

PART C: PROJECT AGREEMENT & SCHEDULES

**(A) PROJECT AGREEMENT**

**DATED**

*11 MARCH*

**2008**

**(1) CAMBRIDGESHIRE COUNTY COUNCIL  
AND  
(2) DONARBON WASTE MANAGEMENT LIMITED**

**WASTE MANAGEMENT PFI  
PROJECT AGREEMENT**

**Sharpe Pritchard**

**Elizabeth House**

**Fulwood Place**

**LONDON**

**WC1V 6HG**

**Reference: ROS/NAS 27000/37**

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**THIS CONTRACT is made on**

11 MARCH

**2008**

**BETWEEN**

1. **CAMBRIDGESHIRE COUNTY COUNCIL** of Cambridgeshire Shire Hall, Cambridge, CB3 0AP (the "Authority") which expression shall include its successors in title and assigns to the extent permitted under this Contract); and
2. **DONARBON WASTE MANAGEMENT LIMITED** company number 06054499 whose registered office is at Ely Road, Waterbeach, Cambridge, CB25 9PG (the "Contractor")

**BACKGROUND**

- A. The National Waste Strategy 2000 issued by the Secretary of State pursuant to the Environmental Protection Act 1990 (the EPA) requires Local Authorities to achieve certain targets for Recycling and Composting which have been enshrined in Best Value Performance Indicators (BVPIs). The 1999 Landfill Directive (99/31/EC) requires all Local Authorities to divert prescribed amounts of biodegradable municipal waste from Landfill and this is enforced by the Waste Emissions and Trading Act 2003 (together the BVPIs and landfill diversion requirements shall be known as the Statutory Targets);
- B. The Authority is a Waste Disposal Authority (WDA) for the purposes of section 30 of the Environmental Protection Act 1990 (the EPA);
- C. The Authority wishes to procure the services of a private sector contractor to provide certain waste management functions with a view to assisting the Authority discharging its statutory obligations and in meeting its Statutory Targets on the basis set out in this Contract;
- D. The Parties agree that, notwithstanding whether the Statutory Targets and/or Contract Targets are being achieved, the Parties will work together using reasonable endeavours to explore measures which may be taken to reduce the amount of Contract Waste that is sent to Landfill and to reduce the amount of Landfill Tax payable by the Authority during the Contract Period;
- E. This Contract is let under the Government's Private Finance Initiative ("PFI");
- F. The Authority has tendered this Contract in accordance with the Public Services Contracts Regulations 1993 and in accordance with its responsibilities under Part 2 of the EPA and has selected the Contractor as the most economically advantageous tenderer to provide the Services; and
- G. The Parties consent to this Contract being a certified contract pursuant to section 4.3 of the Local Government (Contracts) Act 1997.

**THE PARTIES HAVE AGREED AS FOLLOWS:**



## **PART 1: PRELIMINARY PROVISIONS**

### **1. DEFINITIONS**

In this Contract the terms set out in Schedule 1 (Definitions) shall have the meanings given to them therein.

### **2. INTERPRETATION**

- 2.1. In this Contract, except where the context otherwise requires:
- 2.1.1. **the masculine includes the feminine and the neuter and vice versa;**
  - 2.1.2. **the singular includes the plural and vice versa;**
  - 2.1.3. **a reference in this Contract to any Clause, Sub-Clause, paragraph, Schedule, appendix or Annex is except where it is expressly stated to the contrary, a reference to such Clause, Sub-Clause, paragraph, Schedule, appendix or Annex of this Contract;**
  - 2.1.4. **save where stated to the contrary, any reference to this Contract or to any other document shall include any permitted variation, amendment or supplement to such document;**
  - 2.1.5. **any reference to any enactment, order, regulation, or other similar instrument shall be construed as a reference to the enactment, order, regulation, or other similar instrument (including any EU instrument) as amended, replaced, consolidated or re-enacted;**
  - 2.1.6. **a reference to a person includes firms, partnerships and corporations and their successors and permitted assignees or transferees;**
  - 2.1.7. **headings are for convenience of reference only; and**
  - 2.1.8. **words preceding "include", "includes", "including" and "included" shall be construed without limitation by the words which follow those words unless inconsistent with the context, and the rule of interpretation known as ejusdem generis shall not apply.**
- 2.2. The Schedules hereto all form part of this Contract and shall have the same force and effect as if expressly set out in the body of this Contract.
- 2.3. Where this Contract states that an obligation shall be performed "no later than" or "within" a prescribed number of Business Days after a

stipulated date or event or “by” a date which is a prescribed number of Business Days after a base date, the latest time for performance shall be 16.00 hours on the last Business Day for performance of the obligations concerned.

