

April 8, 2015

MN Department of Administration
Information Policy Analysis Division
201 Administration Building
50 Sherburne Avenue
Saint Paul, MN 55155

John Kysylyczyn
3083 Victoria Street
Roseville, MN 55113
(651) 484-1384

Commissioner,

I am writing to seek an advisory opinion concerning a government contractor who refuses to respond to a public information request. The contractor is:

Dan Krivit, Senior Project Manager
Foth Infrastructure & Environment, LLC
Eagle Point II
8550 Hudson Boulevard North, Suite 105
Lake Elmo, MN 55042
(651)288-8509

Since the beginning of 2015, I have filed numerous information requests with the City of Bloomington to review communications related to city council efforts to change their trash hauling system.

In 2013, the city retained Dan Krivit with Foth Infrastructure & Environment, LLC as their professional consultant for this effort. Mr. Krivit has extensively guided city staff on this issue. He has billed the city approximately \$250,000 for his firm's efforts.

Throughout this process, Mr. Krivit has attempted to claim that significant portions of his data and emails with staff are non-public even though no statute exists to support such a classification. His emails and reports are riddled with statements claiming confidentiality and non-public status.

For example, on September 29, 2014, Mr. Krivit attempted to override the Bloomington City Attorney and City Clerk in proclaiming that copies of garbage bills voluntarily sent to city staff were non-public. See *Exhibit A*.

On November 1, 2014, Mr. Krivit discusses how he would work with city staff to “shred/delete” data. That data he was referring to is the specific data that the City Attorney and City Clerk stated was public information on September 29, 2014. See *Exhibit B*.

On February 20, 2015, I filed a public information request with the city to review a spreadsheet of Bloomington city data that Mr. Krivit stated in emails that he was maintaining in his office. See *Exhibit B*. I personally believe based upon the numerous emails of his that I have read to date, that he was intentionally keeping this information in his office because he thinks this will allow him to avoid the Minnesota Data Practices Act.

I received a response from City Clerk Janet Lewis on February 20, 2015 that this spreadsheet was not in the possession of city staff. They informed me that it resided with Foth Companies and provided me their contact information. See *Exhibit C*.

On February 23, 2015, I sent a written public information request through email directly to Dan Krivit at Foth Companies. I asked to review this spreadsheet along with additional information. See *Exhibit D*.

When I was reviewing an unrelated information request February 25, 2015 at Bloomington City Hall, City Clerk Janet Lewis informed me that Mr. Krivit received my information requests. She indicated that he was quite irate that she provided me his contact information and that he was consulting with the Bloomington City Attorney on how to avoid having to respond to the information request. Her comments indicated that Mr. Krivit was implying that he was not subject to information requests or that he had the option of providing only the data he wished to provide. Ms. Lewis informed me that she had no authority to force Mr. Krivit to comply with my information requests.

The data I am requesting is from a singular project which has been broken up into four phases. I am in possession of two contracts representing what I believe is the first phase of the project, and a second contract that is clearly labeled as the third phase of the project. The first contract is labeled October 2013. See *Exhibit F*. The second is labeled November 2014. See *Exhibit G*. Both contracts clearly state that the contractor is obligated to comply with the Minnesota Government Data Practices Act. In the November 2014 contract, Section IV, Paragraph C, it states, “The Contractor will comply

with all applicable provisions of the Minnesota Government Data Practices Act, Chapter 13 of the Minnesota Statutes.”

Mr. Krivit knows he is subject to the Minnesota Data Practices Act. He has worked as a local government consultant for a number of years and is well aware of the law. With the volume of work his firm has been involved with, they have signed thousands of contracts which state that they must comply with this law.

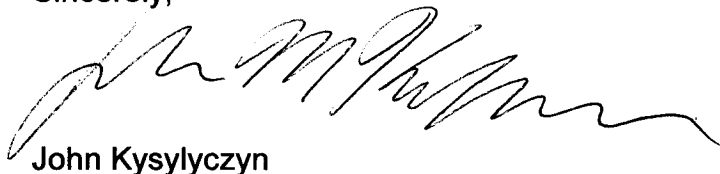
(Note: Both Foth contracts labeled as *Exhibits F & G* apply to my information request as they represent different phases of what has been a multi-phase project, and the data I am requesting would fall under both of these contracts.)

It has been over six weeks since I have submitted my information requests to Mr. Krivit. He has failed to make any attempt to contact me or respond to my information request. I know he has my information requests because Bloomington staff informed me that he immediately contacted the Bloomington City Attorney’s office to seek advice on how he could dodge the information request.

I have asked Mr. Krivit for communications between the Bloomington project team at Foth. I highly suspect, based upon Mr. Krivit’s comments in emails to Bloomington city staff, that he has made numerous inappropriate and damaging comments about citizens, garbage haulers, and myself that he does not wish to be made public. I believe he has ignored my information requests in order to give him additional time to scrub Foth computers of incriminating communications. He has publicly stated his desire to create a process which would “shred/delete” public information. It would not be unreasonable to reach the conclusion that he currently is attempting to “shred/delete” information on Foth computers concerning their work in Bloomington.

