


12.11.12 # 25

TO: The Honorable Chairman and Members of the
Board of County Commissioners

FROM: James L. Bennett, County Attorney 

SUBJECT: Recommendation for Approval of the Revision to the "Transfer Closing Date" in
Amendment No. 5 of the Pinellas County Resource Recovery Service Agreement

DATE: December 11, 2012

RECOMMENDATION: I RECOMMEND THAT THE BOARD OF COUNTY COMMISSIONERS APPROVE A REVISION TO AMENDMENT NO. 5 OF THE PINELLAS COUNTY RESOURCE RECOVERY SERVICE AGREEMENT EXTENDING VEOLIA ES PINELLAS, INC.'S TRANSFER CLOSING DATE FROM NOVEMBER 30, 2012 TO DECEMBER 21, 2012.

DISCUSSION: On September 18, 2012, the Board of County Commissioners approved Amendment No. 5 to the Pinellas County Resource Recovery Facility Service Agreement with Veolia ES Pinellas, Inc. ("Veolia"), Dover, Delaware, for Waste-to-Energy Facility Operator Reprocurement Services. On October 30, 2012, the Board of County Commissioners approved a revision to Amendment No. 5 extending the transfer closing date to November 30, 2012. Amendment No. 5 facilitates an ownership change from Veolia's parent corporation to Green Conversion Systems, LLC. Paragraph 2(d) of the Amendment provides that by November 30, 2012, an assumption of the guaranty, new performance bonds, and new letter of credit would be in place. Veolia would like an extension of time to December 21, 2012, to complete all their required activities related to finalizing these documents.

The Administrator and the County Attorney support this extension of time.

The current Paragraph 2(d) reads:

(d) Transfer Closing Date. The Transfer Closing shall have occurred no later than November 30, 2012, absent which this Amendment shall be null and void, *ab initio*.

It would be revised to read:

(d) Transfer Closing Date. The Transfer Closing shall have occurred no later than December 21, 2012, absent which this Amendment shall be null and void, *ab initio*.

A copy of the revised Amendment No. 5 is attached.

JLB:JAM:elb

Attachment

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**AMENDMENT NO. 5 TO THE
PINELLAS COUNTY RESOURCE RECOVERY
FACILITY SERVICE AGREEMENT**

THIS AMENDMENT NUMBER 5 (this "Amendment No. 5") **TO THE PINELLAS COUNTY RESOURCE RECOVERY FACILITY SERVICE AGREEMENT** (the "Service Agreement") is made and entered into as of this ____ day of _____, 2012, by and between **PINELLAS COUNTY, FLORIDA** (the "County"), a political subdivision of the State of Florida, acting by and through its Board of County Commissioners, and **VEOLIA ES PINELLAS, INC.** (the "Contractor"), a Delaware corporation having its principal place of business at 3001 110th Ave., St. Petersburg, Florida, and authorized to do business in the State of Florida. The County and the Contractor may be referred to herein as the "Party" or "Parties," as the context or the usage of such term may require.

RECITALS

WHEREAS, the County and the Contractor entered into the Service Agreement on January 23, 2007, which Service Agreement was subsequently amended by Amendment Nos. 1, 2, 3 and 4 (hereinafter, reference to the term "Service Agreement" shall be deemed to include and be amended by Amendment Nos. 1, 2, 3 and 4);

WHEREAS, the Contractor commenced the construction activities, management, operation and maintenance of the Facility on May 6, 2007;

WHEREAS, the parent company of the Contractor, Veolia ES Montenay Holding LLC, a Delaware limited liability company, desires to transfer all of the stock in the Contractor to Green Conversion Systems LLC, a Delaware limited liability company ("GCS"), and thereafter GCS desires to change the name of the Contractor to Green Conversion Systems Pinellas, Inc. (such stock transfer and name change being herein referred to as the "Ownership Change");

WHEREAS, concurrent with the Ownership Change, the Parties desire (i) for Veolia Environmental Services North America Corp., a Delaware corporation (the "Original Guarantor"), to assign the Guaranty to GCS, and for GCS to assume all such obligations and liabilities thereunder, (ii) to effect an increase in the face amount of the Security Instruments in recognition of the Ownership Change and the assignment of the Guaranty in order to provide the County with satisfactory continuing recourse and security for performance of the Contractor's obligations under the Service Agreement; (iii) to effect a release of the Original Guarantor; and (iv) to identify and establish dates certain for the construction, installation, repair or replacement, of certain Facility-related items and to incorporate the same as part of the Standards of Maintenance (clauses (i) through (iv) are collectively referred to hereafter as the "Ownership Change Actions"); and

WHEREAS, the parties desire to enter into this Amendment No. 5 to reflect their agreements relating to the Ownership Change Actions.

