CH
02/20/2014
Item No 06

AN ORDINANCE 2014-02-20-0088

SELECTING NEW EARTH, INC., AND AWARDING A CONTRACT FOR ORGANIC MATERIAL PROCESSING SERVICES, IN AN AMOUNT ESTIMATED AT $82,500.00 FOR THE FIRST YEAR PROCESSING AN ESTIMATED 5,000 TONS OF MATERIAL AND $165,000.00 PROCESSING AN ESTIMATED 10,000 TONS ANNUALLY THEREAFTER, FOR AN INITIAL TERM OF FIVE YEARS WITH FIVE ADDITIONAL ONE-YEAR RENEWAL OPTIONS.

* * * * *

WHEREAS, the City Council approved the implementation of a subscription-based Organic Material Recovery Program beginning in FY 2013, which includes providing customers with a third cart that can be used to dispose of organic materials such as grass clippings, leaves, shredded paper, kitchen scraps, food-soiled paper and soiled pizza boxes; the organic materials are collected by SWMD crews using automated equipment and delivered to a contractor to process the material into compost; the subscription based program is currently available to approximately 60,000 homes within the City of San Antonio and, over the next several years, the program will be made available to 340,000 homes serviced by City crews; and

WHEREAS, on September 27, 2013, the City issued a Request for Proposals (RFP) for "Organic Materials Processing Services" (RFP 013-049), two responses were received and these were evaluated and scored by a committee consisting of representatives from various City departments and, based on the evaluations and rankings made in the selection process, staff recommends awarding a contract to New Earth, Inc., as the most qualified respondent; and

WHEREAS, this Ordinance authorizes the selection of **New Earth, Inc.,** and awards a contract to provide the Solid Waste Management Department with Organics Materials Processing services, at a cost of $16.50 per ton, for an initial term of five years with five additional one year renewal options, in an amount estimated at $82,500.00 for the first year to process an estimated 5,000 tons of material and $165,000.00 processing an estimated 10,000 tons annually thereafter; **NOW THEREFORE,**

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

SECTION 1. **New Earth, Inc.**, is hereby selected to provide services in relation to the "Organic Materials Processing Services" (RFP 013-049) for the City of San Antonio as the most qualified respondent to the Request for Proposals.

SECTION 2. The City Manager, or her designee, or the Director, Solid Waste Management Department, or his designee, is hereby authorized to take all actions necessary to negotiate and execute an Agreement with **New Earth, Inc.**, for a term of five years, with the option for the City to extend the contract for five additional one year terms under the same terms and conditions. The initial term of the Agreement shall begin after approval by the City and shall end on December 31, 2019. The City Manager, or her designee, or the Director, Solid Waste Management Department, or his designee, is hereby authorized to execute all documents

required to exercise the annual renewal options with no additional Council action required, provided that funding is available and has been approved in the SWMD annual budget. A copy of the Agreement, in substantially final form, is attached and incorporated herein for all purposes as **Attachment I.** The execution authority granted by this Ordinance shall expire 60 days from the effective date.

SECTION 3. Funding in the amount of $82,500.00 for this Ordinance is available for Fund 55001000, Cost Center 5501010001 and General Ledger 5201041, as part of the Fiscal Year 2014 Budget.

SECTION 4. Future funding through the term of this contract is contingent upon City Council approval of subsequent fiscal year budgets.

SECTION 5. Payment not to exceed the budgeted amount is authorized to **New Earth, Inc.**, and should be encumbered with a purchase order.

SECTION 6. 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 7. This Ordinance shall be effective immediately upon passage by eight affirmative votes; otherwise it shall be effective on the tenth day after passage hereof.

PASSED and APPROVED this **20th** day of **February, 2014.**

M A Y O R
Julián Castro

ATTEST:

Leticia M. Vacek, City Clerk

APPROVED AS TO FORM:

for Robert F. Greenblum, City Attorney

Agenda Item:	**6**
Date:	02/20/2014
Time:	09 41 34 AM
Vote Type:	Motion to Approve
Description:	An Ordinance selecting New Earth, Inc and awarding a contract for Organic Material Processing services, in an amount estimated at $82,500 00 for the first year processing an estimating 5,000 tons of material and $165,000 00 processing an estimate 10,000 tons material thereafter, for an initial term of five years with five, one-year renewal option [Peter Zanoni, Deputy City Manager; David W McCary, Solid Waste Management]
Result:	Passed

