

# Memorandum of Understanding

No. 1866

**THIS AGREEMENT** is made and entered into on \_\_\_\_\_, by the City of Pompano Beach (“City”), and on behalf of the members of the Southeast Florida Governmental Purchasing Cooperative (Cooperative) and Airgas USA, LLC, a Florida Limited Liability Company (“Contractor”).

**WHEREAS**, City and Cooperative requires deliveries of CO2 liquified gas, which Contractor is capable and willing of providing; and

**WHEREAS**, Contractor has asked the City to modify the terms of Bid T-11-23, for which said CO2 liquified gas shall be provided by the Contractor.

**NOW, THEREFORE**, in consideration of those mutual promises and the terms and conditions set forth hereafter, the parties agree as follows:

The following changes to the conditions set forth in the bid document being utilized as standards for the purchasing of CO2 liquid gas are hereby modified as follows for the final year of purchases pursuant to the bid. For the avoidance of doubt, Participating Agencies that purchase products under this Memorandum of Understanding (“MOU”) as part of the Cooperative shall be bound by the terms of the bid as modified by this MOU:

1. Section I – Specifications/Special Conditions changed as follows:

- a. Subsection B. “Contract Period” Third paragraph under subsection is deleted in its entirety.
- b. Subsection F. “Cost Adjustments” is now modified as follows:

The cost(s) shall remain firm for the initial twelve (12) month period of the contract term. Contractor may upon 60 days’ notice, adjust prices charged to the City in the event of any significant increase in Contractor’s cost to obtain, manufacture the products sold hereunder. During any period where Contractor’s prices are higher due to such events, the City may either pay the revised price, terminate the contract, or obtain products from another supplier without penalty to Contractor.

- c. Subsection K. “Participating Agencies/Contact Persons/Delivery Locations/Special Requirements” shall be deleted in its entirety and replaced with the following:

The following agencies are participating in this bid solicitation and the resulting contract (“Participating Agency”). Each Participating Agency shall be considered a party to this Agreement and shall be bound by the obligations contained herein:

Broward County  
City of Boca Raton  
City of Delray Beach  
City of Pembroke Pines  
City of Sunrise  
Town of Davie  
Village of Wellington

Other Co-op members may participate in this contract for new usage, during the contract term, or on any contract extension term, if approved by the lead agency and Contractor. New Co-op members may participate in any contract, on acceptance and approval by the lead agency and Contractor.”

d. Subsection M. “MSDS” is deleted in its entirety and replaced with “Material Safety Data Sheets shall be available upon request or from Bidder’s website.”

e. Subsection O. “Cancellation of Order” is amended as follows:

If contractor cannot fulfill delivery requirements, the City retains the right to cancel the order and make such purchase on the open market.

f. Subsection Q. “Market Conditions” is deleted in its entirety.

g. Subsection R. “Safety”, Paragraph 1, is amended as follows:

The successful bidder shall be responsible for initiating, maintaining and supervising all of its internal safety precautions and programs in connection with the work. The successful bidder shall comply with the rules and regulations of the state of Florida. Bidder, City and Cooperative shall comply with all applicable safety standards and regulations with regard to its transportation and delivery of any and all products pursuant to the bid.

h. Subsection R. “Safety, Paragraph 3, is deleted in its entirety.

i. Subsection R. “Safety, Paragraph 5, is amended to read as follows:

5. Customer-Owned Tanks: Prior to the initial delivery to a facility, Bidder shall conduct a basic tank inspection of Customer-Owned storage system and report any identified concerns to the owner.

j. Subsection U. “Insurance” shall be deleted and replaced with Exhibit \_\_\_\_, attached hereto.

2. Section II General Conditions is amended as follows:

a. Paragraph 17 “Conflict of Instructions” is deleted in its entirety and replaced with:

Should a conflict exist between the terms contained in the bid document and this Memorandum of Understanding, the terms of this Memorandum of Understanding shall control.

b. Paragraph 19 “Warranties” is deleted in its entirety and replaced with:

Contractor warrants that the products will meet Compressed Gas Association guidelines and NSF Standards and any other products sold by Contractor will conform to Contractor’s or manufacturer’s standard specifications. Contractor makes no warranty with respect to products manufactured by others, but will, on request, to the extent permitted, pass on to The City any applicable manufacturer’s

warranty. Contractor warrants that the services shall be performed in a good and workmanlike manner. **CONTRACTOR SPECIFICALLY DISCLAIMS ANY OTHER EXPRESS OR IMPLIED STANDARDS, GUARANTEES, OR WARRANTIES, INCLUDING ANY WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE OR NON-INFRINGEMENT AND ANY WARRANTIES THAT MAY BE ALLEGED TO ARISE AS A RESULT OF CUSTOM OR USAGE. CONTRACTOR MAKES NO WARRANTIES OF ANY KIND FOR ANY TECHNICAL ADVICE PROVIDED BY CONTRACTOR TO THE CITY AND ASSUMES NO OBLIGATION OR LIABILITY FOR ANY SUCH TECHNICAL ADVICE WITH REFERENCE TO THE USE OF PRODUCTS OR RESULTS WHICH MAY BE OBTAINED THEREFROM, AND ALL SUCH ADVICE IF GIVEN AND ACCEPTED IS AT THE CITY'S SOLE RISK.**

- c. Paragraph 23 "Indemnification" is amended to read as follows:

Contractor covenants and agrees that it will indemnify, save, defend and hold harmless the City and all of the City's officers, agents, and employees from any third party claim, loss, damage, costs, charge or expense to the extent caused by its negligence in any act, action, or omission by contractor during the performance of duties pursuant to the bid, , except that neither the contractor nor any of its sub-contractors will be liable under this section for damages arising out of injury or damage to persons or property directly caused or resulting from the negligence of City or any of its officers, agents, or employees. Furthermore to the extent of the limits provided in Section 768.28 Florida Statutes, as amended, the City and all member of the Southeast COOP shall indemnify save, defend, and hold harmless the Contractor for their negligence. Said indemnification shall not constitute a waiver under said statute, nor constitute authorization to be sued by any party.

3. The following provisions are added to Section II General Conditions:

39. Excuse of Performance: Contractor shall not be liable for failure to perform if prevented by circumstances beyond its reasonable control. If Contractor is unable to supply products to The City, then The City may obtain replacement products from other sources.

40. Allocation: If sufficient product is not available from Contractor's normal source of supply for any reason, Contractor may allocate Product among its own requirements and its customers. Contractor will make reasonable efforts to obtain additional product from other sources, provided The City shall pay all additional costs associated with such Product. Allocation in regard to this Section will completely satisfy and discharge Contractor's supply obligations and Contractor will, therefore, not be deemed to be in breach of such obligations.

41. City's and Cooperative's Responsibilities: Products are sold on the condition that they be handled, used and disposed of in conformance with recognized industry and professional standards, including those related to the protection of human

health and the environment. The City acknowledges that there are hazards associated with the use of the products, that it understands such hazards, and that it is the responsibility of the City to warn and protect all those exposed to such hazards. It is The City's responsibility to ensure that: (i) the installation and/or use of the products complies with all applicable laws, codes or regulations for the relevant jurisdiction; (ii) the products are safe for the intended use; and (iii) the products are handled in a safe and professional manner. The City and Cooperative shall have the sole responsibility for determining the suitability of any of Contractor's products for the use contemplated. After delivery of products to the City and Cooperative pursuant to this Agreement, the City and Cooperative assume all risk and liability arising out of the presence, storage, transport or use of the products.

