

RESOLUTION NO. 07-343

**A RESOLUTION APPROVING THE FIRST
AMENDMENT TO THE APRIL 2006 ECONOMIC
INCENTIVE CONTRACT BETWEEN TRIANGLE
WASTE SOLUTIONS AND THE CITY OF PORT
ARTHUR SECTION 4A ECONOMIC
DEVELOPMENT CORPORATION**

WHEREAS, pursuant to Resolution No. 06-091, the City of Port Arthur Section 4A Economic Development Corporation entered into an Economic Incentive Contract and Loan Agreement with Triangle Waste Solutions; and

WHEREAS, at the May 16, 2007 regular meeting, the Board of Directors for the City of Port Arthur Section 4A Economic Development Corporation approved an amendment to the original Economic Incentive Contract and Loan Agreement in substantially the same form as attached hereto as Exhibit "A"; and

WHEREAS, the proposed First Amendment to the Economic Incentive Contract and Loan Agreement with Triangle Waste Solutions, attached hereto as Exhibit "A", reflects a release of a portion of the collateral and revises the milestone schedule.

**NOW, THEREFORE, BE IT RESOLVED BY THE CITY COUNCIL OF
THE CITY OF PORT ARTHUR:**

Section 1. That the facts and opinions in the preamble are true and correct.

Section 2. That the duly authorized representatives of the City of Port Arthur Section 4A Economic Development Corporation are herein authorized to execute the First Amendment to the Economic Incentive contract and Loan Agreement with Triangle Waste Solutions in substantially the same form as denoted in Exhibit "A", with an

execution date after the date the resolution was approved and with the comments as to the Executive Summary being deleted in Exhibit "A".

Section 3. That the changes as denoted in Exhibit "B" as it applies to the April 2006 Economic Incentive Agreement are herein approved to be incorporated into the Agreement in a final form to be approved by the City Attorney.

Section 4. That a copy of this Resolution shall be spread upon the Minutes of the City Council.

READ, ADOPTED AND APPROVED ON THE 17th day of JULY
A.D. 2007, at a Regular Meeting of the City Council of the City of Port Arthur, Texas by the following vote:

AYES: Mayor Prince; Mayor Pro Tem Sinegal;
City Council members Chatman, Jones,
Henderson and Williamson

NOES: None

Deloris Prince
MAYOR

Attest:
Evangeline Green
EVANGELINE GREEN, CITY SECRETARY

APPROVED:
Floyd Batiste
FLOYD BATISTE, EDC CEO

APPROVED AS TO FORM:
Mark Sokolow
MARK T. SOKOLOW, CITY ATTORNEY

EXHIBIT “A”

**FIRST AMENDMENT
TO ECONOMIC INCENTIVE CONTRACT AND LOAN AGREEMENT
BETWEEN
THE CITY OF PORT ARTHUR SECTION 4A ECONOMIC DEVELOPMENT CORP.
&
TRIANGLE WASTE PROPERTIES, LP**

The Economic Incentive Contract and Loan Agreement between the City of Port Arthur Section 4A Economic Development Corporation and Triangle Waste Properties, LP dated April 7, 2006 ("Original Incentive Agreement") is hereby amended to release collateral, specifically Certificates of Deposit Nos. 3637287 and 3637242 ("Certificates of Deposit"), to revise the promised performance by Triangle Waste Properties, LP and to revise the Performance Milestone Schedule.

The Original Incentive Agreement is modified and amended by this First Amendment to Economic Incentive Contract and Loan Agreement (the "First Amendment"), and except as specified herein, all terms, conditions, performance obligations, covenants and agreements of Triangle Waste Properties, LP or the City of Port Arthur Section 4A Economic Development Corporation as specified in the Original Incentive Agreement are ratified and affirmed, and each party covenants and represents that there are no defaults in the Original Incentive Agreement.

~~1. The Executive Summary is amended and restated to read as follows.~~

EXECUTIVE SUMMARY

Triangle Waste Properties LP, a Texas limited partnership, ("Triangle") is a local corporation, engaged in waste management, which includes providing septic waste equipment and services; metal collection and resale; and roll-off truck services. Triangle's target market lies between Lake Charles, Louisiana and Galveston, Texas. Triangle's lease, at its current location in Beaumont, is nearing expiration and Triangle would like to move and expand.