Voter	Group	Not Present	Yea	Nay	Abstain	Motion	Second
Julián Castro	Mayor		x				
Diego Bernal	District 1		x				
Ivy R Taylor	District 2		x				
Rebecca Viagran	District 3		x				
Rey Saldaña	District 4		x			x	
Shirley Gonzales	District 5		x				
Ray Lopez	District 6		x				x
Cris Medina	District 7		x				
Ron Nirenberg	District 8		x				
Joe Krier	District 9			x			
Michael Gallagher	District 10			x			

Attachment I

AGREEMENT BETWEEN THE CITY OF SAN ANTONIO AND NEW EARTH, INC. FOR ORGANIC MATERIAL PROCESSING SERVICES (RFP 013-049)

STATE OF TEXAS
COUNTY OF BEXAR

This agreement (hereinafter referred to as the "Agreement"), made and entered into in San Antonio, Bexar County, Texas, between the City of San Antonio, a Municipal Corporation in the State of Texas acting by and through its City Manager (hereinafter referred to as "City"), and

New Earth, Inc.
7800 IH 10 East
San Antonio, TX 78219

a Corporation chartered under the laws of the State of Texas (hereinafter referred to as "New Earth" or "Contractor"), said Agreement being executed by John Kalmbach, Vice President, San Antonio, and pursuant to Ordinance No. 2014-02-____-_____, passed and approved by the City Council on February ____, 2014.

Terms and conditions for performance and compensation payment for this Agreement are set forth in the following contract documents, true and correct copies of which are attached and fully incorporated herein verbatim for all purposes:

1. Exhibit I, a Request for Proposals for "Organic Material Processing Services" (RFP 013-049), issued by the City on September 27, 2013;
2. Exhibit II, Addendum 1 to RFP, issued October 7, 2013;
3. Exhibit III, Price Schedule submitted by New Earth as RFP Attachment B;
4. Exhibit IV, Copy of enabling Ordinance No. 2014-02-____-_____

Referenced Documents: Further, New Earth's response to the RFP is also fully incorporated by reference, verbatim, for all purposes. All the documents attached hereto and those incorporated by reference constitute the contract documents for this Agreement..

Conflict: The RFP governs New Earth's response; this Integration Agreement governs both the RFP and response; the Enabling Ordinance governs all in case of conflict.

This agreement supersedes any previous agreement or understanding of the parties, whether written or oral.

Compensation: As authorized by the Ordinance, City will pay Contractor a $16.50 cost per ton of Organic Material delivered to the Contractor, less any credits received by the City. The

estimated total annual budget sum, during the initial term of the Agreement, shall not exceed $600,000.00, unless City Council action is taken to amend the enabling Ordinance.

If funding for the entire Agreement is not appropriated at the time this Agreement is entered into, City retains the right to terminate this Agreement at the expiration of each of City's budget periods, and any subsequent contract period is subject to and contingent upon such appropriation.

In consideration of Contractor's performance in a satisfactory and efficient manner, as determined solely by the Director Solid Waste Management Department (hereinafter "Director"), of all services and activities set forth in this Agreement, City agrees to pay Contractor an amount estimated not to exceed six hundred thousand dollars ($600,000.00) per year during the initial term of the Agreement as total compensation. Contractor shall provide compost to the City, as specified in RFP Attachment A, Part Three, Proposed Plan, to promote the Program.

It is understood and agreed by the Parties that the City does not guarantee any minimum volume of work, and that Contractor will be paid for actual work performed and for allowable expenses, provided that Contractor shall present City with an invoice for all expenses and services monthly within 14 days of the end of the month. Payment shall be made no more than 30 calendar days following receipt and approval of each invoice.

Work Start Date: Work shall start immediately upon instruction to New Earth from the Director Solid Waste Management Department or his designee, but no sooner than the effective date of the enabling Ordinance, for performance of various City projects described in the RFP's scope of services or the contract documents identified above. The Parties acknowledge and agree that the current contract to process organic materials, as authorized by Ordinance 2011-08-18-0688, and amended by Ordinances 2012-09-20-0754, 2013-01-31-0078 and 2013-09-12-0627, shall terminate immediately upon execution of this Agreement and that there shall be no interruption in the services provided by New Earth to the City.

Term of Performance and Termination Date: The term of this agreement is for five (5) years and shall commence, after approval by the City Council as signified by the passage of an Ordinance, upon execution after the effective date of the enabling Ordinance, and terminate on December 31, 2019. The City has the sole discretion to renew the Agreement for five (5) additional renewal terms of one (1) year each, under the same terms and conditions. City Council approval will be required for the renewal terms if there is a substantial change in the terms and conditions of the contract, or if the price adjustment exceeds the annual CPI adjustment as provided for in the contract documents.

