

**RESOLUTION 2018-40R**

**A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF SAN MARCOS, TEXAS APPROVING A CONTRACT WITH TXI OPERATIONS, LP, DBA MARTIN MARIETTA FOR THE SALE OF RECLAIMED WATER; AUTHORIZING THE CITY MANAGER TO EXECUTE THE APPROPRIATE DOCUMENTS RELATED TO THIS CONTRACT ON BEHALF OF THE CITY AND DECLARING AN EFFECTIVE DATE.**

**RECITALS:**

1. On March 6, 2007, the City awarded a contract to TXI Operations, LP, dba Martin Marietta "Martin Marietta" for the sale of reclaimed water and for assisting in the necessary improvements of the reclaimed water pipeline.
2. All necessary improvements of the reclaimed water pipeline have been completed.
3. The original March 6, 2007 contract will be expiring and the City wishes to continue selling reclaimed water to Martin Marietta.

**BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF SAN MARCOS, TEXAS:**

**PART 1.** The contract with Martin Marietta for the sale of reclaimed water is approved.

**PART 2.** The City Manager is authorized to execute appropriate documents related to this contract on behalf of the City.

**PART 3.** This resolution shall be in full force and effect immediately from and after its passage.

**ADOPTED** this the 20<sup>th</sup> day of March, 2018.

  
John Thomaides  
Mayor

Attest:

A handwritten signature in cursive script that reads "Jamie Lee Case". The signature is written in black ink and is positioned above the printed name and title.

Jamie Lee Case

City Clerk

## **RECLAIMED WATER SUPPLY CONTRACT**

This Retail Water Supply Contract ("Contract") is entered into on March 30, 2018 (the "Effective Date") between TXI Operations, LP, a Delaware limited partnership doing business as Martin Marietta (hereinafter, "Martin Marietta") and the City of San Marcos, Texas, a municipal corporation (the "City").

### **Recitals**

WHEREAS, Martin Marietta operates a cement manufacturing facility and an adjacent limestone quarry, crushing, and processing facility (the "Martin Marietta Facility") in Comal County, Texas that requires a supply of water for operating purposes; and

WHEREAS, the City owns and operates a wastewater treatment plant (the "WWTP") with a capacity capable of supplying to Martin Marietta the amount of reclaimed water specified in this Contract; and

WHEREAS, Martin Marietta has investigated the suitability of using reclaimed water from the WWTP in the Martin Marietta Facility for operating purposes, and has satisfied itself as to this suitability; and

WHEREAS, the City desires to sell and Martin Marietta desires to purchase reclaimed water under the terms and conditions specified in this Contract; and

NOW, THEREFORE, in consideration of the foregoing and the following mutual promises, covenants, benefits and agreements contained herein, the City and Martin Marietta agree as follows:

### **Article 1. Provision of Reclaimed Water by the City**

**Section 1.01. Quantity of Water to be Supplied.** The City agrees to provide to Martin Marietta, and Martin Marietta agrees to purchase from the City, reclaimed water produced each day at the WWTP for use at the Martin Marietta Facility for operating purposes. The reclaimed water will be delivered at a location (the "Point of Delivery") on the Martin Marietta property boundary to be designated by mutual agreement of the City and Martin Marietta. The City will make available to Martin Marietta up to 700,000 gallons of reclaimed water each day (the "Maximum Quantity"), which may be taken in smaller quantities at Martin Marietta's sole discretion without lessening the guaranteed amount for any subsequent day, through the delivery facilities to be constructed under this Contract (the "Delivery Facilities"), at the rate described in Section 3.01, subject to Section 4.04 related to uncontrollable circumstances. Martin Marietta may purchase additional quantities of reclaimed water from the City in excess of the Maximum Quantity at the same price to the extent they are available from production at the WWTP and deliverable through the Delivery Facilities. The water shall be delivered in a consistent delivery pressure range, at a flow rate of up to 487 gpm. Higher flow rates may be allowed by the City if system conditions permit.

**Section 1.02. Quality of Water to be Supplied.** The City agrees that the reclaimed water supplied under this Contract will conform to the standards for Type I reclaimed water contained in Title 30, Part I, Section 210.33 of the Texas Administrative Code.