NOW, THEREFORE, in consideration of the mutual promises and covenants of each to the other contained in this Amendment No. 5 and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the Contractor and the County do hereby covenant and agree as follows:

1. Definitions. Except as otherwise expressly defined herein, initial capitalized terms used herein shall have the meanings assigned them in the Service Agreement.

2. Conditions to County's Consent to Ownership Change Actions. The County's consent to the Ownership Change Actions is expressly conditioned upon the following actions (the "Transfer Conditions"), which shall be effected at or prior to the closing and effectiveness of the Ownership Change (the "Transfer Closing"):

(a) Assignment and Assumption of Original Guaranty. The Original Guarantor and GCS shall execute and deliver to the County the Assignment and Assumption Agreement in the form of Attachment A attached hereto (the "Assignment");

(b) Substitute Security Instruments. The following actions shall have been satisfied with respect to the Security Instruments:

(i) Performance Bond. To the extent one or both Performance Bonds is in effect pursuant to Section 11.4(b) on the date of the Transfer Closing, the issuer of such Performance Bonds shall have reaffirmed its obligations to the County under such Performance Bond(s) by execution and delivery to the County of a written reaffirmation in the form of Attachment B hereto (the "Performance Bond(s) Reaffirmation"). In the event that Performance Bond(s) are in effect on the date of the Transfer Closing and if a Performance Bond Reaffirmation is not delivered to the County at or prior to the Transfer Closing, GCS, at or prior to the Transfer Closing, shall secure and caused to be issued to Green Conversion Systems of Pinellas, Inc., or cause Green Conversion Systems of Pinellas, Inc. to secure and have issued, a substitute Performance Bond(s) satisfying the requirements of Section 11.4, as amended by Section 5 of this Amendment No. 5.

(ii) Substitute Letter(s) of Credit - Contractor. To the extent Green Conversions Systems of Pinellas, Inc. secures one or both Letter(s) of Credit pursuant to Section 11.4(c) in satisfaction of Section 11.4, as amended by Section 5 of this Amendment No. 5, Green Conversions Systems of Pinellas, Inc. shall issue the same in favor of the County, and the County shall have received, the Letter(s) of Credit, which substitute Letter(s) of Credit shall be for the account and benefit of the County on and after the Transfer Closing.

(c) Confirmation Letters. Letters of confirmation from GCS financial backers or support facilities and GCS, in each case, acknowledging receipt and acceptance of the CDM Smith Inspection Report (Schedule 23) and the document entitled the "Pinellas Maintenance Plan" dated June 2012 forwarded under cover letter dated June 18, 2012 from Christopher Neu, Vice President/Facility Manager, Veolia Environmental Services to the Director. The Parties acknowledge that the "Pinellas Maintenance Plan" is subject to annual review and modification.

(d) Transfer Closing Date. The Transfer Closing shall have occurred no later than December 21, 2012, absent which this Amendment shall be null and void, *ab initio*.

3. Security Instruments. If the outstanding capital stock of Contractor is sold by Veolia ES Montenay Holding LLC ("Prior Owner") to GCS and one or more Security Instruments are secured and maintained by an affiliate of the Prior Owner and one or more Security Instruments are secured and maintained by or on behalf of GCS, the County agrees that it will use commercially reasonable efforts to seek to collect payment in respect of the Security Instrument(s) secured and maintained by GCS prior to seeking to collect payment in respect of any Security Instrument secured and maintained by or on behalf of the affiliate of Prior Owner, provided that the County is not obligated to exhaust any or all rights and remedies against GCS before resorting to Security Instruments secured or maintained by the Prior Owner.