The City of Port Arthur Section 4A Economic Development Corporation ("PAEDC") will convey a ten (10) acre parcel in the new PAEDC Business Park (the "Park") to Triangle, which cost the PAEDC an estimated \$392,040. (The deed will reserve the necessary easements for the city utilities.) Additionally, PAEDC will grant Triangle \$500,000, in five annual grants of \$100,000 each. In exchange, Triangle agrees to hire 21 new employees, bringing the total number of employees to 60, with an estimated annual payroll of \$1,650,000, by March 31, 2007. Triangle promises to use its best efforts to hire Port Arthur, Texas residents. Additionally, Triangle agrees to meet or exceed the Park's covenants and restrictions; agrees to meet Triangle-specific restrictions; agrees to allow the EDC to pre-approve the architectural drawings for the facility; and agrees to serve as a model of cleanliness and maintenance for other Park occupants.

If Triangle breaches this agreement then the grants will automatically convert to a loan in the amount of \$392,040 plus cash grants made by PAEDC minus any credits earned as described hereunder (liquidated damages). The loan will have a three-year term, starting on the date of Triangle's breach, and an interest rate of ten percent (10%). To secure this loan Triangle will grant PAEDC a Deed of Trust, with PAEDC holding a second priority lien.

Triangle may earn credits to reduce the duration of this contract or to reduce liquidated damages in the event of a breach. Starting when Triangle achieves the payroll level of \$1,650,000 (annualized) and continuing for as long as Triangle maintains at least this level of employment, Triangle will receive a \$1.00 credit for each \$6.00 of payroll paid to residents of Port Arthur. Payroll to non-residents cannot be credited.

1. To avoid surprises, Triangle agrees to send PAEDC brief status reports, every three (3) months for the first year and every six months thereafter, until issuance of a close out report. Triangle will forfeit its credits if it fails to cure such default within 5 days for any reporting period for which it did not issue a report in a timely manner.

2. The following sections of the Agreement are amended and restated to read as follows:

a. **Section 5(b)(3):** Triangle will hire at least 21 new employees by March 31, 2007, bringing the total number of employees to 60 employees, with an estimated annual total payroll of \$1,650,000 per year¹, as measured by Internal Revenue Service (IRS) forms W-2 and W-3. After its facility in the Business Park received a Certificate of Occupancy, Triangle shall move its employees described in the Incentive Agreement and this Amendment to the Business Park.

b. **Section 5(b)(5):** Contemporaneously with PAEDC's land grant to Triangle, and contemporaneously with the first grant payment from PAEDC, Triangle will execute a Deed of Trust in the form of Exhibit "T" attached (the "Second Deed of Trust") to the Original Incentive Agreement covering the granted Property subject to the senior lien of Texas State Bank as lending bank; said senior lien not to exceed FOUR MILLION AND NO/100 (\$4,000,000) of indebtedness.

c. **Section 5(b)(8):** If Triangle breaches this agreement then the grants will automatically convert to a loan in the amount of \$392,040 plus cash grants made by PAEDC minus any credits earned as described hereunder (liquidated damages). The loan will have a three-year term, starting on the date of Triangle's breach, and an interest rate of ten percent (10%). To secure this loan Triangle will grant PAEDC a Deed of Trust, with PAEDC holding a second priority lien.

d. **Section 7:** Triangle's amended performance milestones are contained in the table below.

¹ This assumes 2000 hours per year and an average employee wage of \$27,500 per year.