**42. REMEDIES; LIMITATION OF LIABILITY: CONTRACTOR SHALL NOT BE LIABLE FOR INDIRECT, SPECIAL, INCIDENTAL, CONSEQUENTIAL AND/OR PUNITIVE DAMAGES. CONTRACTOR'S SOLE LIABILITY AND THE CITY OR PARTICIPATING AGENCY'S SOLE REMEDY FOR DAMAGES RESULTING FROM PRODUCTS, DELIVERY OF NON-CONFORMING PRODUCTS, OR CONTRACTOR'S FAILURE TO DELIVER SUCH PRODUCTS, SHALL BE LIMITED TO, AT CONTRACTOR'S OPTION, THE REFUND OF THE PURCHASE PRICE OR REPLACEMENT OF THE PRODUCT OR SERVICE IN QUESTION. CONTRACTOR'S LIABILITY FOR ALL OTHER DIRECT DAMAGES SHALL BE LIMITED TO, FOR THE CITY OR PARTICIPATING AGENCY CLAIMING DAMAGES, 50% OF THE AMOUNT PAID BY SUCH ENTITY TO CONTRACTOR DURING THE PRIOR 12 MONTHS, PER OCCURRENCE, AND 100% OF THE AMOUNT PAID BY SUCH ENTITY TO CONTRACTOR DURING THE PRIOR 12 MONTHS, FOR THE ENTIRE TERM. FOR NEW PARTICIPATING ENTITIES ADDED TO THIS AGREEMENT WITH NO PURCHASE HISTORY, THE DIRECT DAMAGES CAP SHALL BE CALCULATED AS, PER OCCURRENCE, 50% OF THE CONTRACTED VOLUME ESTABLISHED AT THE START OF THE ENTITY'S PARTICIPATION IN THE AGREEMENT, AND FOR THE ENTIRE TERM, 100% OF THE CONTRACTED VOLUME ESTABLISHED AT THE START OF THE ENTITY'S PARTICIPATION IN THE AGREEMENT. THE LIMITATIONS CONTAINED IN THIS SECTION SHALL APPLY REGARDLESS OF WHETHER THE CLAIM FOR DAMAGES IS BASED ON BREACH OF CONTRACT, BREACH OF WARRANTY, TORT OR OTHERWISE, AND SHALL APPLY EVEN WHERE SUCH DAMAGES ARE CAUSED IN WHOLE OR IN PART, BY THE NEGLIGENCE, GROSS NEGLIGENCE OR ACTS AND OMISSIONS OF THE PARTY CLAIMING DAMAGES OR THE PARTY FROM WHOM DAMAGES ARE SOUGHT. THE PROVISIONS GOVERNING REMEDIES AND LIMITATIONS OF LIABILITY SET FORTH IN THIS AGREEMENT SHALL SURVIVE EXPIRATION, TERMINATION, OR CANCELLATION OF THIS AGREEMENT.**

4. Section III – Proposal; the following pricing shall be in effect for the final year of the bid duration:

1. Unit Price is \$0.225 per pound or \$450.00 per ton
2. City and Cooperative shall be charged a Restricted Access fee of \$75.00, unless Contractor is given 120 hours per week access to the delivery site, or 24 hours 7 days a week access to the delivery site.
3. City and Cooperative may elect, for a \$65.00 per month fee, to install a telemetry unit for monitoring tank levels. Use of this option shall place City or Cooperative on a forecasted schedule that will signal Contractor when tanks are down to 30% capacity. City or Cooperative must make arrangements with Contractor for installation of telemetry monitoring.
4. If City or Cooperative do not make use of the telemetry monitoring services, Contractor shall also charge a call in fee of \$75.00.

**IN WITNESS WHEREOF**, the parties hereto have caused this Agreement to be executed the day and year hereinabove written.

Attest:

**CITY OF POMPANO BEACH**

\_\_\_\_\_  
KERVIN ALFRED, CITY CLERK

By: \_\_\_\_\_  
REX HARDIN, MAYOR

By: \_\_\_\_\_  
GREGORY P. HARRISON, CITY MANAGER

APPROVED AS TO FORM:

\_\_\_\_\_  
MARK E. BERMAN, CITY ATTORNEY

(SEAL)

**“CONTRACTOR”**

AirGas USA, LLC

Witnesses:

\_\_\_\_\_

\_\_\_\_\_  
(Print or Type Name)

\_\_\_\_\_

\_\_\_\_\_  
(Print or Type Name)

By: \_\_\_\_\_

JAY R. WORLEY, CHIEF OPERATING OFFICER

STATE OF \_\_\_\_\_

COUNTY OF \_\_\_\_\_

The foregoing instrument was acknowledged before me, by means of  physical presence or  online notarization, this \_\_\_\_ day of \_\_\_\_\_, 20\_\_, by John F. Sheehan as Division South President of AirGas USA, LLC, a Florida limited liability company on behalf of the company. He is personally known to me or who has produced \_\_\_\_\_ (type of identification) as identification.

NOTARY’S SEAL:

\_\_\_\_\_  
NOTARY PUBLIC, STATE OF FLORIDA

\_\_\_\_\_  
(Name of Acknowledger Typed, Printed or Stamped)

\_\_\_\_\_  
Commission Number

## EXHIBIT A

### INSURANCE REQUIREMENTS

#### MEMORANDUM OF UNDERSTANDING (MOU) COOP POMPANO BEACH, FL AIRGAS USA, LLC

Contractor shall not commence services under the terms of this Agreement until certification or proof of insurance detailing terms and provisions has been received and approved in writing by the City's Risk Manager. If you are responding to a bid and have questions regarding the insurance requirements hereunder, please contact the City's Purchasing Department at (954) 786-4098. If the contract has already been awarded, please direct any queries and proof of the requisite insurance coverage to City staff responsible for oversight of the subject project/agreement.