4. Release of Original Guarantor. At or prior to the Transfer Closing, provided that all the Transfer Conditions have been satisfied, the County shall execute and deliver to Veolia ES North America, Inc. a release in the form of Attachment C attached hereto (the "Release").

5. Increase in Amount of Security Instruments. Section 11.4(a) of the Service Agreement is amended by striking the words and number "ten million dollars (\$10,000,000.00)" whenever the same appears in such Section 11.4(a) and insisting in lieu thereof, thirteen million dollars (\$13,000,000.00)".

6. Limitation of Liability Reduction Recognition. The first paragraph of Section 11.2.1 is amended by adding the following to the end thereof:

THE PARTIES RECOGNIZE AND AGREE THAT DURING THE TERM OF THIS AGREEMENT PRIOR TO THE DATE OF AMENDMENT NO. 5 THAT VEOLIA ES PINELLAS, INC., THE PRIOR NAMED CONTRACTOR, HAD INCURRED AND PAID DAMAGES TO THE COUNTY AND ACCORDINGLY, THE LIMITATION OF LIABILITY AMOUNT SPECIFIED ABOVE HAS BEEN REDUCED BY SUCH AMOUNT OF DAMAGES SO INCURRED AND PAID BY SUCH PRIOR NAMED CONTRACTOR. THE PARTIES FURTHER RECOGNIZE AND AGREE THAT ANY PAYMENTS OF AMOUNTS TO THE COUNTY BY THE GUARANTOR UNDER THE GUARANTY WITH RESPECT TO THE CONTRACTOR'S LIMITATION OF LIABILITY SHALL BE DEEMED TO BE FOR THE ACCOUNT OF THE CONTRACTOR FOR PURPOSES OF THIS SECTION 11.2.1.

7. Facility Repairs, Replacements and Improvements. In addition to, and not in substitution of, the requirements of the Service Agreement, the Contractor shall promptly undertake and complete, or if undertaken, complete the punch list items identified in Schedule 23 (CDM Smith Inspection Report) by the completion dates prescribed therein. If the Contractor fails to complete each such punch list item in the time prescribed, the County shall, for purposes of Schedule 23 (CDM Smith Inspection Report), have the rights and remedies specified in Section 6 of the Service Agreement as if such items were Punch List Items, provided that the Parties' rights pursuant to Sections 6.1 and 6.2 of the Service Agreement shall, solely for purposes of this Section 7 of this Amendment No. 5, not be applicable. The Service Agreement is amended by adding Schedule 23 (CDM Smith Inspection Report) to the list of Schedules.

8. Acknowledgments. The County acknowledges that the Service Agreement is in full force and effect and the County is not aware of any disputes, offsets, claims, counterclaims or Events of Default existing under the Service Agreement against the Contractor, other than as specified in Exhibit 1 hereto. There have been no prepayments made to the Contractor under the Service Agreement, and except for outstanding accounts receivable owed as of the date of this Amendment No. 5, there are no monies owed to the Contractor under the Service Agreement.

9. Amendment Effectiveness. This Amendment No. 5 shall be effective upon satisfaction of the Transfer Conditions and delivery of the Release by the County to the Original Guarantor.

10. Full Force and Effect. Except as specifically amended, terminated or otherwise modified above, the terms and conditions of the Service Agreement and any other documents, instruments and agreements executed or delivered or both, in connection therewith, shall remain in full force and effect and are hereby ratified and confirmed.

11. Execution in Counterparts. This Amendment No. 5 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 No. 5 by telecopier or PDF file shall be effective as delivery of a manually executed counterpart of this Amendment No. 5.

12. Governing Law. This Amendment No. 5 shall be governed by and construed in accordance with the laws of the State of Florida.

13. Headings. Section headings in this Amendment No. 5 are included herein for convenience of reference only and shall not constitute a part of this Amendment No. 5 for any other purpose.

[Signature Page Follows]

IN WITNESS WHEREOF, each of the Contractor and the County has caused this Amendment No. 5 to be executed in its name by its duly authorized officials or officers and has caused its seal to be affixed to this Amendment No. 5 on the day first written above.

ATTEST

PINELLAS COUNTY

By: _____
Name: _____
Title: Clerk of the Circuit Court

By: _____
Name: _____
Title: Chairman of the Board of
County Commissioners

ATTEST

VEOLIA ES PINELLAS, INC.

