:

SECTION 1. The terms and conditions of the Agreement, as set forth in Attachment I to this Ordinance, which Attachment I is incorporated herein and made a part hereof for all purposes, are hereby approved.

The City Manager, or her designee, or the Director of the Building & Equipment Services Department or his designee, is hereby authorized to enter into and execute the Agreement, under terms and conditions substantially in accordance with those set forth in Attachment I to this Ordinance.

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SECTION 2. Funds generated by this ordinance will be deposited into Fund 71001000, Internal Order 235000000004 and General Ledger 4303112.

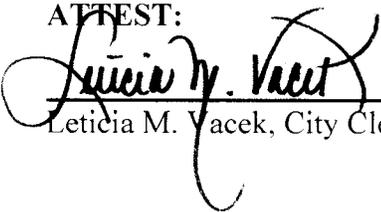
SECTION 3. The financial allocations in this Ordinance are subject to approval by the Director of Finance, City of San Antonio. The Director of Finance may, subject to concurrence by the City Manager or the City Manager's designee, correct allocations to specific SAP Fund Numbers, SAP Project Definitions, SAP WBS Elements, SAP Internal Orders, SAP Fund Centers, SAP Cost Centers, SAP Functional Areas, SAP Funds Reservation Document Numbers, and SAP GL Accounts as necessary to carry out the purpose of this Ordinance.

SECTION 4. This Ordinance is effective immediately, upon passage by eight (8) affirmative votes; otherwise, said effective date shall be ten (10) days from the date of passage hereof.

PASSED and APPROVED this 6th day of September, 2012.

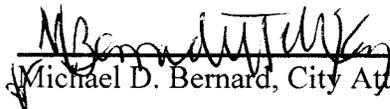

M A Y O R
Julián Castro

ATTEST:



Leticia M. Vacek, City Clerk

APPROVED AS TO FORM:

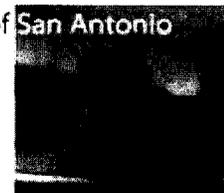


Michael D. Bernard, City Attorney



Request for
COUNCIL
 ACTION

City of San Antonio



Agenda Voting Results - 24B

Name:	24A, 24B						
Date:	09/06/2012						
Time:	10:31:25 AM						
Vote Type:	Motion to Approve						
Description:	An Ordinance authorizing an Agreement with Martin Marietta Materials Southwest, Inc. for the temporary use of the City's CNG facilities through November 30, 2012.						
Result:	Passed						
Voter	Group	Not Present	Yea	Nay	Abstain	Motion	Second
Julián Castro	Mayor	x					
Diego Bernal	District 1		x				x
Ivy R. Taylor	District 2	x					
Leticia Ozuna	District 3		x				
Rey Saldaña	District 4	x					
David Medina Jr.	District 5		x				
Ray Lopez	District 6		x				
Cris Medina	District 7		x			x	
W. Reed Williams	District 8		x				
Elisa Chan	District 9		x				
Carlton Soules	District 10		x				

RKN
09/06/12
Item 24 (B)

A T T A C H M E N T I

**AGREEMENT FOR
USE OF CNG FACILITIES**

STATE OF TEXAS §
 §
COUNTY OF BEXAR §

THIS AGREEMENT (“Agreement”) is entered into this _____ day of _____, 2012, by and between **MARTIN MARIETTA MATERIALS SOUTHWEST, INC.** (hereinafter “MMMSW”) and **CITY OF SAN ANTONIO** (hereinafter “COSA”), both of which may be referred to herein collectively as the “Parties”.

WITNESSETH:

Whereas, COSA has constructed a facility at its Northeast Service Center - Toolyard site, which is located at 10303 Toolyard, San Antonio, Texas 78233, and from which CNG fuel is dispensed for its vehicles that operate on and consume this type of fuel (the “COSA CNG Facility”); and

Whereas, MMMSW is testing a CNG fueled ready mix truck (the “MMMSW CNG Vehicle”) as part of its aggregates operations and is in need of CNG fuel on a short-term basis for purposes of such testing; and

Whereas, MMMSW desires to use the COSA CNG Facility on a short-term basis to fuel the MMMSW CNG Vehicle; and

Whereas, COSA’s City Council authorized the execution of this Agreement pursuant to Ordinance No. 2012-08-__ - ____, passed and approved _____; and

Whereas, MMMSW’s Board of Directors has authorized the execution of this Agreement on behalf of MMMSW pursuant to MMMSW Board Resolution, passed and approved August 14, 2012.