I am asking that the Commissioner issue an opinion as to whether Mr. Krivit is required to respond to my information request, whether he is required to provide me access to any of the data I have requested, and whether he can “shred/destroy” public data maintained at Foth.

Sincerely,

A handwritten signature in black ink, appearing to read 'John Kysylyczyn', written in a cursive style.

John Kysylyczyn

(Exhibits A, B, C, D, F, G attached)

A

Colclasure, James

From: Krivit, Dan <Dan.Krivit@Foth.com>
Sent: Monday, September 29, 2014 10:28 AM
To: Gates, Jim
Cc: Keel, Karl; Klennert, Jennefer L; Kaul, Ann
Subject: Bloomington - Treatment of trash invoice data as confidential vs. public data
Attachments: 22_004summary_data.pdf; 9-25-14 City staff memo to request hauler invoices SY JLK DFK -jg cmts.docx

Jim,

You and I discussed this issue on the phone on Thur Sept 25. You directed me to call Ann Kaul in Bloomington's City Attorney's office. I called that afternoon and left a voice mail message. She just called me back and we briefly discussed the situation. Also I've read Ann's email back to you just now below in this email chain.

The following is my understanding. In summary, we believe that recent State statutes and guidance from the League of Minnesota Cities (LMC) may allow the City to keep the names, street addresses and email addresses as "not public data" while still providing the summary/aggregated data results to any requestor. Also, City staff may want to suggest that any requestor complete and return the City's "Summary Data Request" form:

http://bloomingtonmn.gov/forms/22_004summary_data.pdf (also attached for your convenience).

Here is my understanding of the situation:

- ◆ The City's Organized Collection Project Team (PT) comprised of selected City and Foth staff needs to gather data on current residential solid waste collection prices as charged by the City's seven (7) residential haulers. On behalf of the PT, you sent an email request to City employees and block captains. See email chain below and attached City staff memo.
- ◆ Many Bloomington residents have already been responsive and have emailed you copies of their hauler invoices. You have then forwarded copies to Jennefer Klennert and myself at Foth. Only in a one or two cases so far has the name or street address been redacted. In general, most invoices has been copied or scanned and emailed to you "as is" without any such redactions such that the respondent's name, address and email address are part of the response packet.
- ◆ The Bloomington City Attorney's office sent the email below implying that some of this data may be public if requested by an outside party.
- ◆ The Minnesota Legislature amended the Minnesota Government Data Practices Act ("MGDPA"), Minnesota Statutes Chapter 13, in the 2014 session. The League of Minnesota Cities (LMC) summarized the relevant sections of the bill in a recent LMC newsletter announcement:

"Data Practices Act Amendments to the Data Practices Act require cities to adopt new security procedures to protect not public data. (Published Aug 11, 2014)

The 2014 Legislature made changes to state data practices law regarding access to data that is not public. The changes were made largely in response to media reports and lawsuits alleging the unauthorized access of not public data by public employees. These claims have resulted in many lawsuits and have cost state and local governments millions of dollars.

The League recommends that all cities make compliance with the new law a high priority.

State data practices law defines "not public data" as any government data classified by law as confidential, private, nonpublic, or protected nonpublic. Common examples of "not public data" include the name of a person who has signed up for a city newsletter, some law enforcement data, and certain personnel data. (See Minnesota Statutes, section 13.02, subdivision 8a.) - See more at: <http://www.lmnc.org/page/1/FONL-datapractices.jsp#sthash.1Lfwx4x6.dpuf> ..."

(Source: LMC Focus On New Laws: Data Practices Act; Published Aug 11, 2014)

- ◆ Under the amended MGDPA, the respondents' name, street address and email address could be considered "not public data". These types of resident data are not needed for the summary report and should be treated as confidential. The PT only needs a summarized, aggregate report of solid waste collection prices by service level.
- ◆ Pursuant to MGDPA, the City has established a set of standard policies and procedures for responding to requests for public data managed by the City. The individual hauler invoices provided by residents in raw, unredacted form, could be determined to be "not public data," especially considering the amended law.
- ◆ The summary report (without any such "not public data") on current residential solid waste collection prices should likely be considered as public data once it is compiled and officially released to City Council. This price analysis report is scheduled to be produced by the PT by approximately the end of November 2014.
- ◆ The City's standing policies and procedures provide for determination if a request is for public or private data. One means to satisfy a request for the "hauler invoice" data is direct the requestor to complete the City's "Summary Data Request" form: http://bloomingtonmn.gov/forms/22_22_004summary_data.pdf (also attached for your convenience). This would provide an official means to satisfy a reasonable request for the PT's public price analysis report once it is completed and released.
- ◆ Until directed otherwise by the City, Foth is treating all hauler invoice data received as "not public data". We are following internal procedures to assure the data is held as confidential. We are building an Excel data base that will produce a summary price analysis report that will not include the resident's name, street address, or email address. The summary report will also not identify the haulers by name.
- ◆ City staff may wish to also handle the resident's individual responses and copies of their hauler invoices as "not public data" or confidential for this data gathering phase of this price analysis. Then, once the price analysis report is released to City Council, the summary data could be released and even posted on the City's Organized Collection web page at no cost to public. You may wish to confirm is this approach is acceptable to Ann Kaul and your City Attorney staff.