By: _____
Name: _____
Title: Secretary

By: _____
Name: _____
Title: President

APPROVED AS TO FORM:

OFFICE OF THE COUNTY ATTORNEY

By: Joseph A. Moroney
Attorney

Attachment A

Form of Assignment and Assumption Agreement

ASSIGNMENT AND ASSUMPTION AGREEMENT

THIS ASSIGNMENT AND ASSUMPTION AGREEMENT (this "Agreement") is made and entered into as of _____, 2012, by and among VEOLIA ENVIRONMENTAL SERVICES NORTH AMERICA CORP., a Delaware corporation ("Assignor"), GREEN CONVERSION SYSTEMS, LLC, a Delaware limited liability company ("Assignee"), and PINELLAS COUNTY, FLORIDA, a political subdivision of the State of Florida, acting by and through its Board of County Commissioners (the "County").

WHEREAS, the County and Veolia ES Pinellas, Inc., a Delaware corporation ("Contractor"), entered into the Service Agreement on January 23, 2007, which Service Agreement was subsequently amended by Amendment Nos. 1, 2, 3 and 4 (hereinafter, reference to the term "Service Agreement" shall be deemed to include and be amended by Amendment Nos. 1, 2, 3 and 4);

WHEREAS, as consideration and inducement for the County to enter into the Service Agreement, the Assignor executed the Guaranty dated as of January 14, 2011 (the "Guaranty") on the account of and for the benefit of the County guaranteeing thereunder all the performance and payment obligations of the Contractor under the Service Agreement;

WHEREAS, the Contractor and the County propose to enter into and execute Amendment No. 5 to the Service Agreement ("Amendment No. 5") which amendment, in part, recognizes and consents to (a) the Ownership Change Actions (as defined in said Amendment No. 5) and (b) the assignment by Assignor to Assignee of all rights, obligations and liabilities of Assignor in, to and under the Guaranty, and the assumption by Assignee of all of Assignor's rights, obligation and liabilities thereunder;

WHEREAS, execution and delivery of this Agreement by the parties is an express condition to the County's consent to the Ownership Change Actions as described in Amendment No. 5 to the Service Agreement; and

WHEREAS, the County is made a party to this Agreement in order to assure that it can enforce directly against the Assignee its obligations under the Guaranty.

NOW, THEREFORE, in consideration of the premises and the mutual covenants and agreements made herein, and intending to be legally bound, the parties hereby agree as follows:

1. Assignment and Assumption. Assignor hereby assigns, transfers, and conveys to Assignee, all rights, obligations and liabilities of Assignor in, to and under the Guaranty. Assignee hereby assumes all rights, obligations and liabilities of Assignor in, to and under the Guaranty and hereby agrees to be bound by the Guaranty and to perform all obligations of the Guarantor thereunder, whether such obligations accrued prior to the date hereof or accrue on or subsequent to the date hereof.

2. Reaffirmation of Guaranty. The Assignee reaffirms, for the benefit of the County, all terms and conditions of the Guaranty. The Assignee waives any defenses to enforcement of the

Guaranty arising from or in connection with the Ownership Change Actions. Notwithstanding anything to the contrary, neither this Agreement nor the Ownership Change Actions shall affect in any way any claim that has been asserted in writing under the Guaranty prior to the date hereof.

3. County's Rights of Direct Enforcement. In consideration of the County's consent to the Ownership Change Actions and the transactions effected by this Agreement, the parties agree that the County shall have the right to enforce the Guaranty against the Assignee, as a primary obligation, without any requirement to pursue claims against or through the Assignor. As such, from and after the date hereof, the Assignee shall be treated in all respects as, and shall be, the Guarantor under the Guaranty. The County may proceed and enforce directly against the Assignee, as Guarantor, any and all claims, rights or actions under the Guaranty, regardless of whether such claims, rights or actions arise from or relate to the period before or after the date hereof.

4. Further Assurances. The parties agree to execute and deliver such additional documents and instruments and to take such further actions as may be necessary or appropriate to carry out the transactions contemplated hereby.

5. Governing Law. This Agreement shall be made under, and shall be construed in accordance with, the laws of the State of Florida, without giving effect to conflict of laws principals thereof.