Contractor is responsible to deliver to the City for timely review and written approval/disapproval Certificates of Insurance which evidence that all insurance required hereunder is in full force and effect and which include on a primary basis, the City as an additional insured on all such coverage, except Worker's Compensation and Employer's Liability. **Such policy or policies shall be issued by United States Treasury approved companies authorized to do business in the State of Florida. The policies shall be written on forms acceptable to the City's Risk Manager, meet a minimum financial A.M. Best and Company rating of no less than Excellent, and be part of the Florida Insurance Guarantee Association Act. No changes are to be made to these specifications without prior written approval of the City's Risk Manager.**

Throughout the term of this Agreement, City, by and through its Risk Manager, reserve the right to review, Contractor's Certificates of Insurance, including limits, coverages or endorsements. City reserves the right, but not the obligation, to review and reject any insurer providing coverage because of poor financial condition or failure to operate legally.

Failure to maintain the required insurance shall be considered an event of default. The requirements herein, as well as City's review or acceptance of insurance maintained by Contractor, are not intended to and shall not in any way limit or qualify the liabilities and obligations assumed by Contractor under this Agreement.

Throughout the term of this Agreement, Contractor and all sub-contractors or other agents hereunder, shall, at their sole expense, maintain in full force and effect, the following insurance coverages and limits described herein, including endorsements:

A. Worker's Compensation Insurance covering all employees and providing benefits as required by Florida Statute, Chapter 440, regardless of the size of the company (number of employees) or the state in which the work is to be performed or of the state in which Contractor is obligated to pay compensation to employees engaged in the performance of the work. Contractor further agrees to be responsible for employment, control and conduct of its employees and for any injury sustained by such employees in the course of their employment.



B. Liability Insurance.

(1) Including the City of Pompano Beach as an additional insured as City's interests may appear, on General Liability Insurance only, relative to claims which arise from Contractor's negligent acts or omissions in connection with Contractor's performance under this Agreement, and to the extent of Contractor's indemnification obligation assumed hereunder.

(2) Such Liability insurance shall include the following checked types of insurance and indicated policy limits.

<b>Type of Insurance</b>	<b>Limits of Liability</b>	
	Per Occurrence	Aggregate
<b>GENERAL LIABILITY:</b>		
* Policy to be written on a claims occurrence basis		
	\$1,000,000	\$2,000,000
XX comprehensive form	bodily injury and property damage	
XX premises - operations	bodily injury and property damage	
XX explosion & collapse hazard		
XX underground hazard		
XX products/completed operations hazard	bodily injury and property damage combined	
XX contractual insurance	bodily injury and property damage combined	
XX broad form property damage	bodily injury and property damage combined	
XX independent Contractors	personal injury	
XX personal injury		
___ CG2010	ongoing operations (or its' equivalent)	
___ CG 2037	completed operations (or its' equivalent)	
___ sexual abuse/molestation	\$1,000,000 Per Occurrence and Aggregate	

---

**AUTOMOBILE LIABILITY:** \$1,000,000 Per Occurrence and Accident. Bodily injury (each person) bodily injury (each accident), property damage, bodily injury and property damage combined.

XX business comprehensive form

C. Employer's Liability. Contractor and all sub-contractors shall, for the benefit of their employees, provide, carry, maintain and pay for Employer's Liability Insurance in the amount of One Hundred Thousand Dollars (\$100,000.00) per employee, Five Hundred Thousand Dollars (\$500,000) per aggregate.

D. Policies: Whenever, under the provisions of this Agreement, insurance is required of the Contractor, the Contractor shall promptly provide the following:

- (1) Certificates of Insurance evidencing the required coverage;
- (2) Names and addresses of companies providing coverage;
- (3) Effective and expiration dates of policies; and

E. Insurance Cancellation or Modification. Should any of the required insurance policies be canceled before the expiration date, or modified or substantially modified, the Contractor shall provide thirty (30) days written notice to the City.

F. Waiver of Subrogation. Contractor hereby waives any and all right of subrogation against the City, its officers, employees and agents for each required policy, except Workers' Compensation. This Waiver of Subrogation requirement shall not apply to any policy, which includes a condition to the policy not specifically prohibiting such an endorsement or voids coverage should Contractor enter into such an agreement on a pre-loss basis.