The City agrees that it will sample the reclaimed water as may be required by Title 30, Part I, Section 210.34 of the Texas Administrative Code or other applicable regulation; and shall provide the results of such sample to Martin Marietta, by email or facsimile. In the event the City learns of sample results which may pose a hazard to health or wellbeing of Martin Marietta workers or equipment beyond those known to exist with Type I reclaimed water, the City will notify Martin Marietta of such results immediately.

**Section 1.03. Metering Equipment.** The City will obtain and install metering equipment which meet the City's standard specifications for measuring within a tolerance of 2% (the "Accuracy Tolerance") the quantity of reclaimed water. The metering equipment will be installed at Martin Marietta's property line, which is defined as the "Point of Delivery." The metering equipment shall also include devices and equipment of standard type for the proposed application to limit, measure, and record the rate of flow at the Point of Delivery, to prevent the backflow of water or the contamination of water in the City's distribution system, and to protect and secure the metering equipment and other devices

**Section 1.04. Maintenance and Testing of Metering Equipment.**

A. The City will maintain the metering equipment within the Accuracy Tolerance, and will test the metering equipment for accuracy at least once every 12 months.

B. Martin Marietta may have the metering equipment independently tested at its own cost with 48 hours notice to the City. The City may attend any such test. If a test shows an inaccuracy in the metering equipment, the City will adjust the monthly billing of a period extending back to the time when the inaccuracy began if such time is ascertainable, or if such time is not ascertainable, for a period extending back to the last test of the metering equipment or 120 days, whichever is shorter, in accordance with the percentage of inaccuracy found during the test, whether above or below the correct volume. In the event the meter fails to register for any period, the City will calculate the usage during the time of meter failure to be the amount of reclaimed water furnished during the same period of the previous year, or as otherwise mutually agreed upon by the parties. The City will recalibrate or replace any inaccurate metering equipment at its expense.

**Section 1.05. Billing.** The City will furnish Martin Marietta with an itemized monthly billing statement showing the volume of reclaimed water supplied in 1,000 gallon increments and the amounts due.

**Article 2. Delivery Facilities**

**Section 2.01. Operation and Maintenance of Delivery Facilities.** The City will be responsible for operation and maintenance of the Delivery Facilities. The City will comply with all applicable laws,

regulations, and ordinances relating to the Delivery Facilities, the reclaimed water and the City's other duties set forth in this Contract, at the City's sole cost and expense.

**Section 2.02. Connections to Delivery Facilities.** The City will ensure that any connections made to the Delivery Facilities to serve other customers are equipped in such a way that the City is able to comply with its supply obligations to Martin Marietta under this Contract. In the event of an uncontrollable circumstance set forth in Section 4.04 below which reduces reclaimed water available below the Maximum Quantity Martin Marietta shall not be cut back from its usage of reclaimed water to a greater percentage than any and all other customers of the City, or the City itself.

**Section 2.03. On-Site Facilities of Martin Marietta.** Martin Marietta will be responsible for construction and maintenance of all facilities on Martin Marietta's property needed to transport the reclaimed water from the Point of Delivery to the points on Martin Marietta's property where the reclaimed water will be used.

### **Article 3. Payments for Reclaimed Water and Other Terms of Supply**

**Section 3.01. Payment.** Martin Marietta will pay to the City at the City's billing offices in San Marcos, Texas, within 15 days after receipt of the itemized statement each month at the prevailing reclaimed water rates determined by the City's governing body. In addition, Martin Marietta will pay to the City the amounts of all federal and state, and local taxes, fees, and charges that may apply to the provision of reclaimed water under this Contract. Regardless of the actual amount of reclaimed water used by Martin Marietta each month, Martin Marietta will pay a minimum monthly amount based on the price for 120,000 gallons per day at the applicable rate. This minimum amount will be recalculated annually based on the prevailing reclaimed water rate. This Minimum monthly amount will be reduced on a pro rata basis, however, for each full day in a month in which the supply of Reclaimed water is reduced below 120,000 GPD or ceases without fault of Martin Marietta.

**Section 3.02. Compliance with City's Regulations.** Martin Marietta will comply with the City's ordinances and regulations governing the use and supply of reclaimed water that are currently in effect and as they may be adopted or amended from time to time, provided that, if any future City ordinances or regulations result in a reasonably necessary expenditure by Martin Marietta or an increased operating cost to Martin Marietta, the City will allow Martin Marietta to recoup its expenditures or increased operating costs by direct offset against the amounts due to be paid by Martin Marietta hereunder.

