

ORDINANCE NO. 2014-08-26-001

AN ORDINANCE OF THE CITY OF KEMPNER, TEXAS, GRANTING J & H DISPOSAL COMPANY, CERTAIN POWERS, LICENSES, PRIVILEGES AND FRANCHISE TO OPERATE A COMMERCIAL SOLID WASTE (GARBAGE AND REFUSE) COLLECTION BUSINESS WITHIN THE CITY; TO USE THE STREETS, AVENUES, EASEMENTS, RIGHTS-OF-WAY, ALLEYS, HIGHWAYS, SIDEWALKS, AND BRIDGES IN SAID CITY FOR A PERIOD OF FIVE (5) YEARS; PRESCRIBING CERTAIN RIGHTS, DUTIES, TERMS AND CONDITIONS; PROVIDING FOR THE PAYMENT TO THE CITY OF A PERCENTAGE OF GROSS RECEIPTS OF GRANTEE, FROM ITS OPERATIONS; PROVIDING FOR ACCEPTANCE; AND PROVIDING FOR CERTAIN RELATED MATTERS.

WHEREAS, J & H DISPOSAL Company, (the “Company”) operates a garbage and refuse collection business within the City of Kempner (the “City”);

WHEREAS, the City Council believes it is in the best interest of the City to offer the Company a franchise on the terms and conditions set forth in this ordinance;

NOW, THEREFORE, BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF KEMPNER, TEXAS, THAT:

Section 1. Definitions.

1.0 For the purposes of this ordinance, when not inconsistent with the context, words, used in the present tense include the future tense, words in the plural include the singular, and words in the singular include the plural, and the use of any gender shall be applicable to all genders whenever the sense requires. The words “shall” and “will” are mandatory and the word “may” is permissive. Words not defined in this Section 1 shall be given their common and ordinary meaning.

1.1 For the purposes of this ordinance, the following words, terms, phrases and their derivations shall have the meaning given in this Section 1.1.

1.1.2 “City” shall mean the City of Kempner, Texas, a municipal corporation in the State of Texas.

1.1.3 “Company” shall mean the J & H Company, its legal representatives, successors, lessees and assigns.

1.1.4 “City Secretary” shall mean the City Secretary/City Clerk of the City.

1.1.5 "Consumer" or "Customer" shall mean any person or organization within the City limits of the City that contract with the Company for garbage and refuse collection services.

1.1.6 "Council" shall mean the governing body of the City.

1.1.7 "Franchise" shall mean this Ordinance, and all rights and obligations established herein to provide solid waste services or as it may be amended.

1.1.8 "Gross receipts" shall mean the total amount collected by Company from any and all customers for solid waste services within the boundaries of the City.

1.1.9 "Solid Waste Services" shall mean the collection and hauling of residential and business solid waste, e.g. garbage, trash and refuse, for disposal at a state licensed landfill; and the actions and services directly related thereto or necessary for the provision of such services to consumers or customers in the City.

1.1.10 "Street" or "alley" shall mean a publicly dedicated or maintained right-of-way, a portion of which is open to use by the public or vehicular travel.

Section 2. Grant of Franchise.

2.1 There is hereby granted to Company a non-exclusive franchise to maintain, establish and operate in the City, as constituted as of the effective date of this ordinance, or as may hereafter be constituted, solid waste services as appropriate to sell, serve, supply and furnish the inhabitants of City and others, and to the City, whenever the City may desire to contract therefor, solid waste services and said Company is hereby granted passage and right-of-way in, along, over and across the streets, avenues, easements, right-of-ways, alleys, highways, sidewalks, bridges and other structures and places of the City, and the right to use in any lawful way during the term of this Franchise any streets, avenues, easements, right-of-ways, alleys, highways, sidewalks, bridges and other structures and places of the City, as they now or hereafter may exist, for the purpose of operating vehicles for the purpose of collecting and hauling garbage, trash and refuse as herein mentioned; provided that all such work, activity and undertakings by the Company shall be subject to the terms and provisions of this Franchise and the continuing exercise by the City of its governmental and police powers; and provided further that nothing herein shall be construed to require or authorize Company to exceed any rights granted herein or by state or federal law.

2.2 The maintenance and operation of the solid waste services and property of Company within the City shall be subject to this Franchise and the ordinances and regulations adopted by the Council in the exercise of the City's police and regulatory powers.

2.3 The term of this Franchise shall be for a period of five (5) years from the date this Ordinance is finally adopted by the Council upon acceptance by Company as herein provided.

2.4 The Company shall not transfer this Franchise nor any rights and privileges granted herein without the written approval of the Council expressed by Ordinance. Such approval shall not be unreasonably withheld.

2.5 Nothing contained in this Franchise shall be construed as granting any exclusive franchise or right.

Section 3. Use of Streets and Easements.