TRIANGLE'S AMENDED PERFORMANCE MILESTONE SCHEDULE

	<u>Deadline</u>	<u>Milestone</u>
(a)	April 1, 2006	Review architectural plans with the EDC Board for approval.
(b)	April 30, 2006	Issue a <i>status report</i> ² to PAEDC's Chief Executive Officer ("CEO") for the period from the effective date of this contract to March 31, 2006.
(c)	July 31, 2006	<i>Status report</i> for April 1, 2006 to June 30, 2006.
(d)	Oct. 31, 2006	<i>Status report</i> for July 1, 2006 to September 30, 2006
(e)	Feb. 28, 2007	<i>Status report</i> ³ for January 1, 2006 to December 31, 2006.
(f)	March 31, 2007	Achieve performance of 21 new (60 total) employees; Annualized total payroll of \$1,650,000.00
(g)	July 31, 2007	<i>Status report</i> for January 1, 2007 to June 30, 2007; Sustain employment and annualized total payroll.
(h)	Sept. 1, 2007	Complete facility construction.
(i)	Feb. 28, 2008	<i>Status report</i> for January 1, 2007 to December 31, 2006; Sustain employment and annualized total payroll.
(j)	July 31, 2008	<i>Status report</i> for January 1, 2008 to June 30, 2008; Sustain employment and annualized total payroll.
(k)	Feb. 28, 2009	<i>Status report</i> for January 1, 2008 to December 31, 2008; Sustain employment and annualized total payroll.
(l)	July 31, 2009	<i>Status report</i> for January 1, 2009 to June 30, 2009; Sustain employment and annualized total payroll.
(m)	Feb. 28, 2010	<i>Status report</i> for January 1, 2009 to December 31, 2009; Sustain employment and annualized total payroll.
(n)	July 31, 2010	<i>Status report</i> for January 1, 2010 to June 30, 2010; Sustain employment and annualized total payroll.
(o)	Sept. 30, 2010 ⁴	<i>Close out report</i> for presentation to the PAEDC Board at its October 2010 meeting.

² Status reports shall include the status of construction, employment and the percentage of employees who are Port Arthur residents.

³ February status reports shall also include the identity of all Triangle Waste Properties, LP partners who own more than 5% of the business.

⁴ Or thirty (30) days after Triangle and PAEDC fully perform. The EDC Board will determine if performance is complete.

3. The following Exhibits are removed and deleted from reference in paragraph 38 of the Original Incentive Agreement and as attachments thereto:

- Exhibit "C"* Commercial Security Agreement
- Exhibit "D"* Acknowledgment of Swinbank & Poarch's Pledge by Texas State Bank
- Exhibit "E"* Financial Statement (UCC-1)

~~4. Paragraph 38 of the Original Incentive Agreement is modified to include a reference to the EXECUTIVE SUMMARY as a part of the Original Incentive Agreement for all purposes and constitutes promise performance by Triangle and/or PAEDC as the case may be in accordance with the Original Incentive Agreement~~

ATTORNEY APPROVALS

APPROVED AS TO FORM:

~~Guy N. Goodson~~
~~General Counsel for PAEDC~~

VERIFIED AS CONSISTENT
WITH CITY COUNCIL RESOLUTION:

Resolution Number: _____

Mark T. Sokolow, City Attorney

AMENDMENT EXECUTION

**CITY OF PORT ARTHUR SECTION 4A
ECONOMIC DEVELOPMENT CORPORATION**

SIGNED AND AGREED TO on the ____ day of _____, 2007.

President, Richard Wycoff

Secretary, Keith Daws, Sr.

Witness

Witness

TRIANGLE WASTE PROPERTIES, LP

SIGNED AND AGREED TO on the ____ day of _____, 2007.

TRIANGLE WASTE PROPERTIES, LP

Signature

Print

Position

Witness

EXHIBIT “B”

Based on a telephone conference between Mark Sokolow and myself on Friday, May 18, 2007, the following is my proposal for a manner of resolving the issues of how two separate grants (one made in 2006 and one to be made in 2007) from the Port Arthur Section 4A Economic Development Corporation (the "EDC") to Triangle Waste Properties, P ("Triangle") would be collateralized:

A. COLLATERAL FOR FIRST GRANT

1. The current certificate of deposit in the amount of \$392,000, which was pledged by Joe Swinbank and Donald Poarch to secure the first grant would be released based upon progress already accomplished under that certain Economic Incentive Contract and Loan Agreement between such parties dated April 7, 2006 (the "First Grant Contract");
2. A Second Lien Deed of Trust covering Lot 4 in Block 1 of Port Arthur Economic Development Corporation Business Park (the first grant facility) would remain in place to secure a cash grant of \$100,000 which has already been advanced by the EDC to Triangle and to secure up to \$400,000 of future grants which may be made under the First Grant Contract;
3. This Second Lien Deed of Trust will be inferior to all terms and provisions of a First Lien Deed of Trust in favor of Texas State Bank or another bona fide unrelated lender to secure an indebtedness not to exceed \$4,000,000. NOTE: The current recorded Second Lien Deed of Trust for the First Grant Contract purports to secure "the sum of Beneficiary's cash grant to Grantee minus credit earned, pursuant to that certain Economic Incentive Contract and Loan Agreement dated April 7, 2006 (not to exceed \$500,000)." I believe that this already means that this Deed of Trust could be released at any time upon the payment to the EDC of the amount of the cash grant actually dispersed to Triangle (which is currently \$100,000) less any credits to which Triangle is entitled under the First Grant Contract. Of course, in such event, Triangle would not be entitled to any further disbursements of the \$500,000 cash grant. Accordingly, I do not believe it is necessary to amend the current recorded Second Lien Deed of Trust except to provide that it will be subordinate not only to a loan in favor of Texas State Bank but also to a loan in favor of any other bona fide unrelated lender. In other words, this Deed of Trust could be paid off and released completely at this time upon the payment of \$100,000 if, for example, the first lien lender required that to be done in order to advance the first lien loan amount.