**Section 3.03. Primary Supply.** Martin Marietta agrees to use the City as its primary source of reclaimed water for the Martin Marietta Facility's operating purposes, provided the City is not in default under this Contract.

**Section 3.04. Reduction or Cessation of Supply of Reclaimed Water;. Notice.** Except under emergency, when notice will be given as soon as practicable, the City will notify Martin Marietta thirty days prior to undertaking scheduled maintenance of the Delivery Facilities that will require a reduction or cessation of supply of reclaimed water to the Martin Marietta Facility. The City will notify Martin Marietta as soon as possible of any unscheduled maintenance or failure of the Delivery Facilities that has caused or will cause a reduction or cessation of supply of reclaimed water to the

Martin Marietta Facility. The City will notify Martin Marietta at least 90 days prior to any other reduction or cessation by the City of supply of reclaimed water to the Martin Marietta Facility that is authorized by this Contract, unless the reduction or cessation is a suspension under Section 4.03.B below, or is based upon a default by Martin Marietta under Section 4.03.C below.

#### **Article 4. Miscellaneous Provisions**

**Section 4.01. Regulatory Compliance.** The obligations of Martin Marietta and the City under this Contract are subject to all applicable federal, state and local laws and regulations currently in effect and as amended or modified from time to time (the "Laws and Regulations"), including but not limited to Title 30, Chapter 210 of the Texas Administrative Code, as amended.

A. The City is responsible for compliance with the Laws and Regulations that apply to the WWTP.

B. The City is responsible for compliance with the Laws and Regulations that apply to the construction of the Delivery Facilities, and the maintenance of the Delivery Facilities after completion and acceptance by the City.

C. Martin Marietta is responsible for compliance with the Laws and Regulations that apply to the use of the reclaimed water at the Martin Marietta Facility. This includes, but is not limited to, implementing an operation and maintenance plan (the "O&M Plan") for Martin Marietta's use of the reclaimed water. The initial O&M Plan will be attached hereto as Exhibit A, prior to commencement of water delivery. Martin Marietta may modify this O&M Plan or adopt a new O&M Plan, subject to regulatory approval and compliance with all Laws and Regulations.

#### **Section 4.03. Term; Termination.**

A. The Initial Term of this Contract is five (5) years commencing on the Effective Date. This Contract may be renewed or extended for additional renewal terms with the mutual consent of the parties

B. The City may suspend the supply of reclaimed water under this Contract, without terminating the Contract, in the following circumstances:

1. Martin Marietta fails to pay any amount billed by the City to Martin Marietta under Section 1.04 of this Contract, unless Martin Marietta has notified the City in writing of a bona fide dispute concerning the bill prior to the deadline in the City's billing notice.

2. Martin Marietta fails to comply with any of the Laws and Regulations that apply to Martin Marietta's use of the reclaimed water, including but not limited to those contained in Title 30, Chapter 210 of the Texas Administrative Code, as amended.

C. The failure or refusal of a party to comply with any term, provision, or covenant of this Contract will constitute a default by that party. In addition, if Martin Marietta becomes insolvent, or

commences, or has commenced against it, proceedings in bankruptcy, this will constitute a default by Martin Marietta. This Contract may be terminated by either party upon a default by the other party. In the event of a default by a party, the other party will give the defaulting party written notice of default, and, if the defaulting party fails to cure or remedy the default within 30 days following receipt of notice, this Contract will terminate immediately without further notice to the defaulting party. The City's acceptance of Martin Marietta's monthly payments subsequent to the occurrence of any event of default will be as compensation for the provision of reclaimed water, and will in no way constitute a waiver by the City of its right to exercise any remedy provided for any event of default.

#### **Section 4.04. Uncontrollable Circumstances.**

A. In this Contract, "Uncontrollable Circumstance" means any act, event, or condition beyond the control of a party that prevents the party from performing an obligation under this Contract.

B. Neither party will be liable to the other for any failure or delay in performance of an obligation under this Contract that results directly from an Uncontrollable Circumstance.

C. An act, event or condition is *not* beyond the reasonable control of a party if it is a result of any willful or negligent act, error or omission or failure to exercise reasonable diligence on the part of the party.

