



ARLINGTON COUNTY, VIRGINIA

Solid Waste Authority Agenda Item Meeting of January 24, 2012

DATE: January 12, 2012

SUBJECT: Adoption by the Arlington Solid Waste Authority of an Amendment to the Operating Lease providing for the lease of certain Facility Improvements at the Waste to Energy Plant in Alexandria.

C. M. RECOMMENDATION: Authorize the Executive Director of the Arlington Solid Waste Authority to execute the attached lease amendment subject to review and approval of such document by the County Attorney.

ISSUES: Adoption of the attached amendment is necessary to complete execution of the new solid waste disposal agreement being considered by the County Board at its January 24, 2012, recessed meeting. There are no outstanding issues.

SUMMARY: The attached amendment amends a lease of the waste pollution control retrofit equipment owned by Arlington's Solid Waste Authority and Alexandria's Sanitation Authority. This lease would be in favor of Covanta Alexandria/Arlington, Inc. and would extend the lease from October 1, 2025, through December 31, 2038, upon exercise of the extension option that Arlington and Alexandria have under the waste disposal agreement considered by the County Board at its January 24, 2012, recessed meeting.

BACKGROUND: This is one of the three documents necessary to effect an extended waste disposal agreement among Arlington and Alexandria and Covanta.

DISCUSSION: Amendment Number 1 (attached) amends the Operating Lease Agreement dated as of November 1, 1998, among the City of Alexandria, Virginia, Sanitation Authority; the Arlington County Solid Waste Authority; and Covanta Alexandria/Arlington, Inc.

FISCAL IMPACT: The fiscal impact of the underlying agreement is detailed in the Board Report attached to the new Waste Disposal and Service Agreement to be considered by the County Board at its January 24, 2012, meeting.

County Manager:

BMD/mjs

County Attorney:

BRC

[Signature]

Staff:

43.

**AMENDMENT NO. 1
TO
OPERATING LEASE AGREEMENT**

THIS AMENDMENT NO. 1 TO OPERATING LEASE AGREEMENT dated as of January __, 2012 (this "Amendment No. 1") amends that certain Operating Lease Agreement dated as of November 1, 1998 (the "Operating Lease Agreement"), among the **CITY OF ALEXANDRIA, VIRGINIA SANITATION AUTHORITY** and **ARLINGTON COUNTY SOLID WASTE AUTHORITY**, each a body politic and corporate of the Commonwealth of Virginia (collectively, the "Lessor"), and **COVANTA ALEXANDRIA/ARLINGTON, INC.**, a Virginia corporation (successor to Ogden Martin Systems of Alexandria/Arlington, Inc.) (the "Lessee"). Except as otherwise expressly defined in this Amendment No. 1, capitalized terms used but not otherwise defined herein have the meanings ascribed to them in the Operating Lease Agreement.

WHEREAS, the Lessor and Lessee are parties to the Operating Lease Agreement which provides for the lease of the Facility Improvements to Lessee;

WHEREAS, in anticipation of the expiration on January 1, 2013, of the Amended and Restated Facility Construction and Operation Agreement dated October 1, 1985, as amended, by and among the Authorities, the Jurisdictions and the Company, the Jurisdictions and the Lessee desire to enter into that certain Waste Disposal and Service Agreement dated of even date herewith (the "Service Agreement"), pursuant to which the Lessee will continue to accept, process and dispose of the Jurisdictions' solid waste at the Facility, in accordance with the terms and conditions stated in the Service Agreement; and

WHEREAS, as a condition precedent to the execution and delivery of the Service Agreement, the Lessor and Lessee desire to enter into this Amendment No. 1 to amend certain terms and conditions of the Operating Lease Agreement, to be effective on the Effective Date (as such term is defined in the Service Agreement).

NOW, THEREFORE, for valuable consideration, the receipt and sufficiency of which are acknowledged, the Lessor and Lessee agree as follows:

1. Effectiveness. This Amendment No. 1 is contingent upon the execution and delivery of the Service Agreement by the Jurisdictions and Lessee and, following such occurrences, shall become effective on the Effective Date (as such term is defined in the Service Agreement). In the event that the Service Agreement is not executed and delivered by all the parties thereto on or prior to February __, 2012, this Amendment No. 1 shall automatically terminate and be of no further force and effect.