B. COLLATERAL FOR SECOND GRANT

1. A certificate of deposit in the amount of \$374,000 will be pledged by Joe Swinbank and Donald Poarch in favor of the EDC to secure the second grant of \$374,000.
2. There would be a second lien (subordinate to a loan securing a First Lien Deed of Trust from a bona fide unrelated lender not to exceed \$4,000,000) covering a 10

acre tract out of Lot 2 of the Port Arthur Economic Development Corporation Business Park (the second grant facility).

3. The Second Lien Deed of Trust would not secure indebtedness but would instead be a performance deed of trust to secure Triangle's obligations under Paragraph (6) of the Deed which is currently attached as Exhibit G to the second grant EDC contract and which covenants and restrictions are as follows:

“(6) the following additional covenants and restrictions which run with the land:

- a. Construction of a covered concrete pad of at least 100'x 100' for metal processing;
- b. Crews on site will operate according to procedures, rules and regulations of TCEQ;
- c. The capture of rainwater and any process water used at the site will be disposed of in accordance with all applicable rules and regulations of TCEQ;
- d. Design, build and operate so that scrap is not visible to any member of the public standing at ground level on a public way;
- e. Screen property lines from view with an eight (8) foot concrete tiltwall with landscaping on the outside to provide extra protection and help contain dust, noise, and odors;
- f. Metal will be contained in proper storage containers when not being processed;
- g. Metal containing radioactive sources will not be recycled or permitted on the Property in the Park;
- h. All roll off containers kept on the Property will be for non hazardous material and all repairs to these containers will be done at a different location as to insure this area does not become a repair area; and
- i. Store all equipment, trucks, roll off containers, etc., either behind the buildings

or inside of the plant, so as not to be visible from South Business Park Drive.”

4. The ability to foreclose under the Second Lien Deed of Trust would be contractually limited to a material breach of one of the Paragraph (6) covenants and restrictions set forth above and the failure to cure same after a notice of the default is first given to Triangle and Triangle is provided with a reasonable opportunity to cure such default. The opportunity to cure default will extend for 60 days provided, however, if the default requires more than 60 days and Triangle promptly initiates steps to cure the default and thereafter continues to diligently attempt to cure the default then such additional time for curing default as is necessary shall be provided to Triangle.
5. The Deed of Trust would also be released in the event that the property is no longer used as a scrap metal recycling facility (so long as the property remains in compliance with all restrictive covenants of public record affecting the subject property).
6. The transfer of the property to another party or entity will not be default under this Deed of Trust so long as (i) the transferee has a tangible net worth that is not less than that of Triangle immediately prior to any such proposed assignment, (ii) the Assignee is a reasonably experienced operator of a scrap metal recycling facility and (iii) Assignee is in substantial compliance with all City, State and Federal laws in connection with its other scrap metal operations.
7. The parties would execute a Collateral Substitution Agreement which would provide that if Triangle, after using diligent and good faith efforts to do so, is unable to obtain first lien financing from a bona fide unrelated lender because of the existence of the deeds of trust on the first grant facility and the second grant facility as described above, the EDC will release such deed of trust liens upon being provided with (i) reasonable evidence of the first lienholder's unwillingness to make the first lien loan with release of the second lien deeds of trust and (ii) a personal guaranty (in form and substance reasonably acceptable to the EDC and Triangle) of all amounts granted or to be granted under both EDC contracts from Joe Swinbank and Donald Poarch. Even if the second lien deed of trust covering the second grant site is released, this property will still be subject to the Paragraph 6 items which are restrictive covenants which run with the land under the deed into Triangle for this property and which can be legally enforced by the EDC.

The above-referenced items are submitted for your concurrent review and consideration. I look forward to discussing this matter with you at your convenience.

Best regards,

Jack Fields