D. The party experiencing an Uncontrollable Circumstance will notify the other party within five days of the occurrence of the Uncontrollable Circumstance and give a specific description of the Uncontrollable Circumstance, including the impact on the party's obligations under the Contract.

**Section 4.05. Independent Contractors.** Nothing in this Contract will be construed as creating any form of partnership or joint venture relationship between the parties. The parties are independent contractors with respect to each other.

**Section 4.06. Assignment.** This Contract will inure to the benefit of, and be binding upon, the successors and permitted assigns of the parties. Except as provided elsewhere herein, neither party may assign any of its rights or duties under this Contract without the written consent of the other party. Martin Marietta may, with prior written notice to the City, 1) assign or otherwise transfer its rights and obligations under this Contract to an entity acquiring the Martin Marietta Facility that will continue the operation of the Martin Marietta Facility in the manner contemplated in this Contract, or 2) assign or otherwise transfer this Contract as collateral to secure loans providing financing or refinancing of the Martin Marietta Facility.

**Section 4.08. Taxes.** Martin Marietta is responsible for the payment of all taxes that may be levied or assessed on its operations and activities under this Contract, except that no municipal taxes or fees which would otherwise be due to the City of San Marcos shall be payable over and above the consideration stated in this Contract.

**Section 4.09. Amendments.** This Contract may be amended only through a written amendment executed by the parties. The term "will" in this Contract is mandatory.

**Section 4.10. Governing Law and Venue.** This Contract is governed by the laws of the State of Texas.

**Section 4.11. Severability.** If any material portion of this Contract is found by a court to be invalid or unenforceable for any reason, either Party shall have the option of terminating this Contract on a going forward basis.

**Section 4.12. Order of Precedence.** In the event of any conflict between the terms of this Contract and the terms of any attachment, exhibit or other document attached to or referred to in this Contract, the terms of this Contract will take precedence. To the extent that this Contract conflicts with City ordinances regarding flow, pressure, and availability of reclaim water, the terms of this Contract prevail.

**Section 4.13. Nondiscrimination.** In furnishing services and conducting activities under this Contract, and in employment practices for employees and subcontractors associated with the construction of the Delivery Facilities, Martin Marietta will not unlawfully discriminate on the basis of race, color, religion, sex, age, natural origin or disability.

**Section 4.14. Prohibition on Contracts with Companies Boycotting Israel.** Pursuant to Chapter 2270 and 808, Texas Government Code, Martin Marietta certifies that is not ineligible to receive the award of or payments under the Agreement and acknowledges that the Agreement may be terminated and payment may be withheld if this certification is inaccurate. Failure to meet or maintain the requirements under this provision will be considered a material breach.

**Section 4.15. Section 2252 Compliance.** Section 2252 of the Texas Government Code restricts City from contracting with companies that do business with Iran, Sudan, or a foreign terrorist organization. Contractor hereby certifies that is not ineligible to receive the award of or payments under this Agreement. Failure to meet or maintain the requirements under this provision will be considered a material breach.

**Section 4.16. Notice.** All notices given under this Contract will be delivered personally, by certified mail, return receipt requested, or by confirmed fax transmission, by overnight mail or by courier, to the following address for the respective party:

To City:           City Manager  
                      City of San Marcos  
                      630 East Hopkins Street  
                      San Marcos, TX 78666  
                      Fax No. 512/396-4656

To Martin Marietta:   Plant Manager  
                          Martin Marietta Hunter Cement  
                          7781 FM 1102  
                          New Braunfels, TX 78132



Fax No. 512-\_\_\_\_\_

With a copy to:  
Martin Marietta Legal Department  
2710 Wycliff Road  
Raleigh, NC 27607  
Fax: 919-783-4535

In witness whereof, the parties have caused this Contract to be duly executed in multiple counterparts, each of which will constitute an original.

City of San Marcos


By: 

Burt Lumbreyas, City Manager

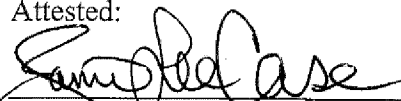
TXI Operations, LP, dba Martin Marietta

By: 

Signature

  
Alan Rowley, TXI Operations  
Printed name, title

Attested:



Jamie Lee Case, City Clerk