We will assume this is an accurate understanding of the situation and an acceptable approach to the management of your residents' hauler invoice data unless you inform us otherwise.

Thanks.

Dan Krivit, Senior Project Manager
Foth Infrastructure & Environment, LLC
Eagle Point II
8550 Hudson Boulevard North, Suite 105
Lake Elmo, MN 55042

Direct Phone: (651) 288-8509 / Cell Phone: (612) 616-7739

General Phone: (651) 288-8550 / Fax: (651) 288-8552

Dan.Krivot@Foth.com

<http://www.Foth.com>

Go Green, keep it on the screen. Please do not print this email unless necessary.

From: Gates, Jim [mailto:jgates@BloomingtonMN.gov]

Sent: Monday, September 29, 2014 9:41 AM

To: Kaul, Ann; Oakland, Marla

Cc: Lewis, Janet; Johnson, Sandra; Keel, Karl; Krivot, Dan; Klennert, Jennefer L

Subject: RE: Trash invoice request

Ann,

Thanks for your research and comments.

Public Works is proceeding with the voluntary collection of hauler invoices in the event the City Council directs staff to proceed with the statute required "hauler negotiations" (see MS115A.94). The invoice information will be used to assure the hauler negotiation submitted prices are market competitive in Bloomington.

Thanks.

Jim

From: Kaul, Ann

Sent: Monday, September 29, 2014 9:10 AM

To: Oakland, Marla

Cc: Lewis, Janet; Gates, Jim; Johnson, Sandra

Subject: RE: Trash invoice request

→ They are likely public. One exception would be if they were trade secrets. In subdivision 1 (b) of Section 13.37, trade secret information is defined as the following:

"Trade secret information" means government data, including a formula, pattern, compilation, program, device, method, technique or process (1) that was supplied by the affected individual or organization, (2) that is the subject of efforts by the individual or organization that are reasonable under the circumstances to maintain its secrecy, (3) that derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use.

From the language in Section 13.37, it is clear that data can be classified as trade secret only if each criterion of the definition is satisfied.

The definition of trade secret in Section 13.37 is derived from the Uniform Trade Secrets Act, Minnesota Statutes Chapter 325C. The language in Section 325C.01, subdivision 5, is as follows:

Trade secret means information, including a formula, pattern, compilation, program, device, method, technique, or process, that: (i) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use, and (ii) is the subject of efforts that are reasonable under circumstances to maintain its secrecy.

From: Oakland, Marla
Sent: Thursday, September 25, 2014 3:31 PM
To: Kaul, Ann
Cc: Lewis, Janet; Gates, Jim
Subject: FW: Trash invoice request



Ann:

In talking with Janet, the hauler invoices collected by the Organized Collection Project Team are likely public; therefore, need to be provided for any data practices requests. Do you know of a statute that classifies data collected for comparison pricing as private?

Marla

From: Gates, Jim
Sent: Thursday, September 25, 2014 10:00 AM
To: All City Employees
Cc: Krivit, Dan (Dan.Krivit@Foth.com); Klennert, Jennefer L (Jennefer.Klennert@foth.com)
Subject: Trash invoice request

Valued City Employees,

As you all hopefully know, Bloomington is on the way toward the organized collection of trash, recyclables, yard waste, organics, and bulky items. The Organized Collection Project Team needs your help!

One of the next steps in the statute required organized collection process is to go through the existing haulers negotiation process. The negotiations are to be 60-days in length, with a goal at the end of the process of presenting a hauler developed proposal that is acceptable to the residents of Bloomington. After the Council approves the hauler proposal, a public hearing will be held to present the hauler proposal, and hear public input and to receive public comments regarding the draft hauler proposal.

As part of the negotiations, the haulers will present their draft costs for the services outlined. What is desired from our city employees is what folks are paying now for trash services, so we can compare the current prices folks are paying to the proposed hauler costs submitted with the draft hauler proposal.

If at all possible, we would like the requested hauler invoices submitted by **October 6, 2014**.

The attached memo hopefully explains the request as well. **This is a purely voluntary participation request!**

Thanks for your time and consideration.

