

BEFORE THE METRO CONTRACT REVIEW BOARD

AUTHORIZING THE EXECUTION OF CHANGE )  
ORDER NO. 32 TO CONTRACT NO. 900848 FOR )  
SOLID WASTE TRANSPORT SERVICES TO )  
PROVIDE FOR REPLACEMENT SECURITY )  
PROVISIONS AND TO MAKE OTHER )  
AMENDMENTS )

RESOLUTION NO. 06-3728

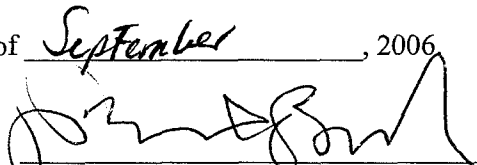
Introduced by Chief Operating Officer  
Michael J. Jordan, with the concurrence  
of Council President David Bragdon

WHEREAS, Metro's Solid Waste Transport Service Contractor, CSU Transport, Inc., has sought modification to the contract terms for security instruments and associated remedies for which provision is made in Change Order No. 30 to the Solid Waste Transport Agreement; and,

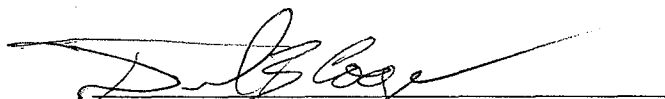
WHEREAS, as described in the accompanying staff report, such a modification provides Metro with sufficient and satisfactory protections under the Solid Waste Transport Agreement, and is otherwise in the public interest; now therefore,

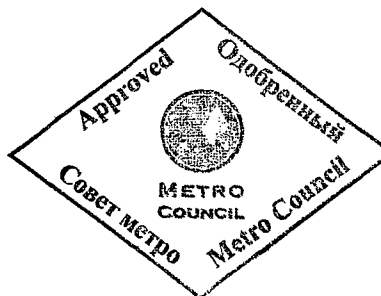
BE IT RESOLVED that the Metro Council, sitting as the Metro Contract Review Board, authorizes the Chief Operating Officer to execute Change Order No. 32 to the Waste Transport Service contract, Contract No. 900848, in a form substantially similar to that set forth as the attached Exhibit "A."

ADOPTED by the Metro Council this 28<sup>th</sup> day of September, 2006

  
\_\_\_\_\_  
David Bragdon, Council President

Approved as to Form:

  
\_\_\_\_\_  
Daniel B. Cooper, Metro Attorney



**EXHIBIT "A"**  
**Resolution No. 06-3728**

CHANGE ORDER NO. 32  
METRO CONTRACT NO. 900848

MODIFICATION TO THE CONTRACT BETWEEN  
METRO AND CSU TRANSPORT, INC.  
ENTITLED "WASTE TRANSPORT SERVICES"

This Change Order No. 32, dated as of the last signature date below (the "Effective Date of Change Order No. 32"), hereby amends Metro Contract No. 900848, entitled "Waste Transport Services," dated March 27, 1989, including all prior amendments (which contract and amendments are collectively referred to as the "Waste Transport Services Agreement").

In exchange for the promises and other considerations set forth in the Waste Transport Services Agreement and in this Change Order No. 32, the parties hereby agree as follows:

**A. Purpose**

The purpose of Change Order No. 32 is (1) to modify the provisions for security instruments and associated remedies now found in Paragraph B of Change Order No. 30 to the Waste Transport Services Agreement; and (2) to make other mutually agreed amendments to the Waste Transport Services Agreement.