2.4. **This Contract is entered into under the PFI.**

2.5. **This Contract is excluded from Part II of the Housing Grants, Construction and Regeneration Act 1996 by operation of paragraph 4 of the Construction Contracts (England and Wales) Exclusion Order 1998. The Contractor acknowledges that the operation of the Housing Grants, Construction and Regeneration Act 1996 upon any Project Document shall not affect the Parties’ rights or obligations under this Contract.**

2.6. All of the Contractor’s obligations, duties and responsibilities under this Contract shall be construed as separate obligations, duties and responsibilities owed to the Authority and (save as provided hereunder) to be performed at the Contractor’s own cost and expense.

2.7. **Various roles of Local Authorities**

2.7.1. Save as otherwise expressly provided and subject to Clause 2.7.2, the obligations of the Authority under this Contract are obligations of the Authority in its capacity as a contracting counter-party and nothing in this Contract shall operate as an obligation upon, or in any other way fetter or constrain the Authority in any other capacity and save for the provisions of Clause 2.7.2 nor shall the exercise by the Authority of its duties and powers in any other capacity lead to any liability under this Contract (howsoever arising) on the part of the Authority to the Contractor.

2.7.2. For the avoidance of doubt, the operation of Clause 2.7.1 shall not:

2.7.2.1. prevent the Contractor from applying for relief in relation to limb (b) of the definition of Relief Event and accordingly from applying for relief pursuant to Clause 104 (Relief Events); or

2.7.2.2. relieve the Authority as a contracting counter-party of any express obligation or liability arising pursuant to this Contract.

### 3. **INDEXATION**

3.1. Except where this Contract expressly provides otherwise **in this Contract, references to amounts expressed to be “Indexed” are references to such amounts** Indexed in accordance with Section 13 (Indexation) of Schedule 26 (Payment Mechanism).

#### **4. CO-OPERATION**

- 4.1. The Parties acknowledge that the Project will require the long term co-operation and assistance of both Parties to deliver a successful outcome and subject to any express provisions in this Contract to the contrary, each Party agrees to co-operate, at its own expense (but without being compelled to incur material expenditure), with and provide information and assistance to the other in a timely manner as required by the other provisions of this Contract and (subject to any obligation in respect of confidentiality and Commercially Sensitive Information) to use reasonable endeavours to share information and data on an open book basis in accordance with Clause 103 (Open Book) in the fulfilment of the purposes and intent of this Contract. To avoid doubt, neither Party shall be under any obligation to perform any of the other Party's obligations under this Contract.

#### **5. PRECEDENCE OF DOCUMENTATION**

- 5.1. In the event of any inconsistency between the provisions of the body of this Contract and the Schedules, or between any of the Schedules, the conflict shall be resolved according to the following descending order of priority:-
- 5.1.1. these Clauses 1 to 141 and Schedule 1 (Definitions), then unless stated expressly to the contrary:-
- 5.1.1.1. the Specification (Schedule 2);
- 5.1.1.2. Payment Mechanism (Schedule 26);
- 5.1.1.3. the Contractor's Service Proposals (Schedule 3) and Contractor's Works Proposals;
- 5.1.1.4. the remaining Schedules equally.

#### **6. CALCULATIONS**

- 6.1. All calculations shall be carried out without rounding. The final result of any calculation shall be rounded as follows:
- 6.1.1. where a monetary amount to the nearest penny;
- 6.1.2. where a weight to the nearest 10 kilograms; and
- 6.1.3. where a financial ratio or rate of return to two decimal places.

#### **7. MASS BALANCE MODEL**

- 7.1. Without prejudice to Clause 7.3 below, the Parties have agreed to incorporate Schedule 32 (Mass Balance Model) into this Contract as a supporting mechanism and tool so that the relevant formulae

associated with the Financial Model are available to the Parties to be considered with the Financial Model in the event of any adjustment to the Unitary Charge arising from a Relevant Event. PROVIDED THAT it is acknowledged by the Parties that the Mass Balance Model is a dynamic model and that whilst the Mass Balance Model as at the Contract Commencement Date reflects a low Waste growth scenario, in assessing the impact of any Relevant Event actual Contract Waste levels at the relevant time shall be reflected (in respect of the T element of the Annual Unitary Charge on the basis set out in Schedule 39 (Unitary Charge Adjustment Protocol)).

7.2. The arrangements for custody and amendments of the Base Case set out in Schedule 39 (Unitary Charge Adjustment Protocol) shall apply to the Mass Balance Model and the Mass Balance Model shall be retained by the Parties with the Base Case.