6. Successors and Assigns. Each and all of the covenants, terms, provisions, and agreements herein contained shall be binding upon and inure to the benefit of the parties hereto, and their respective legal representatives, successors, and assigns.

7. Counterparts. This Agreement may be signed in any number of counterparts, each of which shall be construed as an original, but all of which together shall constitute one and the same instrument.

[Signature Page Follows]

IN WITNESS WHEREOF, the undersigned have executed this Agreement on the date first above written.

ASSIGNOR:

VEOLIA ENVIRONMENTAL SERVICES
NORTH AMERICA CORP.

By: _____

Name:

Title:

ASSIGNEE:

GREEN CONVERSION SYSTEMS, LLC

By: _____

Name:

Title:

COUNTY:

PINELLAS COUNTY

By: _____

Name:

Title:

Attachment B

Form of Reaffirmation of Performance Bond

[Letterhead of Performance Bond Issuer]

REAFFIRMATION OF PERFORMANCE BOND

_____, 2012

Pinellas County, Florida

[Address]

[Address]

Ladies and Gentlemen:

Reference is made to (i) that certain Service Agreement dated as of January 23, 2007, as amended by Amendment Nos. 1, 2, 3 and 4 (hereinafter, reference to the term "Service Agreement" shall be deemed to include and be amended by Amendment Nos. 1, 2, 3 and 4), by and between Pinellas County, Florida, a political subdivision of the State of Florida, acting by and through its Board of County Commissioners (the "County"), and Veolia ES Pinellas, Inc., a Delaware corporation (the "Contractor"); and (ii) that certain Performance Bond dated as of January 11, 2007, and continued as of January 11, 2012, issued by the undersigned in favor of the County on behalf of the Contractor, a copy of which is attached hereto (the "Performance Bond"). Concurrent with effectiveness of Amendment No. 5 to the Service Agreement, the name of the Contractor has been changed from Veolia ES Pinellas, Inc. to Green Conversion Systems Pinellas, Inc. Capitalized terms that are used herein and not otherwise defined herein shall have the respective meanings assigned thereto under the Service Agreement.

The undersigned (i) reaffirms all of its obligations under the Performance Bond, (ii) acknowledges that the County enjoys the benefits of the Performance Bond, and (iii) acknowledges and agrees that the Performance Bond remains in full force and effect, including, without limitation, after giving effect to (a) the amendment to the Service Agreement pursuant to that certain Amendment No. 5 to the Pinellas County Resource Recovery Facility Service Agreement, dated as of the date hereof, and (b) the Ownership Change of the Contractor as defined and described in Amendment No. 5. The undersigned waives any defense to enforcement of the Performance Bond arising from the Ownership Change of the Contractor.

[Signature Page Follows]

Very truly yours,

[Performance Bond Issuer]

By: _____

Name:

Title:

STATE OF _____)

CITY/COUNTY OF _____)

The foregoing instrument was acknowledged before me, _____,
Notary Public, this ____ day of _____, 2012, by _____, who has
presented identification of _____. _____ voluntarily acknowledged
this instrument as _____ of _____, on behalf of the
_____.

Notary Public

Registration Number: _____

My commission expires: _____

Notary Seal

PERFORMANCE BOND

[ATTACHED]

Attachment C

Form of Release

RELEASE

THIS RELEASE dated as of _____, 2012, is being executed and delivered by PINELLAS COUNTY, FLORIDA, a political subdivision of the State of Florida, acting by and through its Board of County Commissioners (the "County"), in favor of VEOLIA ENVIRONMENTAL SERVICES NORTH AMERICA CORP., a Delaware corporation (the "Original Guarantor"), in accordance with Section 4 of Amendment No. 5 dated _____, 2012 ("Amendment No. 5") to Service Agreement dated January 23, 2007, as amended, by and between VEOLIA ES PINELLAS, INC., a Delaware corporation (the "Contractor"), and the County. Capitalized terms used but not otherwise defined herein shall have the meanings ascribed to such terms in Amendment No. 5.