**B. Provisions of Change Order No. 32**

1. The provisions of this Change Order No. 32 shall modify the provisions of Paragraph B of Change Order No. 30 to the Waste Transport Services Agreement, and accordingly upon execution of this Change Order, Metro hereby agrees to forebear its contractual rights under Change Order No. 30 to withhold the sums set forth in that Change Order and to replace them with the rights and obligations set forth herein. In addition, in consideration of the obligations of Contractor set forth herein, upon execution of this Change Order Metro hereby releases Contractor of the obligation to obtain the replacement or renewal security instruments contemplated by Change Order No. 30.
2. In lieu of the bond or security instruments and associated remedies for which provision is made in Paragraph B of Change Order No. 30 to the Waste Transport Services Agreement, Contractor and Metro agree that Metro shall have the right to retain from certain payments owed to Contractor and an amount up to the sum of \$500,000, as specified and described herein. First, Metro shall retain the sum of \$150,000 from Contractor by withholding \$50,000 from each of the monthly payments due to Contractor in the first, second and seventh month following the effective date of this Contract Change Order No. 32 (the "Cash Retainage."). Second, Metro shall have the

right to retain the sum of \$350,000, less an amount equal to the cost of any capital expenditures made by the Contractor for major equipment improvements after the effective date of the Change Order, from the final payment made to Contractor if Contractor exercises its right to terminate the Waste Transport Services Agreement with 60 days notice as described below (the "Final Payment Retainage"). For the purpose of this Paragraph B.2, "major equipment improvements" shall include repairs or renovations to the tractors and trailers used in the performance of the Waste Transport Services Agreement. Prior to making any "major equipment improvements" Contractor shall give Metro reasonable notice of the proposed "major equipment improvements" it intends to make and the reason(s) therefore. The intended purpose of this provision regarding "major equipment improvements" is to assist Contractor's efforts to ensure that trailers and, where appropriate, tractors remain in a safe and operable condition.

3. The Cash Retainage shall be placed in an interest bearing account until paid, with interest accruing to the Contractor. The Cash Retainage and any accrued interest shall be returned to Contractor in the event of a sale of Contractor's entire business or all of Contractor's equipment, provided any such sales are approved by Metro; or in the event of a termination of the Agreement by Metro; or on November 1, 2009. In all other circumstances, return to Contractor of the Cash Retainage and any accrued interest shall be made based upon the date upon which Contractor provides its Notice of Intent to Terminate Service, as described herein, and shall be made in accordance with and subject to the terms of Schedule A as set forth below.
4. Except as provided in the Paragraph B.4, payment to Contractor of the final payment for transport services shall be subject to the Final Payment Retainage described herein; shall be made based upon the date upon which Contractor provides its Notice of Intent to Terminate Service, as described herein; and shall be made in accordance with and subject to the terms of Schedule B as set forth below. Metro shall pay any final payment owed to Contractor without withholding the Final Payment Retainage and without regard to Schedule B as set forth below if the final payment arises following the sale of Contractor's entire business or all of Contractor's equipment, provided any such sales are approved by Metro; or in the event of a termination by Metro; or if the final payment is made for services performed through December 31, 2009.
5. Notwithstanding any provision to the contrary in Article 11 of the Waste Transport Services Agreement, Contractor shall have the right to terminate the Waste Transport Services Agreement by providing sixty (60) days written Notice of Intent to Terminate Service to Metro, *provided that* under no circumstances may Contractor provide such Notice or seek to terminate the Agreement prior to May 1, 2007. If on or after May 1, 2007 and before October 1, 2009, Contractor exercises its right to terminate the Agreement and provides such Notice, Metro will pay to Contractor the Cash Retainage and accrued interest in conformance with the attached Schedule A, and Metro will make any final payment owed and due to Contractor, subject to the Final Payment Retainage and in conformance with the attached Schedule B.