7.3. By its incorporation into the Contract the Authority does not warrant, guarantee, confirm or accept the accuracy or completeness of the data relating to tonnage and composition of Waste contained in Schedule 32 (Mass Balance Model).

8. **[NOT USED]**

9. **AUTHORITY VIRES: LOCAL GOVERNMENT (CONTRACTS) ACT 1997**

9.1. The Certification Requirements are intended to be satisfied by the Authority with respect to this Contract and the Direct Agreement before the end of the Certification Period.

9.2. The Contractor hereby consents to the issue by the Authority of certificates under section 3 of the Local Government (Contracts) Act 1997 in respect of this Contract and the Direct Agreement.

9.3. If the certificates are not issued by the Authority before the end of the Certification Period then the Contractor shall be entitled by giving notice in writing to the Authority within 10 Business Days of the end of the Certification Period, to terminate this Contract, whereupon the Relevant Discharge Terms shall apply.

9.4. The relevant discharge terms within the meaning of section 6 of the Local Government (Contracts) Act 1997 are set out in Schedule 5 (Relevant Discharge Terms).

10. **PROJECT DOCUMENTS AND FINANCING AGREEMENTS**

10.1. **Delivery of Initial and Changed Project Documents and Financing Agreements**

10.1.1. **The Contractor has provided to the Authority copies of the Project Documents (as listed in Schedule 43 (Project Documents)) and of the Initial Financing Agreements (as listed in Schedule 42 (Financing Agreements)).**

- 10.1.2. **Without prejudice to the provisions of Clauses 10.2 or 10.3, or to the definition of Senior Financing Agreements, if at any time an amendment is made to any Project Document or Financing Agreement, or the Contractor enters into a new Project Document or Financing Agreement (or any agreement which affects the interpretation or application of any Project Document or Financing Agreement), the Contractor shall deliver to the Authority a conformed copy of each such amendment or agreement within ten (10) Business Days of the date of its execution or creation (as the case may be), certified as a true copy by an officer of the Contractor.**

**10.2. Changes to Project Documents**

**The Contractor shall perform its obligations under, and observe all of the provisions of, the Project Documents and shall not:**

- 10.2.1. **terminate or agree to the termination of all or part of any Project Document;**
- 10.2.2. **make or agree to any material variation of any Project Document;**
- 10.2.3. **in any material respect depart from its obligations, (or waive or allow to lapse any rights it may have in a material respect), or procure that any counterparty to a Project Document in any material respect departs from its obligations (or waives or allows to lapse any rights they may have in a material respect), under any Project Document; or**
- 10.2.4. **enter into (or permit the entry into by any other person of) any agreement replacing all or part of (or otherwise materially and adversely affecting the interpretation of) any Project Document,**

**unless the proposed course of action (and any relevant documentation) has been submitted to the Authority for review and there has been no objection made by the Authority within 10 Business Days of receipt by the Authority of such submission, or such shorter period as may be agreed by the Parties, and provided, in the circumstances specified in Clause 10.2.1, that the Contractor has complied with the provisions of Clause 131 (Assignment and Subcontracting) and Clause 133 (Change of Ownership). The Authority may only make objection to the matters set out in Clauses 10.2.1 to 10.2.4 on the following reasonable grounds:**

- 10.2.4.1. **the proposed course of action will adversely**

affect the ability of the Contractor to perform its obligations under the relevant Project Document or the Contract; and/or

- 10.2.4.2. the proposed course of action will increase the Authority's obligations or prejudice its rights under the Contract (provided that the Authority confirms that the operation of Clause 29 (Capital Contingency) shall not be deemed for the purposes of this Clause 10.2.4.2 to increase the obligations of the Authority or prejudice its rights under the Contract).

### **10.3. Changes to Financing Agreements**

- 10.3.1. **Without prejudice to the provisions of Clauses 10.1 (Delivery of Initial and Changed Project Documents and Financing Agreements), 10.4 (Changes to Financing Agreements and Project Documents), and 112 (Refinancing), the Contractor shall not, without the prior written consent of the Authority, enter into new Financing Agreements or terminate, amend, waive its rights or otherwise deal with its Financing Agreements if the same may reasonably be expected to have a material adverse effect on the ability of the Contractor to perform its obligations under the Project Documents or this Contract.**

### **10.4. Changes to Financing Agreements and Project Documents**

**No amendment, waiver or exercise of a right under any Financing Agreement, Project Document or Ancillary Document shall have the effect of increasing the Authority's liabilities on early termination of this Contract unless:**

- 10.4.1. **the Contractor has obtained the prior written consent of the Authority to such increased liability for the purposes of this Clause 10.4; or**
- 10.4.2. **it is an Additional Permitted Borrowing.**

## **11. COLLATERAL WARRANTIES**

- 11.1. The Contractor shall not engage the Construction Sub-Contractor, the New Facilities Construction Sub-Contractor (but not including any New Facilities Construction Sub-Contractor in respect of the IVC Facility), the Professional Team or the Operating Sub-Contractor or the Landfill Sub-Contractor, or any replacement thereof (whether before or after the Contract Commencement Date) in connection with the relevant Works or Services (as the case may be) without having procured that such persons have first delivered to the Authority a Collateral Warranty

duly executed by all parties thereto other than the Authority.