The Company is hereby authorized, licensed and empowered to do any and all things necessary and proper to be done and performed in executing the powers and utilizing the privileges herein mentioned and granted by this Franchise, provided the same do not conflict with the traffic codes and ordinances, with existing sewers, electric power lines, telephone lines, cable television lines and other authorized installations, and provided that all work done in said streets, avenues, easements, rights-of-way, alleys, highways, sidewalks, bridges and other structures and places and public grounds by the Company shall be limited to the collection and hauling of garbage, trash and refuse with reasonable diligence and without unnecessary inconvenience to the public or individuals.

Section 4. Service to be Provided by Company.

4.1 Service may be provided by means of hauling, collection and travel in the streets, alleys, easements, and other public rights-of-way. The Company shall not place its equipment and appurtenances where the same will obstruct or interfere with motor vehicle traffic, or any existing television cable, electric, drainage, sewer or telephone facilities, traffic control signalization, street lights, fire lines or communication lines, be unsightly, or constitute a nuisance. The Council may require the relocation or screening of any containers or bins.

4.2 The Company shall furnish service consistent with the requirements and intent of this Franchise and its "service regulations" as now or hereafter adopted by the Company; provided that, consistent with such regulations, the Company shall provide service to all areas of the City, and shall be subject to the police powers and regulations of the City.

4.3 The Company's trucks, equipment and appurtenances shall be used and operated so that none of such shall unreasonably endanger the lives of persons, unreasonably interfere with any public improvements the City may deem proper to make, be unsightly or constitute a nuisance, or obstruct the free use of the streets, alleys, bridges, easements or public property.

Section 5. Company Rules and Regulations.

5.1 The Company's rates, rules and regulations shall be and remain in effect as adopted and amended from time to time; provided that should such conflict with an ordinance of the City, the requirements of the ordinance shall govern.

5.2 Company shall be entitled to require from each and every customer to make such deposits and payments as required by the Company, and to comply with the rules and regulations adopted by the Company.

Section 6. Franchise and Rental Fees.

6.1 The streets, rights-of-way, and public easements to be used by the Company in the operation of its business within the boundaries of the City as such boundaries exist as of the effective date of this ordinance, are valuable public properties acquired and maintained by the City at great expense to its taxpayers, without which the Company would be required to invest in right-of-way costs and acquisitions, and since the City will incur costs in regulating and administering this Franchise, the Company shall through the term of this Franchise pay to the City five percent (5%) of the Company's total gross revenues (exclusive of Texas Limited Sales Tax) each calendar quarter collected from customers and consumers within the corporate limits of the City under the Company's rates effective from time to time.

6.2 The franchise fee shall be in lieu of any and all other city imposed rentals or compensation or franchise, license, privilege, instrument, occupation, excise or revenue taxes or fees and all other exactions or charges (except as and when applicable ad valorem property taxes, special assessments for local improvements, city sales tax, and such other charges imposed uniformly upon persons, firms or corporations then engaged in business within the City) or permits relating to the business, revenue, equipment and all other property of the Company and its activities, or any part thereof, in the City which relate to the operations of the Company's solid waste services.

6.3 Should the City not have the legal power to agree that the payment of the foregoing sums of money shall be in lieu of licenses, fees, street or alley rentals or charges, easement or franchise taxes or charges aforesaid, then City agrees that it will apply so much of said sums of money paid as may be necessary to satisfy Company's obligations, if any, to pay any such licenses, charges, fees, rentals, easement or franchise taxes or charges.

Section 7. Insurance Provided by Company.

The Company shall maintain, throughout the term of the Franchise, property coverage, general liability insurance, automobile liability insurance, and worker compensation insurance, with an insurance company, or companies, licensed to do business in the State of Texas insuring against claims for liability and damages.

Section 8. Indemnification and Hold Harmless.

The Company agrees to indemnify, defend, and hold harmless the city, its agents, officers and employees, against and from any and all claims by or on behalf of any person, firm, corporation or other entity, arising from the Company's operations and business, or arising from any act of negligence of the Company, or any its agents, contractors, servants, employees or licensees, and from and against all costs, counsel fees, expenses and liabilities incurred in or about any such claim or proceeding brought thereon, and from any and all claims arising from

any breach or default on the part of the Company in the performance of any covenant or agreement on the part of the Company to be performed pursuant to the terms of this Franchise. The City shall promptly notify the Company of any claim or cause of action which may be asserted against the City relating to or covering any matter against which the Company has agreed, as set forth above, to indemnify, defend and hold harmless the City. The Company reserves the right, but not the obligation, to employ such attorneys, expert witnesses and consultants as it deems necessary to defend against the claim or cause of action. The Company may be granted the right to take, in the event the Company and the City are Co-Defendants in a suit, total or partial lead responsibility for the defense of any claim or cause of action. It is understood that it is not the intention of either the City or the Company to create any liability, right, or claim for the benefit of third parties and this Franchise is intended and shall be construed for the sole benefit of the City and the Company.