6. Notwithstanding any provision to the contrary in Article 10 of the Waste Transport Services Agreement, Metro shall have the right any time after the effective date of this Contract Change Order No. 32 to terminate the Waste Transport Services Agreement by providing two (2) days written notice of such termination to Contractor.
7. Notwithstanding any provision to the contrary in Article 10 of the Waste Transport Services Agreement, Contractor agrees that if it elects to terminate this Agreement pursuant to Paragraph B.5 of this Change Order or if it ceases to provide transport service without providing the 60-day notice required herein, all equipment used in its solid waste transport operations shall immediately be made available to Metro in accordance with the terms of Paragraph B.2 of Change Order No. 25 and of Paragraph B.1 of the Consent to Assignment dated May 14, 2001 (Change Order No. 26), and that the immediate provision of such equipment shall not be subject in any way to any 10-day cure of default provision of the Agreement, but shall be subject to any conditions of insurance, driver qualifications, licensing or other reasonable requirements made of Metro by the Contractor's primary equipment lien holder. Metro's right of use of the equipment shall terminate either 182 days after the use commences, if Metro opts not to exercise its right to provide compensation for use of the equipment for an additional 183 days pursuant to Paragraph B.2 of Change Order No. 25, or 365 days after the use commences, if Metro opts to exercise its right pursuant to Paragraph B.2 of Change Order No. 25 to provide compensation for use of the equipment for an additional 183 days after Metro has used the equipment at no charge for 182 days; provided, however, that in no event shall Metro have any right of use of the equipment after December 31, 2009, unless Metro purchases the equipment pursuant to Paragraph B.8 of this Change Order No. 32.
8. In the event that Contractor exercises its right to terminate the Waste Transport Services Agreement by providing the sixty (60) days written Notice described in Paragraph B.5, Contractor shall provide Metro with an option to purchase any or all of the equipment that Contractor used in the performance of the Waste Transport Services Agreement, and shall also provide Metro with the opportunity to match and exceed any offer of purchase of such equipment made to Contractor.
9. Metro agrees that it shall not exercise its discretionary right under Section B.4 of Change Order No. 24 to extend the expiration of the term of Waste Transport Services Agreement from December 31, 2009 to December 31, 2014.

**C. No Other Modifications**

Except as modified herein, all other terms and conditions of the Waste Transport Services Agreement shall remain in full force and effect. Any conflict between the provisions of this Change Order No. 32, on the one hand, and the original Waste Transport Services Agreement, including other previous amendments and change orders, on the other hand, shall be resolved by reference to and reliance upon this Change Order No. 32.

CSU TRANSPORT, INC.

METRO

\_\_\_\_\_  
Signature  
Michael Bender, Acting President

\_\_\_\_\_  
Signature  
Michael Jordan, Chief Operating Officer

\_\_\_\_\_  
Date

\_\_\_\_\_  
Date

#### SCHEDULE A

<b>Date Contractor Provides Notice of Its Intent to Terminate</b>	<b>Percentage Amount of the \$150,000 Cash Retainage paid to Contractor</b>
Notice provided on or before April 30, 2007	0.00%
Notice provided on or after May 1, 2007 and before or on June 30, 2007	16.70%
Notice provided on or after July 1, 2007 and before or Sept. 30, 2007	25.00 %
Notice provided on or after Oct. 1, 2007 and before or on Dec. 31, 2007	33.36%
Notice provided on or after Jan. 1, 2008 and before or on March 31, 2008	41.69%
Notice provided on or after April 1, 2008 and before or on June 30, 2008	50.00%
Notice provided on or after July 1, 2008 and before or Sept. 30, 2008	58.35%
Notice provided on or after Oct. 1, 2008 and before or on Dec. 31, 2008	66.68%
Notice provided on or after Jan. 1, 2009 and before or on March 31, 2009	75.00%
Notice provided on or after April 1, 2009 and before or on June 30, 2009	83.34%
Notice provided on or after July 1, 2009 and before or Sept. 30, 2009	91.67%
Notice provided on or after October 1, 2009	100.00%