NOW THEREFORE, the Parties agree as follows:

ARTICLE I. PURPOSE

The purpose of this Agreement is to state the terms and conditions by which MMMSW shall be entitled to use the COSA CNG Facility to fuel the MMMSW CNG Vehicle.

ARTICLE II. TERM

2.01 The term of this Agreement shall begin on the date it is executed by the last of the Parties to do so and shall terminate on November 30, 2012, unless terminated earlier in accordance with 2.02 below, or extended in accordance with section 2.03 below.

2.02 This Agreement may be terminated, without penalty, at any time by either party upon

written notice to the other party.

2.03 This Agreement may be extended on the same terms and conditions for up to two (2) one (1) month periods upon the consent of and written agreement between MMMSW and COSA. Any such extension shall be authorized in writing on COSA's behalf by its Director, Building & Equipment Services, or designee, and by any authorized officer on behalf of MMMSW. Authorization of any such extension by COSA's City Council shall not be required

ARTICLE III. SERVICES

3.01 COSA shall provide MMMSW access to the COSA CNG Facility for the purpose of fueling the MMMSW CNG Vehicle.

ARTICLE IV. COMPENSATION

4.01 MMMSW shall compensate COSA for the CNG fuel consumed in fueling the MMMSW CNG Vehicle, in the amount of \$ 5.00 per gallon consumed.

4.02 COSA will submit MMMSW a monthly report of charges by COSA for goods and services provided pursuant to this Agreement. Upon approval by MMMSW of the charges in COSA's monthly report, which approval will not be unreasonably withheld, MMMSW shall submit to COSA payment in full for all charges stated in the monthly report. Such payment shall be made to COSA no later than 30 days from the date the monthly report is received by MMMSW. Should MMMSW dispute a portion of the charges on the monthly report MMMSW may not withhold payment of any undisputed portion, but shall submit payment for the undisputed charge as prescribed by this section.

ARTICLE V. MISCELLANEOUS

5.01 MMMSW shall be responsible for ensuring each operator of the MMMSW CNG Vehicle to be refueled at the COSA CNG Facility obtains and maintains in current and good standing status all applicable and required training, licenses and certifications while operating the MMMSW CNG Vehicle on the premises of the COSA CNG Facility.

5.02 COSA shall arrange for each MMMSW operator who will refuel the MMMSW CNG Vehicle on the COSA CNG Facility to receive training which shall [a] include natural gas safety, fueling procedures, safety shutdowns, ESD system, the gas detection system, and an introduction to natural gas, dispensers with fuel-management systems, manual and automatic operation of pumps, electrical switch gear, and panel control to include all shutdowns, indicator lights, alarms and resets as needed, de-fueling, and emergency response in case of leak or malfunction, and [b] also include using the fast-fill dispensers, including the fuel management system. MMMSW shall reimburse COSA for all costs incurred by COSA in arranging for such training. MMMSW shall ensure that each MMMSW operator who will refuel the MMMSW CNG Vehicle receives all of the training described above before refueling the MMMSW CNG Vehicle at the COSA CNG Facility.

5.03 MMMSW shall ensure that there are no occupants on the MMMSW CNG Vehicle other

than the MMMSW operator from the time the MMMSW CNG Vehicle enters the COSA CNG Facility until the MMMSW CNG Vehicle leaves the COSA CNG Facility.

5.04 The standard days and hours during which the MMMSW CNG Vehicle may be refueled at the COSA CNG Facility are Monday through Friday between the hours of 6:00 p.m. and 6:00 a.m. Refueling on additional days and/or at different hours ("Additional Refueling") may be arranged with the prior written consent of the COSA Director of Building & Equipment Services. MMMSW shall be responsible for all costs incurred by COSA to accomplish the Additional Refueling, which shall be billed and paid in the first billing cycle after the Additional Refueling. Refueling and/or Additional Refueling activities shall be superseded by all Scheduled Maintenance and/or Emergency Maintenance of the COSA CNG Facility.

5.05 MMMSW acknowledges that this Agreement is subject to the operational status of the COSA CNG Facility and that if it becomes non-operational for any reason, CNG fuel will not be available from the COSA CNG Facility to refuel the MMMSW CNG Vehicle during that period. COSA agrees that it will make reasonable efforts using sources and resources presently available to it to cause the status of the COSA CNG Facility to be restored to operational at the earliest possible time, so that CNG fuel will be available to accomplish the purposes of this Agreement.