Notice: Except where the terms of this Agreement expressly provide otherwise, any election, notice or communication required or permitted to be given under this Agreement shall be in writing and deemed to have been duly given if and when delivered personally (with receipt acknowledged), or three (3) days after depositing same in the U.S. mail, first class, with proper postage prepaid, or upon receipt if sending the same by certified mail, return receipt requested, or upon receipt when sent by a commercial courier service (such as Federal Express or DHL Worldwide Express) for expedited delivery to be confirmed in writing by such courier, at the

addresses set forth below or to such other address as either party may from time to time designate in writing.

If intended for City, to:	City of San Antonio Attn: Solid Waste Management Department P.O. Box 839966 San Antonio, Texas 78283-3966
If intended for Contractor, to:	New Earth, Inc. Attn: John Kalmbach 7800 IH 10 East San Antonio, TX 78219

Assignment and Subcontracting: Contractor shall supply qualified personnel as may be necessary to complete the work to be performed under this Agreement. Persons retained to perform work pursuant to this Agreement shall be the employees or subcontractors of Contractor. Contractor, its employees or its subcontractors shall perform all necessary work.

It is City's understanding, and this Agreement is made in reliance thereon, that Contractor intends to use the following subcontractors: none. The list of subcontractors shall be provided to the Director for approval, and any deviation from this subcontractor list, whether in the form of deletions, additions or substitutions shall be approved by the Director, prior to the provision of any services by said subcontractor.

Any work or services approved for subcontracting hereunder shall be subcontracted only by written contract and, unless specific waiver is granted in writing by the City, shall be subject by its terms to each and every provision of this Agreement. Compliance by subcontractors with this Agreement shall be the responsibility of Contractor. City shall in no event be obligated to any third party, including any subcontractor of Contractor, for performance of services or payment of fees. Any references in this Agreement to an assignee, transferee, or subcontractor, indicate only such an entity as has been approved by the Director.

Except as otherwise stated herein, Contractor may not sell, assign, pledge, transfer or convey any interest in this Agreement, nor delegate the performance of any duties hereunder. by transfer, by subcontracting or any other means, without the consent of the Director. As a condition of such consent, if such consent is granted, Contractor shall remain liable for completion of the services outlined in this Agreement in the event of default by the successor Contractor, assignee, transferee or subcontractor.

Any attempt to transfer, pledge or otherwise assign this Agreement without said written approval, shall be void ab initio and shall confer no rights upon any third person. Should Contractor assign, transfer, convey, delegate, or otherwise dispose of any part of all or any part of its right, title or interest in this Agreement. City may, at its option, cancel this Agreement and all rights, titles and interest of Contractor shall thereupon cease and terminate, in accordance with the termination provisions above, notwithstanding any other remedy available to City under this Agreement. The violation of this provision by Contractor shall in no event release Contractor

from any obligation under the terms of this Agreement, nor shall it relieve or release Contractor from the payment of any damages to City, which City sustains as a result of such violation.

Nonwaiver of Performance: Unless otherwise specifically provided for in this Agreement, a waiver by either Party of a breach of any of the terms, conditions, covenants or guarantees of this Agreement shall not be construed or held to be a waiver of any succeeding or preceding breach of the same or any other term, condition, covenant or guarantee herein contained. Further, any failure of either Party to insist in any one or more cases upon the strict performance of any of the covenants of this Agreement, or to exercise any option herein contained, shall in no event be construed as a waiver or relinquishment for the future of such covenant or option. In fact, no waiver, change, modification or discharge by either party hereto of any provision of this Agreement shall be deemed to have been made or shall be effective unless expressed in writing and signed by the party to be charged. In case of City, such changes must be approved by the Director. No act or omission by a Party shall in any manner impair or prejudice any right, power, privilege, or remedy available to that Party hereunder or by law or in equity, such rights, powers, privileges, or remedies to be always specifically preserved hereby.

Independent Contractor: Contractor covenants and agrees that he or she is an independent contractor and not an officer, agent, servant or employee of City; that Contractor shall have exclusive control of and exclusive right to control the details of the work performed hereunder and all persons performing same, and shall be responsible for the acts and omissions of its officers, agents, employees, contractors, subcontractors and consultants; that the doctrine of respondent superior shall not apply as between City and Contractor, its officers, agents, employees, contractors, subcontractors and consultants, and nothing herein shall be construed as creating the relationship of employer-employee, principal-agent, partners or joint venturers between City and Contractor. The parties hereto understand and agree that the City shall not be liable for any claims which may be asserted by any third party occurring in connection with the services to be performed by the Contractor under this Agreement and that the Contractor has no authority to bind the City.