## **SCHEDULE B**

<b>Date Contractor Provides Notice of Its Intent to Terminate</b>	<b>Percentage of Final Payment Retainage to be withheld from final payment to Contractor</b>
Notice provided on or before April 30, 2007	100%
Notice provided on or after May 1, 2007 and before or on June 30, 2007	83.34%
Notice provided on or after July 1, 2007 and before or Sept. 30, 2007	75.00%
Notice provided on or after Oct. 1, 2007 and before or on Dec. 31, 2007	66.68%
Notice provided on or after Jan. 1, 2008 and before or on March 31, 2008	58.35%
Notice provided on or after April 1, 2008 and before or on June 30, 2008	50.00%
Notice provided on or after July 1, 2008 and before or Sept. 30, 2008	41.69%
Notice provided on or after Oct. 1, 2008 and before or on Dec. 31, 2008	33.36%
Notice provided on or after Jan. 1, 2009 and before or on March 31, 2009	25.00%
Notice provided on or after April 1, 2009 and before or on June 30, 2009	16.70%
Notice provided on or after July 1, 2009 and before or Sept. 30, 2009	8.37%
Notice provided on or after October 1, 2009	0.00%

## **STAFF REPORT**

IN CONSIDERATION OF RESOLUTION NO. 06-3728, FOR THE PURPOSE OF AUTHORIZING THE EXECUTION OF CHANGE ORDER NO. 32 TO CONTRACT NO. 900848 FOR SOLID WASTE TRANSPORT SERVICES TO PROVIDE FOR REPLACEMENT SECURITY PROVISIONS AND TO MAKE OTHER AMENDMENTS

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Date: September 28, 2006

Prepared by: Paul Ehinger

### **BACKGROUND**

Metro entered into a service agreement with Jack Gray Transport in 1989. The agreement authorized Gray to provide for the transportation of solid waste from the Metro Central and Metro South Transfer Stations, to the Columbia Ridge Landfill. In 1998, the Metro Council approved the assignment of the agreement to Specialty Transportation Services (STS), a subsidiary of Asche Transportation Services. In 2000, the Council approved a change of control and ownership under which Churchill Environmental and Industrial Equity Partners purchased STS. In 2001 the Metro Council approved assignment of the contract to CSU Transport, Inc., a new company controlled by Churchill.

In 2004, CSU's request to substitute a performance bond in lieu of a corporate guarantee and letter of credit was approved by the Metro Council under the terms of Change Order No. 30. CSU recently sought modification to the contract terms for security instruments and remedies that are included in Change Order No. 30.

Resolution No. 06-3728, if approved by the Metro Council, authorizes a number of modifications to the Waste Transport Contract that change the security instruments and associated remedies provided by CSU Transport, Inc. The following is a brief description of the change order.

Under the terms of this change order, Metro agrees to accept the right to retain from payments to the Contractor an amount up to \$500,000. This sum includes \$150,000 of cash retainage, withheld in three payments of \$50,000 each. The remaining \$350,000 will be withheld from the final payment. These amounts decline as the Contractor approaches the end of the contract in 2009. The \$350,000 in withholding from the final payment can also be reduced if the Contractor makes major repairs to its equipment.

Under the current terms of the Waste Transport Contract, Metro has the right to use the Contractor's equipment at no cost for 6 months and to rent the equipment for another 6 months if there is a default under the contract, however Metro would have to wait for 10 days to get access to the equipment because the Contractor has 10 days to cure the default. This change order grants immediate access subject to reasonable insurance and licensing requirements during a default resulting in nonperformance.

After May 1, 2007, the Contractor may terminate the agreement by providing 60 days notice. The Contractor will forfeit a percentage of the retainage if it exercises its right to terminate the agreement with notice prior to the expiration of the contract, with the percentage retained decreasing over time. If the Contractor exercises its right to terminate with notice, Metro will have the right to use the equipment as described above.

Metro obtains the right to terminate the contract with two days notice under the terms of this change order.

Metro agrees that it will waive its right to extend the Waste Transport Contract beyond the original termination date of December 31, 2009.

#### **ANALYSIS/INFORMATION**

1. **Known Opposition** – None
2. **Legal Antecedents** – Council action required by Metro Code.
3. **Anticipated Effects** – Metro will continue to receive low cost transportation services in the near term and have time to ensure uninterrupted long-term service.
4. **Budget Impacts** – No change to existing rates.

#### **RECOMMENDED ACTION**

The Chief Operation Officer recommends adoption of Resolution No. 06-3728.

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