Section 9. Forfeiture and Termination of Franchise.

9.1 In addition to all other rights and powers retained by the City under this Franchise or otherwise, the City reserves the right to declare this Franchise forfeited and to terminate the Franchise and all rights and privileges of the Company hereunder in the event of a material breach of the terms and conditions hereof. A material breach by Company shall include, but shall not be limited to, the following:

9.1.1 Failure to pay the franchise fee;

9.1.2 Failure to materially provide the services provided for in this Franchise;

9.1.3 Failure to keep and maintain a business office, open during regular business hours for service to the public, within reasonable access of the City during the entire term of this Franchise and which office shall, at minimum, provide and maintain the required services.

9.1.4 Material misrepresentation of fact in the application for a negotiation of this Franchise; or

9.1.5 Conviction of any director, officer, employee, or agent of the Company of the offense of bribery or fraud connected with or resulting from the awarding of this Franchise.

9.1.6 Material misrepresentation of fact knowingly made to the City with respect to or regarding Company's operations, management, revenues, services or reports required pursuant to this Franchise.

9.2 Company shall not be excused by mere economic hardship or by malfeasance of its directors, officers or employees.

9.3 In order for the City to declare forfeiture pursuant to Sections 9.1.1, 9.1.2 or 9.1.3, the City shall make a written demand that the Company comply with any such provision, rule, order, or determination under or pursuant to this Franchise. If such violation by the Company continues for a period of thirty (30) days following such written demand without written proof

that the corrective action has been taken or is being actively and expeditiously pursued, the Council may take under consideration the issue of termination of the Franchise. The City shall cause to be served upon Company, at least twenty (20) days prior to the date of such Council meeting, a written notice of intent to request such termination and the time and place of the meeting. Notice shall be given of the meeting and issue which the Council is to consider.

9.4 The Council shall hear and consider the issue, hear any person interested therein, and shall determine, in its discretion, whether or not any violation by the Company has occurred.

9.4.1 If the Council shall determine that the violation by the Company was the fault of Company and within its control, the Council may declare the Franchise of the Company forfeited and terminated, or the Council may grant to Company a period of time for compliance.

9.4.2 Upon a forfeiture or termination of the Franchise pursuant to this Section 9, the City may at its option: (a) advertise the availability of a franchise for another Commercial Solid Waste (Garbage and Refuse) Collection Business within the City; or (b) negotiate and enter into an agreement with a Commercial Solid Waste (Garbage and Refuse) Collection Business Franchise with the successful proposer.

9.4.3 In the event of a valid forfeiture and termination of the Franchise pursuant to this Section 9, the Company contracts, covenants and agrees that it will not contest or oppose the City's right and authority to contract with another entity to provide the services set forth in this Franchise

Section 10. Acceptance of Franchise by Company.

This Franchise shall not become effective until accepted by the Company executing the written acceptance provided at the end of the franchise ordinance, prior to or within thirty (30) days from the final adoption of this ordinance, and filing such properly executed acceptance with the City Secretary. When adopted by the City and accepted by the Company in conformance with this section, this Franchise shall be a duly executed contract by and between the City and the Company.

Section 11. Transfer, Sale or Conveyance by Company.

The Company shall not transfer, sale or convey this Franchise without the prior written approval of the Council for the transfer of this Franchise, expressed by ordinance.

Section 12. Severability.

If any section, paragraph, subdivision, clause, part or provision hereof shall be adjudged invalid or unconstitutional the same shall not affect the validity hereof as a whole or any part or provision other than the part or parts held invalid or unconstitutional.

Section 13. Open meetings.


It is hereby officially found and determined that the meeting at which this ordinance was passed was open to the public, and public notice of the time, place and purpose of said meeting was given, as required by the Open Meetings Act, Chapter 551, Texas Government Code.

Section 14, Publication.


The full caption of this ordinance shall be published one (1) time in a weekly newspaper published within or in general circulation within the City. This ordinance shall take effect only upon its acceptance by the Company within the time and manner herein above provided. In the event this Franchise is not accepted by the Company this ordinance shall expire and become null and void.

PASSED AND APPROVED on this the 26th day August, 2014.

CITY OF KEMPNER



Paul Cook, Mayor

ATTEST:


Trudy Davis, City Secretary

ACCEPTED AND AGREED TO be effective as of the date passed and approved by the
City Council of the City of Kempner.

J & H DISPOSAL



Perry Hayden, Partner



Dean Leamaster, Partner