Jim Gates
Deputy Director of Public Works
Office: 952-563-8730
Fax: 952-563-4868
Email: jgates@bloomingtonMN.gov

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This communication including any attachments, (E-mail) is confidential and may be proprietary, privileged or

B

Colclasure, James

From: Krivit, Dan <Dan.Krivit@Foth.com>
Sent: Monday, November 03, 2014 9:50 AM
To: Gates, Jim
Cc: Keel, Karl; Klennert, Jennefer L; Shuros, Warren A
Subject: THANKS ...---> RE: CONFIDENTIAL - Bloomington: Draft Foth memo on the City's current solid waste prices from survey of resident invoices

Jim,

Thanks. We are making your changes and a couple of other minor corrections. We will consider this a "final" draft memo ready to print as a handout at tomorrow's hauler meeting unless we hear back from you or Karl otherwise.

Thanks.

Dan Krivit, Senior Project Manager
Foth Infrastructure & Environment, LLC
Eagle Point II
8550 Hudson Boulevard North, Suite 105
Lake Elmo, MN 55042
Direct Phone: (651) 288-8509 / Cell Phone: (612) 616-7739
General Phone: (651) 288-8550 / Fax: (651) 288-8552
Dan.Krivit@Foth.com
<http://www.Foth.com>

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From: Gates, Jim [mailto:jgates@BloomingtonMN.gov]
Sent: Monday, November 03, 2014 8:57 AM
To: Krivit, Dan
Cc: Keel, Karl; Klennert, Jennefer L; Shuros, Warren A
Subject: RE: CONFIDENTIAL - Bloomington: Draft Foth memo on the City's current solid waste prices from survey of resident invoices

Dan,
Minor comments.
Thanks.
Jim

From: Krivit, Dan [mailto:Dan.Krivit@Foth.com]
Sent: Saturday, November 01, 2014 7:01 AM
To: Gates, Jim
Cc: Keel, Karl; Klennert, Jennefer L; Shuros, Warren A
Subject: CONFIDENTIAL - Bloomington: Draft Foth memo on the City's current solid waste prices from survey of resident invoices

Jim and Karl,

Attached is Foth's draft memo summarizing the results of the recent price survey of resident solid waste invoices. Please review, comment, edit and approve for release as a handout at the 3rd haulers' negotiation session on Tue Nov 4th.

Jim, Jennefer mentioned to me that you are keeping a tally of unsolicited comments from residents (e.g., "Supports organized collection", "Opposes organized collection", etc.) Can you please share the results of your tally with us?

You may want to review the Excel database spreadsheet. This is where we recorded and analyzed the invoice data. Just let us know and we will email the spreadsheet to you.

It is apparent that the tactic of releasing this Foth memo first to the haulers on a confidential basis is working to continue to establish higher levels of trust between the haulers and the City negotiating team. The haulers may ask for changes in the Foth memo or for additional information. Foth recommends that we welcome such hauler **suggestions**, but that we not make any prior commitments to make changes until they submit a written request from their entire hauler group.

This Foth memo as a snapshot of current prices will likely be less sensitive to the haulers than the next Foth memo comparing these rates to other cities' contract prices. We have heard less pushback on this Bloomington resident current price survey compared to other comments about the upcoming "other cities' contract prices" analysis.

As noted in the attached Foth memo, this method of sampling resident invoices does not provide a means to estimate the number of households without regular solid waste collection service by a hauler. We do not yet have a good estimate of residents that "self-haul" their own trash and recyclables. Other open hauling cities have used an estimate of about 10 percent. We should ask the haulers for their collective, citywide estimate on Tue Nov 4 when we handout this draft Foth memo.

P.S. We should decide collectively how to manage the ultimate disposition of the residents' emails and invoice copies that have been sent in. Once the Excel spreadsheet data is checked and verified, should we make sure to shred/delete all the originals to further protect the non-public data? Let's discuss this on Tue Nov 4 in our sidebar meeting in Karl's office.

Thanks.



Dan Krivit, Senior Project Manager
Foth Infrastructure & Environment, LLC
Eagle Point II
8550 Hudson Boulevard North, Suite 105
Lake Elmo, MN 55042
Direct Phone: (651) 288-8509 / Cell Phone: (612) 616-7739
General Phone: (651) 288-8550 / Fax: (651) 288-8552
Dan.Krivit@Foth.com
<http://www.Foth.com>

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C

John M. Kysylyczyn

From: Lewis, Janet <jlewis@BloomingtonMN.gov>
Sent: Friday, February 20, 2015 5:11 PM
To: 'John Kysylyczyn'
Cc: Gates, Jim; Oakland, Marla; Kaul, Ann; Verbrugge, Jamie; Johnson, Sandra; Sullivan, Anna
Subject: RE: New information request - Kysylyczyn

To Mr. Kysylyczyn:
The City of Bloomington does not have any data related to your data request dated February 17, 2015.

The spreadsheet referenced in your data request is not in our possession. The City did not create it nor maintains it. Rather, it resides with Foth Companies. Contact information for this record is:

Dan Krivit, Senior Project Manager
Foth Infrastructure & Environment, LLC
Eagle Point II
8550 Hudson Boulevard North, Suite 105
Lake Elmo, MN 55042
Direct Phone: (651) 288-8509



The City is under no obligation to produce or obtain it for production.