2. Amendments to the Operating Lease Agreement.

(a) The definition of “Facility Agreement” in Section 1.01 of the Operating Lease Agreement is deleted in its entirety and the following is substituted in lieu thereof:

“ ‘**Facility Agreement**’ means the Waste Disposal and Service Agreement dated as of January ___, 2012, by and among the City, the County and the Company, as amended, modified, or supplemented from time to time.”

(b) The following definition of “Change” is hereby added to and inserted in the appropriate alphabetical order to Section 1.01 of the Operating Lease Agreement:

“ ‘**Change**’ means any restoration, modification, addition or alteration to the Facility.”

(c) The following definition of “Guarantor” is hereby added to and inserted in the appropriate alphabetical order to Section 1.01 of the Operating Lease Agreement:

“ ‘**Guarantor**’ means Covanta Holding Corporation, a Delaware corporation and the parent company of the Company.”

(d) The following definition of “Lease Guaranty” is hereby added to and inserted in the appropriate alphabetical order to Section 1.01 of the Operating Lease Agreement:

“ ‘**Lease Guaranty**’ means the guaranty executed by the Guarantor and issued in favor of the Jurisdictions wherein the Guarantor guarantees the obligations of the Company, as set forth in Exhibit C attached to the Facility Site Lease.”

(e) The following definition of “Permitted Encumbrances” is hereby added to and inserted in the appropriate alphabetical order to Section 1.01 of the Operating Lease Agreement:

“ ‘**Permitted Encumbrances**’ means:

(i) liens of contractors, subcontractors, suppliers of goods, materials, equipment or services, or laborers or other like liens arising in the ordinary course of business, in respect of claims which are paid or which liens are discharged within 60 days of the due date thereof or being contested in good faith by appropriate proceedings conducted with due diligence, or deposits made to obtain the release of such liens;

(ii) liens arising in connection with workers’ compensation, unemployment insurance, old age pensions and social security benefits and liens securing appeal and release bonds, provided that adequate provision for the payment of all such obligations has been made on the books of the Company or the Authorities (as the case may be);

(iii) liens incurred or deposits made in the ordinary course of business to secure the performance of tenders, statutory obligations, bids, leases, or government contracts and performance bonds, fee and expense arrangements with trustees and fiscal agents and similar obligations (exclusive of obligations incurred in connection with the borrowing of money or the payment of the deferred purchase price of property);

(iv) (a) any attachment lien being contested in good faith by appropriate proceedings diligently pursued if such lien shall have been duly stayed, and (b) any judgment lien so long as the judgment it secures shall have been discharged or the execution thereof stayed, in either case, prior to the earlier of the commencement of proceedings for the enforcement thereof or 30 days after the entry thereof, and so long as such judgment or attachment shall have been discharged within 30 days after the expiration of any such stay;

(v) liens in respect of taxes, assessments, governmental charges or levies on the Facility or other property of the Issuer, the Authorities or the Company (as the case may be) as to which interest and penalties have not yet accrued or which are being contested in good faith by appropriate proceedings being conducted with due diligence;

(vi) leases permitted under this Agreement;

(vii) any lien, security interest or encumbrance on any real property of the Company or the Authorities (as the case may be) not included in the Facility Site Lease;

(viii) any lien or security interest or encumbrance on the property or the receipts securing the Authorities placed upon any furniture, equipment or other tangible personal property or any fixture being acquired by the Company or the Authorities (as the case may be) at the time of acquisition or within ten days thereafter to secure all or a portion of the purchase price thereof;

(ix) existing easements and title exceptions described in the Facility Site Lease;

(x) such utility, access and other easements, rights of way, restrictions, exceptions, minor defects or irregularities in or clouds on title or encumbrances not arising out of the borrowing of money or the securing of advances of credit as normally exist with respect to properties similar in character to the Facility or the solid waste system revenues and which will not, in the opinion of the Company or the Authorities, interfere with or impair the operations of the Facility in any material respect;

(xi) any lien, security interest or encumbrance on any property of the Company or the Authorities not constituting part of the Facility Site, the Solid Waste System Revenues or the Revenues; and

(xii) the rights of banks in which funds of the Authorities or the Company (as the case may be) shall be deposited in the ordinary course of business of the Authorities or the Company, respectively.

(f) A new Section 1.03 is hereby added to the Operating Lease Agreement immediately after Section 1.02 and shall read in its entirety as follows:

“Section 1.03. Other Capitalized Terms. To the extent an initial capitalized term is used herein but not defined in this Agreement, such term shall have the meaning specified in the Facility Agreement.”