5.06 MMMSW acknowledges that this Agreement is subject to COSA's ability to satisfy COSA operational obligations for COSA CNG vehicles. CNG fuel will not be available from the COSA CNG Facility to refuel the MMMSW CNG Vehicle if COSA is not for any reason capable of satisfying both the COSA CNG refueling obligation and the MMMSW refueling need. COSA agrees that it will make reasonable efforts using sources and resources presently available to satisfy COSA operational obligations at the earliest possible time, so that CNG fuel will be available to MMMSW to accomplish the purposes of this Agreement.

ARTICLE VI. INDEPENDENT CONTRACTOR STATUS; NO THIRD PARTY BENEFICIARIES

6.01 Nothing contained herein shall be deemed to create any relationship other than that of an independent contractor between MMMSW and COSA. Under no circumstances shall COSA, its directors, officers, employees, agents, successors or assigns, be deemed employees, agents, partners, successors, assigns or legal representatives of MMMSW. Under no circumstances shall MMMSW, its directors, officers, employees, agents, successors or assigns, be deemed employees, agents, partners, successors, assigns or legal representatives of COSA.

6.02 No Joint Enterprise – There is no intention on the part of the Parties to create or otherwise form a joint enterprise under or pursuant to this Agreement.

6.03 COSA and MMMSW specifically agree that (1) this Agreement only affects rights and obligations between the Parties, and is in no way intended by the Parties to benefit or otherwise affect any third person or entity, notwithstanding the fact that such third person or entity may be in a contractual relationship with COSA or MMMSW, or both, or that such third parties may benefit incidentally by this Agreement; and (2) the terms of this Agreement are not intended to

release, either by contract or operation of law, any third person or entity from obligations owing by them to either COSA or MMMSW.

ARTICLE VII. NOTICES AND ADDRESSES

All notices, invoices, statements and reports to MMMSW or COSA shall be deemed given when either delivered in person or deposited in the U.S. Mail, postage prepaid, certified mail, return receipt requested, addressed to the appropriate party at the following address:

If to MMMSW: David A. Little
Vice President-Operation Services
Martin Marietta Materials Southwest, Inc.
8200 IH-10 West Suite 600
San Antonio, Texas 78230

If to COSA: Jorge A. Perez
Director, Building & Equipment Services
111 Soledad Riverview Towers 16th Floor
San Antonio, Texas 78283

and
City Clerk
City of San Antonio
P.O. Box 839966
San Antonio, Texas 78283-3966

ARTICLE VIII. ENTIRE AGREEMENT

This Agreement, together with its authorizing ordinance and its exhibits, if any, constitute the final and entire agreement between the parties hereto and contain all of the terms and conditions agreed upon. No other agreements, oral or otherwise, regarding the subject matter of this Agreement shall be deemed to exist or to bind the parties hereto, unless same is in writing, dated subsequent to the date hereto, and duly executed by the parties, in accordance with Article XIII. Amendments.

ARTICLE IX. ASSIGNMENT

Neither this Agreement nor any rights, duties or obligations hereunder shall be assignable by either party without the prior written consent of the other party. Any such attempt at assignment without prior approval shall be void.

ARTICLE X. TEXAS LAW TO APPLY

This Agreement is performable in Bexar County, Texas, and the validity of any of its terms or provisions, as well as the rights and duties of the parties hereunder, shall be governed by the laws of the State of Texas. The parties further agree that venue for any legal action, claim or dispute arising under this Agreement will be in Bexar County, Texas.

ARTICLE XI. RESERVED

ARTICLE XII. INDEMNIFICATION

12.01 MMMSW covenants and agrees to FULLY INDEMNIFY, DEFEND and HOLD HARMLESS COSA, and the elected officials, employees, officers, directors, volunteers and representatives of COSA, individually and collectively, from and against any and all costs, claims, liens, damages, losses, expenses, fees, fines, penalties, proceedings, actions, demands, causes of action, liability and suits of any kind and nature, including but not limited to, personal injury, death and property damage, made upon COSA directly or indirectly arising out of, resulting from or related to MMMSW's activities under this Agreement, including any acts of omission of MMMSW, any agent, officer, director, representative, employee, consultant or subcontractor of MMMSW, and their respective officers, agents, employees, directors and representatives while in the exercise of the rights or performance of the duties under this Agreement. The indemnity provided for in this paragraph shall not apply to any liability resulting from the negligence of COSA, its officers or employees, in instances where such negligence causes personal injury, death, or property damage. IN THE EVENT MMMSW AND COSA ARE FOUND JOINTLY LIABLE BY A COURT OF COMPETENT JURISDICTION, LIABILITY SHALL BE APPORTIONED COMPARATIVELY IN ACCORDANCE WITH THE LAWS OF THE STATE OF TEXAS, WITHOUT, HOWEVER, WAIVING ANY GOVERNMENTAL IMMUNITY AVAILABLE TO COSA UNDER TEXAS LAW AND WITHOUT WAIVING ANY DEFENSES OF THE PARTIES UNDER TEXAS LAW.