Sincerely,

*Janet K. Lewis, CMC
Bloomington City Clerk
(952) 563-4989*

The City of Bloomington is now using BloomingtonMN.gov for its website and e-mail addresses. Please update my contact information in your address book.

jlewis@BloomingtonMN.gov *New e-mail address as of January 1, 2014



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From: Lewis, Janet
Sent: Wednesday, February 18, 2015 4:56 PM
To: 'John Kysylyczyn'
Cc: Gates, Jim; Oakland, Marla; Keel, Karl; Johnson, Sandra; Kaul, Ann
Subject: RE: New information request - Kysylyczyn

To Mr. Kysylyczyn:
The City is in receipt of your data request dated February 17, 2015 and received by the City Clerk's Office February 17, 2015. You are requesting to review the following:

- An Excel spreadsheet with citizen submitted garbage hauler invoice data created by Dan Krivit; and

- All correspondence or documents dated between January 16 – February 17, 2015 the city has received or sent to/from Richardson, Richter & Associates and Foth Companies.

If such data exists and is classified as public data, it will be provided to you for inspection at no cost as quickly as possible but as staffing levels and as workloads allow.

I'll see you Thursday, February 19 at 10:30 for inspection of a previously submitted data request dated January 15, 2015.

Sincerely,

Janet K. Lewis, CMC
Bloomington City Clerk
(952) 563-4989

The City of Bloomington is now using BloomingtonMN.gov for its website and e-mail addresses. Please update my contact information in your address book.

jlewis@BloomingtonMN.gov *New e-mail address as of January 1, 2014



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From: John Kysylyczyn [<mailto:john@ksolutionsllc.com>]
Sent: Tuesday, February 17, 2015 9:40 PM
To: Lewis, Janet
Subject: New information request

Janet,

Attached is a new information request.

Did the Thursday date work to review documents?

Sincerely,

John M. Kysylyczyn
K Solutions LLC, owner
Anoka County Record LLC, owner
3083 Victoria Street
Roseville, MN 55113
Email: john@ksolutionsllc.com
Home office: (651) 484-1384

<http://www.ksolutionsllc.com>
<http://www.anokacountyrecord.com>
Mayor of Roseville, MN 2000-2004

D

February 23, 2015

Dan Krivit, Senior Project Manager
Foth Infrastructure & Environment, LLC
Eagle Point II
8550 Hudson Boulevard North, Suite 105
Lake Elmo, MN 55042

Garbage Haulers for Citizen Choice
C/O K Solutions LLC
3083 Victoria Street
Roseville, MN 55113

Mr. Krivit:

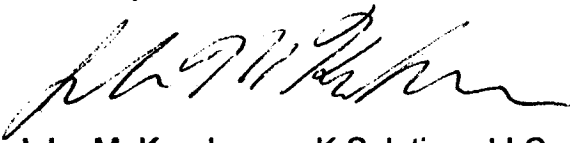
I would like to review all internal correspondence, documents, emails, etc, between employees or consultants of your firm, or others in relation to your work for the City of Bloomington, from the beginning of your work with them until the date of this letter.

I would also like to review your Excel spreadsheet with all of the citizen submitted haulers invoice data.

This request is being made under Minnesota Statutes Chapter 13.

I will review the materials in person. Please contact me when they are available.

Sincerely,



John M. Ksylyczyn, K Solutions LLC
for Garbage Haulers for Citizen Choice

Contact: john@ksolutionsllc.com or US Mail

17PM JD
9/9/13

F

**AGREEMENT BETWEEN THE CITY OF BLOOMINGTON
AND FOTH INFRASTRUCTURE & ENVIRONMENT, LLC FOR
SOLID WASTE MANAGEMENT PLAN SERVICES**

THIS AGREEMENT is made this 1st day of October 2013,
between the City of Bloomington a Minnesota municipal corporation located at 1800
West Old Shakopee Road, Bloomington, Minnesota 55431 (hereinafter referred to as the
"City"), and Foth Infrastructure & Environment, LLC, located at Eagle Point II, 8550
Hudson Boulevard North, Suite 105, Lake Elmo, MN 55042 (hereinafter referred to as
the "Contractor").

WITNESSETH

WHEREAS, the City desires to secure a contract to furnish a Solid Waste
Management Plan for the City of Bloomington (hereinafter referred to as the "Project");
and

WHEREAS, the Contractor represents that it has the professional expertise and
capabilities to provide the necessary labor, materials, equipment and supplies to perform
the Project; and

WHEREAS, the City desires to have the Contractor provide professional solid
waste management services; and

NOW, THEREFORE, in consideration of the terms and conditions expressed
herein, the parties agree as follows:

I. TERM OF AGREEMENT

The term of this Agreement shall commence on the date an executed Agreement
is received by the Consultant and expire on completion of all the terms and conditions of
this Agreement, subject to termination as provided in Subdivision

II. DUTIES OF CONTRACTOR

A. The Contractor shall furnish a solid waste management process for the
not-to-exceed amount of NINETY NINE THOUSAND FIVE HUNDRED NINETY
FIVE AND NO/100 DOLLARS (\$99,595.00). All requests for payment from the City

To meet the above requirements, the Contractor may use a combination of Commercial General Liability and Umbrella coverage, as long as the City approves such use and it is evidenced on the Certificate of Insurance naming the City as an additional insured on both policies. The Umbrella needs to be a following form coverage and provide a thirty (30) day notice of cancellation.