(g) Section 3.02 of the Operating Lease Agreement is deleted in its entirety and the following is substituted in lieu thereof:

“Section 3.02 Term. The term of this Agreement shall commence on the date of execution and delivery of this Agreement and shall terminate upon the earlier to occur of any of the following events:

(a) October 1, 2025, unless subsection (b) of this Section 3.02 is applicable;

(b) December 31, 2038, if and only if prior to October 1, 2025, the Jurisdictions, in their sole discretion, exercise their Extension Option (as defined in the Facility Agreement) in accordance with Section 2.3(c) of the Facility Agreement and the Facility Agreement is extended until December 31, 2038; provided further, however, if, at any time prior to October 1, 2025,

(1) the Facility Agreement is terminated as a result of an Event of Default of the Lessee under Section 10.3 of the Facility Agreement; or

(2) the Lessee fails to accept and Process Acceptable Waste at the Facility delivered by or on behalf of the Jurisdictions (each, a “Performance Event of Default”) and such failure constitutes:

(i) an Event of Default under Section 10.3(b) of the Facility Agreement, taking into account applicable cure periods; provided, that the Jurisdictions have given the Lessee written notice after the occurrence of the Event of Default that such Event of Default will entitle them to terminate the Extension Option under this Section 3.02(b) and such Event of Default is not fully cured within the

period commencing on the date of such written notice and ending six (6) months later (or such earlier time during the 6-month period if the Lessee is not diligently or continuously pursuing such cure); or

(ii) an Event of Default under Section 10.3(f) of the Facility Agreement.

(3) the Lessee fails to pay any amounts due and payable to the Jurisdictions (each, a "Payment Event of Default") and such failure constitutes:

(i) an Event of Default under Section 10.3(a) of the Facility Agreement, taking into account applicable cure periods, provided, that the Jurisdictions have given the Lessee written notice after the occurrence of the Event of Default that such Event of Default will entitle them to terminate the Extension Option pursuant to this Section 3.02(b) and such Event of Default is not fully cured within a thirty (30) day period following the date of such written notice; or

(ii) an Event of Default under Section 10.3(f) of the Facility Agreement.

then the Jurisdictions may, upon written notice to the Lessee, terminate their Extension Option, in which case the term of this Agreement shall expire on October 1, 2025 notwithstanding the Jurisdictions' earlier election of the Extension Option. For purposes of clarity, following the occurrence of an Event of Default (taking into account applicable cure period(s), if any, under Section 10.3 of the Facility Agreement) under Sections 3.02(b)(2)(i), (2)(ii), (3)(i), or (3)(ii) hereof and expiration of the cure period described in such section(s), if applicable, the Lessee shall have no additional cure period and the Jurisdictions may exercise their right to terminate the Extension Option at any time.

(c) the termination of this Agreement under Article VII upon the occurrence of an Event of Default; or

(d) the termination of the Facility Agreement by Lessee in accordance with Section 10.6(c) of the Facility Agreement."

(h) Section 4.06 of the Operating Lease Agreement is deleted in its entirety and the following is substituted in lieu thereof:

"Section 4.06 Liens and Encumbrances. On or before the last day of the Term, Lessee shall discharge any liens placed on the Facility Improvements, other than any Permitted Encumbrances."

(i) A new subsection (h) of Section 7.01 is hereby added to the Operating Lease Agreement immediately after subsection (g) of Section 7.01 and shall read in its entirety as follows:

“(h) at anytime after October 1, 2025 (if the Facility Agreement is extended until December 31, 2038 in accordance with Section 2.3(c) of the Facility Agreement), there is an Event of Default on the part of the Company under and as defined in the Facility Agreement to (1) accept and Process Acceptable Waste delivered by or on behalf of the Jurisdictions at the Facility or (2) pay any amounts due and payable to the Jurisdictions, or both, in each case, in accordance with, and as required by, the Facility Agreement that is not cured within the applicable cure period specified in Section 10.3 of the Facility Agreement; or”

(j) A new subsection (i) of Section 7.01 is hereby added to the Operating Lease Agreement immediately after subsection (h) of Section 7.01 and shall read in its entirety as follows:

“(i) The failure of the Guarantor to comply with its obligations under the Lease Guaranty in accordance with the terms and conditions therein.”