The Contractor has advised the County that the Contractor's parent company is selling all of the issued and outstanding capital stock of the Contractor to GCS Opco, LLC, a Delaware limited liability company, an affiliate of Green Conversion Systems LLC, a Delaware limited liability company (the "New Guarantor"). In connection with such sale, and in accordance with Amendment No. 5, the New Guarantor has executed and delivered to the Contractor and the County an Assignment and Assumption Agreement in the form of Attachment A to Amendment No. 5 (the "Assumption").

Section 12 of the Guaranty provides that "no assignment or transfer of rights or obligations by [Original] Guarantor shall relieve it from the full liabilities and the full financial responsibility, as provided for under this Guaranty, unless and until the transferee or assignee shall agree in writing to assume such obligations and duties and the County has consented in writing to such assumption."

The County (a) hereby consents to the assumption of the Guaranty by the New Guarantor, and (b) agrees that the Original Guarantor shall be, and hereby is, fully and completely relieved of, and released from, all of its obligations under the Guaranty, including, without limitation, the full liabilities and the full financial responsibility, as provided for under the Guaranty. The County acknowledges that the Original Guarantor is relying upon the County's consent set forth in this Release.

If any provision of this Release is held invalid or unenforceable by any court of competent jurisdiction, the other provisions of this Release will remain in full force and effect. This Release may not be changed except in a writing signed by the person(s) against whose interest such change shall operate. This Release shall be governed by and construed under the laws of the State of Florida without regard to principles of conflicts of law.

[Signature Page Follows]

IN WITNESS WHEREOF, the undersigned has executed and delivered this Release as of the date first set forth above.

ATTEST

PINELLAS COUNTY

By: _____
Name: _____
Title: Clerk of the Circuit Court

By: _____
Names: _____
Title: Chairman of the Board of
County Commissioners

APPROVED AS TO FORM:

By: _____
Name: _____
Title: Office of the County Attorney

Exhibit 1

Outstanding Issues With the Contractor

Exhibit 1 to Amendment Number 5

The following list provides a summary of known disputes, offsets, claims, counterclaims or events of default asserted by the County against the Contractor under the Service Agreement as of the date of this Amendment No. 5. This list has been prepared by the County at the request of the Contractor, and the attachment of this list to Amendment No. 5 does not represent the Contractor's agreement with any of the items on this list, all of which the Contractor reserves the right to dispute.

1. Pending approval of Amendment Number 4 to the Service Agreement, Veolia is in default for failure to maintain the Electrical Capacity Factors under Section 12.2.9 of the Service Agreement. Amendment number 4 grants certain relief for lack of waste and for a specific period of time for the maintenance of the capacity factors.
2. Pending approval of Amendment Number 4 to the Service Agreement, there are three outstanding force majeure claims enumerated in Section 23 of Amendment Number 4. In short these include: (a) the data provided by the County and used to develop the baseline for determining PSD compliance was alleged by Veolia to be erroneous and flawed, (b) Veolia alleges that a purported change in Permit interpretation by the DEP results in a reduction in the throughput capacity of the Facility and (c) whether the County's failure to deliver the Guaranteed Tonnage is County Fault or a Force Majeure under the Service Agreement. Amendment Number 4 waives and dismisses these Force Majeure claims with some specific exceptions.
3. FDEP has pending enforcement action(s) for continued violation of the carbon monoxide (CO) permit limitations and the U. S. EPA is also interested in these violations.
4. FDEP previously took enforcement action and levied a \$49,600 fine for violations of air permit emissions limitations, the payment of which is in dispute between the Parties
5. The contractor is presently out of compliance with the Standards of Maintenance and the County is presently withholding \$153,000 under the terms of the Service Agreement for such failure to comply with the Standards of Maintenance.
6. The Section 6.1 Consulting Engineer's Inspection Report – Punch List Items, dated August 20, 2012 contains an extensive list of items requiring repair and timeframes to cure the respective items.
7. The Contractor has responsibility for replacing the retaining rings on turbine-generator 1 during the next scheduled TG 1 outage at agreed upon cost.
8. The County and Veolia are in receipt of FDEP's proposed modifications to the PSD permit which include some changes that could result in change in law claims under the Service Agreement.
9. Other potential issues: (i) ongoing or pending lawsuits related to the two deaths that occurred at the Facility; (ii) ongoing or pending lawsuits by former employees; (iii) potential actions related to recent OSHA claim(s).

Schedule 23

CDM Smith Inspection Report