2. **Business Automobile Insurance in the amount of \$1,500,000 per occurrence for bodily injuries or death arising out of each occurrence, as well as \$1,500,000 per occurrence for property damage.**
 3. **Workers' Compensation Insurance as required by Minnesota Statutes, Section 176.181, subd. 2.**
 4. **Professional Liability Insurance in the amount of \$1,000,000 per occurrence.**
 5. **The Contractor agrees to name the City as an additional insured on its Commercial General Liability and Business Automobile Insurance policies, and to provide an endorsement of such status. In addition, the Contractor agrees to notify the City thirty (30) days prior to cancellation or a change in any of the aforementioned insurance policies. All insurance must be provided at the Contractor's expense and at no additional cost to the City.**
- G. **The Contractor agrees that the City will own and have the right to use, reproduce and apply as it desires, any data, reports, analyses and materials which are collected or developed by the Contractor or anyone acting on behalf of the Contractor as a result of this Agreement.**

III. DUTIES OF THE CITY

- A. **After both parties have signed this Agreement, and after the completion and acceptance of Contractor's performance of the duties under this Agreement, the City shall pay the Contractor the not-to-exceed sum of one hundred four thousand five hundred dollars and zero cents (\$104,500).**

- B. Payments to Contractor will be made within thirty (30) days of receipt of invoice from Contractor.

IV. GENERAL PROVISIONS

- A. Entire Agreement. This Agreement represents the entire Agreement between the Contractor and the City and supersedes and cancels any and all prior agreements or proposals, written or oral, between the parties relating to the subject matter hereof; and amendments, addenda, alterations, or modifications to the terms and conditions of this Agreement shall be in writing and signed by both parties.
- B. Americans With Disability Act. The Contractor agrees to comply with the Americans With Disabilities Act (ADA), Section 504 of the Rehabilitation Act of 1973 and not discriminate on the basis of disability in the admission or access to, or treatment of employment in its services, programs, or activities. The Contractor agrees to hold harmless and indemnify the City from costs, including but not limited to damages, attorney's fees and staff time, in any action or proceeding brought alleging a violation of ADA and/or Section 504 caused by the Contractor. Upon request accommodation will be provided to allow individuals with disabilities to participate in all services, programs and activities. The City has designated coordinators to facilitate compliance with the Americans with Disabilities Act of 1990, as required by Section 35.107 of the U.S. Department of Justice regulations, and to coordinate compliance with Section 504 of the Rehabilitation Act of 1973, as mandated by Section 8.53 of the U.S. Department of Housing and Urban Development regulations.
- C. Minnesota Government Data Practices Act. The Contractor will comply with all applicable provisions of the Minnesota Government Data Practices Act, Chapter 13 of the Minnesota Statutes, as amended.
- D. Applicable Laws. This Agreement shall be interpreted using the laws of the State of Minnesota. The Contractor agrees to comply with all applicable local, state and federal laws, rules, regulations and ordinances in the performance of the duties of this Agreement.



G

**AGREEMENT BETWEEN THE CITY OF BLOOMINGTON
AND Foth Infrastructure and Environmental, LLC**

THIS AGREEMENT is made for the implementation of solid waste organized collection services this 20th day of November, 2014, by and between the City of Bloomington, a Minnesota municipal corporation located at 1800 West Old Shakopee Road, Bloomington, Minnesota 55431 (hereinafter referred to as the "City"), and Foth Infrastructure and Environmental, LLC; located at Eagle Point II, 8550 Hudson Blvd North, Suite 105, Lake Elmo, MN 55042 (hereinafter referred to as the "Contractor").

WITNESSETH

WHEREAS, the City desires to implement the change from "open system" to "organized collection" of solid waste including trash, recyclables, yard waste, bulky wastes and organics in Bloomington (hereinafter referred to as the "Project"); and

WHEREAS, the Contractor represents that it has the professional expertise and capabilities to provide the technical and strategic consulting services to plan and implement the organized collection of solid waste materials described above for residential solid waste collection; and

WHEREAS, the City desires to have the Contractor implement Phas 3 described in Foth Proposal (Proposal) dated August 29, 2014 that is attached to this agreement; and

NOW, THEREFORE, in consideration of the terms and conditions expressed herein, the parties agree as follows:

I. TERM OF AGREEMENT

The term of this Agreement shall be from September 23, 2014, to May 1, 2015, subject to termination as provided in Subdivision V.