Termination: For purposes of this Agreement, "termination" of this Agreement shall mean termination by expiration of the Agreement term as stated above, or earlier termination pursuant to any of the provisions hereof. This Agreement may be terminated without cause by City upon 90 calendar days written notice. Upon written notice City may terminate this Agreement as of the date provided in the notice, in whole or in part, upon the occurrence of the sale, transfer, pledge, conveyance or assignment of this Agreement without prior approval, as provided above in Assignment and Subcontracting, which shall constitute an Event for Cause under this Agreement.

Defaults With Opportunity for Cure. Should Contractor default in the performance of this Agreement in a manner stated in this section below, same shall be considered an event of default. City shall deliver written notice of said default specifying such matter(s) in default. Contractor shall have fifteen (15) calendar days after receipt of the written notice to cure such default If Contractor fails to cure the default within such fifteen-day cure period, City shall have the right, without further notice, to terminate this Agreement in whole or in part as City deems appropriate, and to contract with another Contractor to complete the work required in this Agreement. City

shall also have the right to offset the cost of said new Agreement with a new Contractor against Contractor's future or unpaid invoice(s), subject to the duty on the part of City to mitigate its losses to the extent required by law.

Bankruptcy or selling substantially all of company's assets.
Failing to perform or failing to comply with any covenant herein required.
Performing unsatisfactorily.

Termination By Law. If any state or federal law or regulation is enacted or promulgated which prohibits the performance of any of the duties herein, or, if any law is interpreted to prohibit such performance, this Agreement shall automatically terminate as of the effective date of such prohibition.

Regardless of how this Agreement is terminated, Contractor shall affect an orderly transfer to City or to such person(s) or firm(s) as the City may designate, at no additional cost to City. all completed or partially completed documents, papers, records. charts, reports, and any other materials or information produced as a result of or pertaining to the services rendered by Contractor, or provided to Contractor, hereunder, regardless of storage medium, if so requested by City, or shall otherwise be retained by Contractor in accordance with records retention requirements. Any record transfer shall be completed within thirty (30) calendar days of a written request by City and shall be completed at Contractor's sole cost and expense. Payment of compensation due or to become due to Contractor is conditioned upon delivery of all such documents, if requested

Within forty-five (45) calendar days of the effective date of completion, or termination or expiration of this Agreement. Contractor shall submit to City its claims, in detail, for the monies owed by City for services performed under this Agreement through the effective date of termination. Failure by Contractor to submit its claims within said forty-five (45) calendar days shall negate any liability on the part of City and constitute a Waiver by Contractor of any and all right or claims to collect moneys that Contractor may rightfully be otherwise entitled to for services performed pursuant to this Agreement.

Upon the effective date of expiration or termination of this Agreement, Contractor shall cease all operations of work being performed by Contractor or any of its subcontractors pursuant to this Agreement.

Termination not sole remedy. In no event shall City's action of terminating this Agreement, whether for cause or otherwise, be deemed an election of City's remedies, nor shall such termination limit. in any way. at law or at equity, City's right to seek damages from or otherwise pursue Contractor for any default hereunder or other action.

Amendments: Except where the terms of this Agreement expressly provide otherwise. any alterations, additions, or deletions to the terms hereof. shall be effected by amendment, in writing, executed by both City and Contractor, and signed by the Director Substantive changes, to include an increase in the amount of compensation, shall require additional City Council approval.

THIS AGREEMENT SHALL BE CONSTRUED UNDER AND IN ACCORDANCE WITH THE LAWS OF THE STATE OF TEXAS AND ALL OBLIGATIONS OF THE PARTIES CREATED HEREUNDER ARE PERFORMABLE IN BEXAR COUNTY, TEXAS.

Any legal action or proceeding brought or maintained, directly or indirectly, as a result of this Agreement shall be heard and determined in the City of San Antonio, Bexar County, Texas.

Entire Agreement: This Agreement, together with its authorizing ordinance and its exhibits as listed above, 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 be in writing, dated subsequent to the date hereto, and duly executed by the parties.

Agreed, Consented to, and Executed this ____day of February, 2014.

NEW EARTH, INC.

BY: _____
John Kalmbach
Vice President, San Antonio

CITY OF SAN ANTONIO

BY: _____
Printed name: _____
Title: _____
CITY MANAGER, or her designee

APPROVED AS TO FORM:

Office of the City Attorney
Robert F. Greenblum, City Attorney

By: _____
Assistant City Attorney

Exhibit I. Request for Proposals for "Organic Material Processing Services" (RFP 013-049), issued by the City on September 27, 2013;

Exhibit II. Addendum 1 to the RFP, issued October 7, 2013;

Exhibit III. Price Schedule submitted by New Earth as RFP Attachment B;

Exhibit IV. Copy of enabling Ordinance No. 2014-02-____-_____