(k) The last paragraph of Section 7.01 of the Operating Lease Agreement is deleted in its entirety and the following is substituted in lieu thereof:

“The provisions of subsection (d) of this Section are subject to the following limitation: If by reason of an Event of Force Majeure (as defined in the Facility Agreement), Lessee is unable in whole or in part to carry out its agreements herein contained, Lessee shall not be deemed in default during the continuance of such inability and no Event of Force Majeure shall be deemed to have occurred so long as Lessee shall seek diligently and in good faith to overcome or remove the Event of Force Majeure as soon as possible; provided, that the settlement of strikes, lockouts and other industrial disturbances shall be entirely within the discretion of Lessee, and Lessee shall not be required to make settlement of strikes, lockouts and other industrial disturbances by acceding to the demands of the opposing party when such course, if in the judgment of Lessee, is unfavorable to Lessee. Nothing in this paragraph shall affect the rights of Lessee or Lessor under the Facility Agreement associated with an Event of Force Majeure.”

(l) Subsection (f) of Section 8.03 of the Operating Lease Agreement is deleted in its entirety and the following is substituted in lieu thereof:

“(f) Lessee agrees with each Authority that it will protect, indemnify and hold the Authorities and the Jurisdictions harmless from and against all penalties, fines and charges of any federal, state or local government having jurisdiction over the Project, liabilities, actions, damages, claims, demands, judgments, losses, costs, expenses, suits or actions and attorneys’ fees, and will defend such Authorities and Jurisdictions in any suit or action (including appeals) arising from any violation of Applicable Law by Lessee, in connection with or as a result of this Agreement or the performance of its

obligations hereunder; provided, however, that Lessee shall not be responsible for a violation that was the result of the willful misconduct or negligent acts or omissions of any such Authority or Jurisdiction or a violation that would be caused by a Change made upon the request of the Jurisdictions under Section 13.6 of the Facility Agreement at their own expense if the plans and specifications for the Change were submitted to Lessee and Lessee notified the Jurisdictions that the Change might cause a violation of Applicable Law of the type indemnified against or if the Applicable Law violated was not in effect when plans and specifications were reviewed by Lessee. Each Authority and Jurisdiction shall promptly notify Lessee of the assertion of any claim against which it is indemnified hereunder, shall give Lessee the opportunity to defend such claim, and shall not settle such claim without the approval of Lessee. The indemnification provisions contained in this paragraph are for the protection of the Authorities and Jurisdictions only and shall not establish, of themselves, any liability to third parties.”

2. Representations and Warranties.

(a) Lessee hereby represents and warrants to the Lessor that:

(i) this Amendment No. 1 constitutes its legal, valid and binding obligation, enforceable against Lessee in accordance with its terms; and

(ii) on the date hereof, no Event of Default has occurred and is continuing.

(b) Lessor hereby represents and warrants to the Lessee that this Amendment constitutes its legal, valid and binding obligation, enforceable against Lessor in accordance with its terms.

3. Incorporation into Operating Lease Agreement. The provisions of this Amendment No. 1 are essential components of the Operating Lease Agreement and, as such, shall be incorporated into and are hereby made an essential part thereof.

4. Full Force and Effect. Except as expressly modified herein, all other terms and provisions set forth in the Operating Lease Agreement shall remain in full force and effect and shall not otherwise be affected by this Amendment No. 1. This Amendment No. 1 shall be binding upon and inure to the benefit of the parties hereto, and their respective successors and assigns, and shall be governed by and construed under the laws of the Commonwealth of Virginia. No amendment, waiver, supplement or other modification of this Amendment No. 1 shall be effective unless made in writing and executed by each of the parties hereto.

5. Counterparts. This Amendment may be executed in any number of counterparts and by different parties hereto in separate counterparts, each of which when so executed and delivered shall be deemed to be an original and all of which taken together shall constitute but one and the same instrument. Delivery of an executed counterpart of a signature page to this Amendment by

telecopier or electronic delivery shall be effective as delivery of a manually executed counterpart of this Amendment No. 1.

[SIGNATURE PAGE FOLLOWS]

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IN WITNESS WHEREOF, the parties have duly executed this Amendment No. 1 as of the date first mentioned above.

ATTEST:

CITY OF ALEXANDRIA, VIRGINIA
SANITATION AUTHORITY

By: _____
Name: _____
Title: _____

[seal]

By: _____
Name: _____
Title: _____

ATTEST:

ARLINGTON COUNTY SOLID WASTE
AUTHORITY

By: _____
Name: _____
Title: _____

[seal]

By: _____
Name: _____
Title: _____

ATTEST:

COVANTA ALEXANDRIA/ARLINGTON, INC.

By: _____
Name: _____
Title: _____

[seal]

By: _____
Name: _____
Title: _____