II. DUTIES OF CONTRACTOR

- A. The Contractor shall provide the consulting service to implement organized collection of solid waste material for residential land use in Bloomington for the not-to-exceed amount of one hundred four thousand five hundred dollars and zero cents (\$104,500). Contractor agrees that the City will pay Contractor when the City has received this executed Agreement, signed by both parties, from the Contractor and the completion of Phase 3 as more fully described on Exhibit A..
- B. The Contractor agrees to complete the Project, as proposed, and perform all other terms and conditions according to the Proposal and the Specifications incorporated by reference herein as Exhibit A including Attachment 1 and Attachment 2.
- C. The Contractor shall defend, indemnify and hold harmless the City, its officials, employees and agents, from any and all claims, causes of action, lawsuits, damages, losses, or expenses, including attorney fees, arising out of or resulting from the Contractor's (including its officials, agents or employees) performance of the duties required under this Agreement, provided that any such claim, damages, loss or expense is attributable to bodily injury, sickness, diseases or death or to injury to or destruction of property including the loss of use resulting therefrom and is caused in whole or in part by any negligent act or omission or willful misconduct of Contractor.
- D. It is agreed that nothing herein contained is intended or should be construed in any manner as creating or establishing the relationship of copartners between the parties hereto or as constituting the Contractor's staff as the agents, representatives or employees of the City for any purpose in any manner whatsoever. The Contractor and its staff are to be and shall remain an independent contractor with respect to all services performed under this Agreement. The Contractor represents that it has, or

will secure at its own expense, all personnel required in performing services under this Agreement. Any and all personnel of the Contractor or other persons, while engaged in the performance of any work or services required by the Contractor under this Agreement, shall not be considered employees of the City, and any and all claims that may or might arise under the Workers' Compensation Act of the State of Minnesota on behalf of said personnel or other persons while so engaged, and any and all claims whatsoever on behalf of any such person or personnel arising out of employment or alleged employment including, without limitation, claims of discrimination against the Contractor, its officials, agents, contractors or employees shall in no way be the responsibility of the City; and the Contractor shall defend, indemnify and hold the City, its officers, agents and employees harmless from any and all such claims regardless of any determination of any pertinent tribunal, agency, board, commission or court. Such personnel or other persons shall not require nor be entitled to any compensation, rights or benefits of any kind whatsoever from the City, including, without limitation, tenure rights, medical and hospital care, sick and vacation leave, Workers' Compensation, Unemployment Compensation, disability, severance pay and PERA.

- E. The parties agree to comply with the Minnesota State Human Rights Act, Minnesota Statutes, Section 363, as amended.
- F. To the extent allowed by law, Contractor agrees to maintain the following insurance coverages, in an amount equal to, or greater than, the minimum limits described below. Contractor will provide the City with a certificate of insurance evidencing such coverages prior to performing any duties included under the terms and conditions of this Agreement. Contractor also agrees to keep a valid certificate of insurance on file, referencing these limits, throughout the entire term of this agreement.
 - 1. Commercial General Liability Insurance in the amount of at least \$1,500,000 per occurrence for bodily injury or death arising out of each occurrence, as well as \$1,500,000 per occurrence for property damage.

To meet the above requirements, the Contractor may use a combination of Commercial General Liability and Umbrella coverage, as long as the City approves such use and it is evidenced on the Certificate of Insurance naming the City as an additional insured on both policies. The Umbrella needs to be a following form coverage and provide a thirty (30) day notice of cancellation.

2. Business Automobile Insurance in the amount of \$1,500,000 per occurrence for bodily injuries or death arising out of each occurrence, as well as \$1,500,000 per occurrence for property damage.
3. Workers' Compensation Insurance as required by Minnesota Statutes, Section 176.181, subd. 2.
4. Professional Liability Insurance in the amount of \$1,000,000 per occurrence.
5. The Contractor agrees to name the City as an additional insured on its Commercial General Liability and Business Automobile Insurance policies, and to provide an endorsement of such status. In addition, the Contractor agrees to notify the City thirty (30) days prior to cancellation or a change in any of the aforementioned insurance policies. All insurance must be provided at the Contractor's expense and at no additional cost to the City.


G. The Contractor agrees that the City will own and have the right to use, reproduce and apply as it desires, any data, reports, analyses and materials which are collected or developed by the Contractor or anyone acting on behalf of the Contractor as a result of this Agreement.

III. DUTIES OF THE CITY

- A. After both parties have signed this Agreement, and after the completion and acceptance of Contractor's performance of the duties under this Agreement, the City shall pay the Contractor the not-to-exceed sum of one hundred four thousand five hundred dollars and zero cents (\$104,500).

- B. Payments to Contractor will be made within thirty (30) days of receipt of invoice from Contractor.