The provisions of this INDEMNITY are solely for the benefit of the parties hereto and not intended to create or grant any rights, contractual or otherwise, to any other person or entity. MMMSW shall advise COSA in writing within three (3) business days of any claim or demand against COSA or MMMSW known to MMMSW related to or arising out of MMMSW's activities under this Agreement and shall see to the investigation and defense of such claim or demand at MMMSW's cost. COSA shall have the right, at its option and at its own expense, to participate in such defense without relieving MMMSW of any of its obligations under this paragraph.

Defense Counsel - COSA shall have the right to select or to approve defense counsel to be retained by MMMSW in fulfilling its obligations hereunder to defend and indemnify COSA, unless such right is expressly waived by COSA in writing. MMMSW shall retain COSA approved defense counsel within seven (7) business days of MMMSW's receipt of COSA's written notice that COSA is invoking its right to indemnification under this Agreement. If MMMSW fails to retain counsel within such time period, COSA shall have the right to retain defense counsel on its own behalf, and MMMSW shall be liable for all reasonable costs incurred by COSA. COSA shall also have the right, at its option, to be represented by advisory counsel of its own selection and at its own expense, without waiving any of the foregoing.

Employee Litigation - In any and all claims against any party indemnified hereunder by any employee of MMMSW, any subcontractor, anyone directly employed by any of them or anyone for whose acts any of them may be liable, the indemnification obligations herein provided shall not be limited in any way by any limitation on the amount or type of damages, compensation or benefits payable by or for MMMSW or any subcontractor under worker's compensation or other employee benefit acts.

The provisions of this Section 12.01 shall survive the termination of this Agreement.

12.02 Neither COSA nor the elected officials, employees, officers, directors, volunteers and representatives of COSA, individually and collectively, will have any liability of any kind or nature, nor have any liability for any claimed actual, special, incidental, consequential or exemplary damages as a result of damage to or destruction of equipment and/or bodily injury to or death of employees of MMMSW directly or indirectly related to the presence of such MMMSW equipment or employees at the COSA CNG Facility or the refueling of the MMMSW CNG Vehicle at the COSA CNG Facility

ARTICLE XIII. INSURANCE

13:01 Prior to the commencement of any fueling activity under this Agreement, MMMSW shall furnish copies of all required endorsements and completed Certificate(s) of Insurance to COSA's Building and Equipment Services Department, which shall be clearly labeled "CNG Fueling" in the Description of Operations block of the Certificate. The Certificate(s) shall be completed by an agent and signed by a person authorized by that insurer to bind coverage on its behalf. COSA will not accept a Memorandum of Insurance or Binder as proof of insurance. The certificate(s) must have the agent's signature and phone number, and be mailed, with copies of all applicable endorsements, directly from the insurer's authorized representative to COSA. COSA shall have no duty to perform under this Agreement until such certificate and endorsements have been received and approved by COSA's Building and Equipment Services Department. No officer or employee, other than COSA's Risk Manager, shall have authority to waive this requirement.

13:02 COSA reserves the right to review the insurance requirements of this Article during the effective period of this Agreement and any extension or renewal hereof and to modify insurance coverages and their limits when deemed necessary and prudent by COSA's Risk Manager based upon changes in statutory law, court decisions, or circumstances surrounding this Agreement. In no instance will COSA allow modification whereby COSA may incur increased risk.

13:03 MMMSW's financial integrity is of interest to COSA; therefore, subject to MMMSW's right to maintain reasonable deductibles in such amounts as are approved by COSA, MMMSW shall obtain and maintain in full force and effect for the duration of this Agreement, and any extension hereof, at MMMSW's sole expense, insurance coverage written on an occurrence basis, unless otherwise indicated, by companies authorized to do business in the State of Texas and with an A.M Best's rating of no less than A- (VII), in the following types and for an amount not less than the amount listed below:

<u>TYPE</u>	<u>AMOUNTS</u>
1. Workers' Compensation	Statutory
2. Employers' Liability	\$500,000/\$500,000/\$500,000