IV. GENERAL PROVISIONS

- A. Entire Agreement. This Agreement represents the entire Agreement between the Contractor and the City and supersedes and cancels any and all prior agreements or proposals, written or oral, between the parties relating to the subject matter hereof; and amendments, addenda, alterations, or modifications to the terms and conditions of this Agreement shall be in writing and signed by both parties.
- B. Americans With Disability Act. The Contractor agrees to comply with the Americans With Disabilities Act (ADA), Section 504 of the Rehabilitation Act of 1973 and not discriminate on the basis of disability in the admission or access to, or treatment of employment in its services, programs, or activities. The Contractor agrees to hold harmless and indemnify the City from costs, including but not limited to damages, attorney's fees and staff time, in any action or proceeding brought alleging a violation of ADA and/or Section 504 caused by the Contractor. Upon request accommodation will be provided to allow individuals with disabilities to participate in all services, programs and activities. The City has designated coordinators to facilitate compliance with the Americans with Disabilities Act of 1990, as required by Section 35.107 of the U.S. Department of Justice regulations, and to coordinate compliance with Section 504 of the Rehabilitation Act of 1973, as mandated by Section 8.53 of the U.S. Department of Housing and Urban Development regulations.
- C. Minnesota Government Data Practices Act. The Contractor will comply with all applicable provisions of the Minnesota Government Data Practices Act, Chapter 13 of the Minnesota Statutes, as amended. 
- D. Applicable Laws. This Agreement shall be interpreted using the laws of the State of Minnesota. The Contractor agrees to comply with all applicable local, state and federal laws, rules, regulations and ordinances in the performance of the duties of this Agreement.

- E. Assignment. This Agreement shall not be assignable except with the written consent of the City.
- F. Examination of Documents. The books, records, documents, and accounting procedures of the Contractor, relevant to this Agreement, are subject to examination by the City, and either the legislative or state auditor as appropriate, pursuant to Minnesota Statutes, Section 16C.05, Subdivision 5.
- G. Mediation. Both parties agree to submit all claims, disputes and other matters in question between the parties arising out of or relating to this Agreement to mediation. The mediation shall be conducted through the Conflict Resolution Center, 2101 Hennepin Avenue, Suite 100, Minneapolis, MN 55405. The parties hereto shall decide whether mediation shall be binding or non-binding. If the parties cannot reach agreement, mediation shall be non-binding. In the event mediation is unsuccessful, either party may exercise its legal or equitable remedies and may commence such action prior to the expiration of the applicable statute of limitations.
- H. Payment of Subcontractors. The Contractor agrees that it must pay any subcontractor within ten (10) days of the prime contractor's receipt of payment from the municipality for undisputed services provided by the subcontractor. The Contractor agrees that it must pay interest of 1-1/2 percent per month or any part of a month to the subcontractor on any undisputed amount not paid on time to the subcontractor. The minimum monthly interest penalty payment for an unpaid balance of \$100 or more is \$10. For an unpaid balance of less than \$100, the prime contractor shall pay the actual penalty due to the subcontractor. A subcontractor who prevails in a civil action to collect interest penalties from a prime contractor must be awarded its costs and disbursements, including attorneys fees, incurred in bringing the action.
- I. Adherence to City Policies. The Contractor agrees, as a condition of being awarded this Agreement, to require each of its agents, officers and employees to abide by the City of Bloomington's policies prohibiting sexual harassment, firearms and smoking, as well as all other reasonable work rules, safety rules or policies regulating the conduct of persons on City property at all times while performing duties pursuant to

this Agreement. The Contractor agrees and understands that a violation of any of these policies or rules constitutes a breach of the Contract and sufficient grounds for immediate termination of the Agreement by the City.

- J. Severability. If any provision or term of this Agreement for any reason is declared invalid, illegal or unenforceable such decision shall not affect the validity of any remaining terms or conditions in this Agreement.
- K. Signatory. Each person executing this Agreement on behalf of a party hereto represents and warrants that such person is duly and validly authorized to do so on behalf of such party, with full right and authority to execute this Agreement and to bind such party with respect to all of its obligations hereunder. In the event the Contractor did not authorize the Signatory to sign on its behalf, the Signatory agrees to assume responsibility for the duties and liability of the Contractor, as set forth herein, personally. This Agreement may be executed in counterparts, each of which shall be deemed an original, but all of which taken together shall constitute but one and the same instrument.

V. TERMINATION

Either party may terminate this Agreement for any reason upon giving thirty (30) days' advanced written notice to the other party.

The City reserves the right to cancel this Agreement at any time in event of default or violation by the Contractor of any provision of this Agreement. The City may take whatever action at law or in equity that may appear necessary or desirable to collect damages arising from a default or violation or to enforce performance of this Agreement.

[REMAINDER OF THIS PAGE HAS BEEN LEFT BLANK.]

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed the day and year first above written.

CITY OF BLOOMINGTON

DATED: 11/20/14

BY: [Signature]
Its Mayor

DATED: 11/20/14

BY: [Signature]
Its City Manager

Reviewed and approved by the City Attorney.

[Signature]
City Attorney

FOTH INFRASTRUCTURE AND ENVIRONMENT, LLC

DATED: October 30, 2014

BY: [Signature]
Its: FRISK Mgmt

October 17, 2014

[Signature]
Technology Director