<p>3. Broad form Commercial General Liability Insurance to include coverage for the following:</p> <ul style="list-style-type: none"> a. Premises/Operations b. Independent Contractors c. Products/Completed Operations d. Personal Injury e. Contractual Liability f. Explosion, Collapse, Underground g. Environmental Impairment/ Impact – sufficiently broad to cover disposal liability. h. Damage to property rented by you 	<p>For <u>Bodily Injury</u> and <u>Property Damage</u> of \$1,000,000 per occurrence; \$2,000,000 General Aggregate, or its equivalent in Umbrella or Excess Liability Coverage</p> <p>\$100,000</p>
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13:04 As they apply to the limits required by COSA, COSA shall be entitled, upon request and without expense, to receive copies of the policies, declaration page, and all endorsements thereto and may require the deletion, revision, or modification of particular policy terms, conditions, limitations, or exclusions (except where policy provisions are established by law or regulation binding upon either of the parties hereto or the underwriter of any such policies). MMMSW shall be required to comply with any such requests and shall submit a copy of the replacement certificate of insurance to COSA at the address provided below within 10 days of the requested change. MMMSW shall pay any costs incurred resulting from said changes.

City of San Antonio
Attn: Building and Equipment Services Department
P.O. Box 839966
San Antonio, Texas 78283-3966

13:05 MMMSW agrees that with respect to the above required insurance, all insurance policies are to contain or be endorsed to contain the following provisions:

- Name COSA, its officers, officials, employees, volunteers, and elected representatives as additional insureds by endorsement, as respects operations and activities of, or on behalf of, the named insured performed under contract with COSA, with the exception of the workers' compensation and professional liability policies;
- Provide for an endorsement that the "other insurance" clause shall not apply to COSA where COSA is an additional insured shown on the policy;
- Workers' compensation, employers' liability, general liability and automobile liability policies will provide a waiver of subrogation in favor of COSA.

- Provide advance written notice directly to COSA of any suspension, cancellation, non-renewal or material change in coverage, and not less than ten (10) calendar days advance notice for nonpayment of premium.

13:06 Within five (5) calendar days of a suspension, cancellation or non-renewal of coverage, MMMSW shall provide a replacement Certificate of Insurance and applicable endorsements to COSA. COSA shall have the option to suspend MMMSW's performance should there be a lapse in coverage at any time during this contract. Failure to provide and to maintain the required insurance shall constitute a material breach of this Agreement.

13:07 In addition to any other remedies COSA may have upon MMMSW's failure to provide and maintain any insurance or policy endorsements to the extent and within the time herein required, COSA shall have the right to order MMMSW to stop activity hereunder until MMMSW demonstrates compliance with the requirements hereof.

13:08 Nothing herein contained shall be construed as limiting in any way the extent to which MMMSW may be held responsible for payments of damages to persons or property resulting from MMMSW's fueling activity under this Agreement.

13:09 It is agreed that MMMSW's insurance shall be deemed primary and non-contributory with respect to any insurance or self insurance carried by COSA for liability arising out of operations under this Agreement.

13:10 It is understood and agreed that the insurance required is in addition to and separate from any other obligation contained in this Agreement and that no claim or action by or on behalf of COSA shall be limited to insurance coverage provided..

13:11 MMMSW is responsible for all damage to its own equipment and/or property.

ARTICLE XIV. AMENDMENT

No amendment, supplementation, modification, or alteration of the terms hereof shall be binding unless the same is in writing, dated subsequent to the date hereof and duly executed by the parties and authorized by COSA City Council; except that the Agreement may be extended as authorized in Article II section 2.03 herein.

ARTICLE XV. LEGAL CONSTRUCTION

In case any one or more of the provisions contained in this Agreement shall for any reason be held to be invalid, illegal, or unenforceable in any respect, such invalidity, illegality, or unenforceability shall not affect any other provision thereof and this Agreement shall be construed as if such invalid, illegal, or unenforceable provision had never been contained herein.

EXECUTED IN DUPLICATE COPIES, EACH OF WHICH HAVE THE FORCE AND EFFECT OF AN ORIGINAL. TO BE EFFECTIVE FROM AND AFTER THE _____ DAY OF _____, 2012.

CITY OF SAN ANTONIO

**MARTIN MARIETTA MATERIALS
SOUTHWEST, INC.**

By: _____
Name: _____
Title: _____

By: DA. Little
Name: DAVID A. LITTLE
Title: V.P. OPERATION SERVICES.

Approved as to Form:

Robert Nordhaus
Assistant City Attorney