12. **[NOT USED]**

13. **COMMENCEMENT AND DURATION**

13.1. **Duration of Contract**

13.1.1. **This Contract and the rights and obligations of the Parties to this Contract shall take effect on the Contract Commencement Date and subject to Clause 136 (Continuation of Obligations) shall continue until the earlier of:**

13.1.1.1. **the Expiry Date; and**

13.1.1.2. **the Termination Date.**

13.2. **Commencement of Works and Services**

13.2.1. In respect of each Facility in respect of which Works are to be carried out the Works Period will commence on the relevant Works Commencement Date and terminate on the earlier of:

13.2.1.1. the date upon which such Facility is Accepted;

13.2.1.2. the Termination Date.

13.2.2. In respect of each aspect of the Services and associated Contract Waste streams, **the Service Period will commence on the relevant Services Commencement Date and terminate on the earlier of:**

13.2.2.1. **the Expiry Date; and**

13.2.2.2. **the Termination Date.**

13.3. **Option to Extend the Contract Period**

13.3.1. On or before a date falling no later than 24 months prior to the Expiry Date either Party shall have the option to give written notice to the other Party of its desire to extend the Expiry Date by a period of up to five years (the "Extension of the Contract Period") and if the other Party so agrees to the Extension of the Contract Period by giving such other Party written notice thereof then this Contract shall remain in full force and effect until the earlier of the extended Expiry Date or the Termination Date subject to the agreement by the Parties of the terms of such extension (including any consequential variations to the Contract and Annual Unitary Charge).

#### **14. GENERAL OBLIGATIONS OF THE AUTHORITY**

- 14.1. Save to the extent it is prevented from doing so by any act or omission of the Contractor or a Contractor Related Party, the Authority shall comply with its obligations under those Ancillary Documents to which it is a party.
- 14.2. Without prejudice to Clause 14.1 the Authority undertakes to the Contractor that in relation to this Project:
  - 14.2.1. it will to the extent that such Consents concern the carrying out of the Project, comply with all Consents applicable to it; and
  - 14.2.2. subject to Clause 2.7, it will not wilfully or negligently impede, hinder, obstruct or interfere with the Contractor in the performance of its obligations under this Contract.

#### **15. GENERAL REPRESENTATIONS WARRANTIES AND UNDERTAKINGS**

##### **Contractor Warranties**

- 15.1. The Contractor warrants to the Authority that:
  - 15.1.1. it is properly constituted and incorporated under the laws of England and Wales and has the corporate power to own its assets and to carry on its business as it is now being conducted;
  - 15.1.2. it has the power to enter into and to exercise its rights and perform its obligations under the Project Documents and Financing Agreements;
  - 15.1.3. all necessary action on the part of the Contractor to authorise the execution of and the performance of its obligations under the Project Documents and Financing Agreements has been taken or, in the case of any Project Document and Financing Agreement executed after the Contract Commencement Date, will be taken before such execution;
  - 15.1.4. the obligations expressed to be assumed by the Contractor under the Project Documents and Financing Agreements are, or in the case of any Project Document and Financing Agreement executed after the Contract Commencement Date will be, legal, valid, binding and enforceable upon and against the Contractor to the extent permitted by law and each Project Document and Financing Agreement is or will be in the proper form for enforcement in England;
  - 15.1.5. the execution, delivery and performance by it of the Project Documents and Financing Agreements does not contravene



any provision of:

- 15.1.5.1. any existing Legislation either in force, or enacted but not yet in force binding on the Contractor;
- 15.1.5.2. the Memorandum and Articles of Association of the Contractor;
- 15.1.5.3. any order or decree of any court or arbitrator which is binding on the Contractor; or
- 15.1.5.4. any obligation which is binding upon the Contractor or upon any of its assets or revenues;
- 15.1.6. the Contractor Warranted Data is true and accurate in all respects;
- 15.1.7. the Contractor has not, other than in connection with the Project, traded at any time since its incorporation as a company pursuant to the Companies Act 1985 (as amended);
- 15.1.8. no claim is presently being assessed and no litigation, arbitration or administrative proceedings are presently in progress or, to the best of the knowledge of the Contractor, pending or threatened against the Contractor or any of its assets which will or might have a material adverse effect on the ability of the Contractor to perform its obligations under any Project Document or Financing Agreements;
- 15.1.9. it is not the subject of any other obligation, compliance with which will or is likely to have a material adverse effect on the ability of the Contractor to perform its obligations under any Project Document or Financing Agreements;
- 15.1.10. no proceedings or other steps have been taken and not discharged (nor, to the best of the knowledge of the Contractor, threatened) for its winding-up or dissolution or for the appointment of a receiver, administrative receiver, administrator, liquidator, trustee or similar officer in relation to any of its assets or revenues;
- 15.1.11. no Contractor Default has occurred which is continuing;
- 15.1.12. (assuming that the Authority has the power to enter into this Contract) each of the Project Documents and Financing Agreements is or, when executed, will be in full force and effect and constitutes or, when executed, will constitute the valid, binding and enforceable obligations of the Parties thereto; and

- 15.1.13. the copies of the Project Documents and Financing Agreements which the Contractor has delivered or, when executed, will deliver to the Authority are or, as the case may be, will be true and complete copies of such documents and there are not in existence any other agreements or documents replacing or relating to any of the Project Documents or Financing Agreements which would materially affect the interpretation or application of any of the Project Documents or Financing Agreements,

and the Authority relies upon such warranties.

### **Contractor Undertakings**

- 15.2. Subject at all times to the Direct Agreement, the Contractor undertakes with the Authority that for so long as this Contract remains in full force:

- 15.2.1. it will upon becoming aware that, any litigation, arbitration, administrative or adjudication or mediation proceedings before or of any court, arbitrator or Relevant Authority which would adversely affect (to an extent which is material in the context of the Project) the Contractor's ability to perform its obligations under this Contract, may be threatened or pending and immediately after the commencement thereof give the Authority notice of all such litigation, arbitration, administrative or adjudication or mediation proceedings:

- 15.2.1.1. within 2 Business Days if the relevant proceedings are commenced against the Contractor itself;

- 15.2.1.2. within 20 Business Days where the relevant proceedings are against the Construction Sub-Contractor or Operating Sub-Contractor;

- 15.2.1.3. within 20 Business Days after becoming aware of such proceedings where the proceedings are threatened or pending.

- 15.2.2. subject to the provisions of Clause 133 (Change of Ownership of Contractor), it will not without the prior written consent of the Authority (and whether by a single transaction or by a series of transactions whether related or not) sell, transfer, lend or otherwise dispose of (other than by way of security) the whole or any substantial part of its business or assets which would materially affect the ability of the Contractor to perform its obligations under this Contract;

- 15.2.3. it will not cease to be resident in the United Kingdom or transfer in whole or in part its undertaking, business or trade

outside the United Kingdom;

- 15.2.4. it will not undertake the performance of its obligations under this Contract for the provision of the Services otherwise than through itself or a Sub-Contractor;
- 15.2.5. it shall not without the written consent of the Authority (such consent not to be unreasonably withheld or delayed) incorporate any company or purchase or acquire or subscribe for any shares in any company save where such company is involved in the provision of the Services;
- 15.2.6. it shall not without the written consent of the Authority (such consent not to be unreasonably withheld or delayed) make any loans or grant any credit or give any guarantee or indemnity to or for the benefit of any person or otherwise voluntarily or for consideration assume any liability (whether actual or contingent) in respect of any obligation of any other person except in the ordinary course of business; and
- 15.2.7. it shall not change or cease its business or start any other business which is materially different from that to be carried on by it under this Contract.

#### **Status of Warranties**

- 15.3. All warranties made, given or undertaken by the Contractor or the Authority (as appropriate) in this Clause 15 are cumulative and none shall be given a limited construction by reference to any other.

#### **Authority's Warranties**

- 15.4. Without prejudice to any express provision of this Contract the Authority shall not be liable to the Contractor for, and the Contractor shall not seek to recover from the Authority (or from any Authority Related Party), any damages, losses, costs, liabilities or expenses which may arise (whether in contract, tort or otherwise) from the adoption, use or application of information, data, statements or guidance given (orally or in writing) by the Authority or any Authority Related Party prior to the Contract Commencement Date.
- 15.5. Without prejudice to any express provisions of this Contract, the Authority does not warrant the accuracy of any representation or statement of fact or law given to the Contractor by the Authority its servants or agents at any time before the Contract Commencement Date.
- 15.6. Except in respect of any statement, information or advice which was made or given fraudulently by the Authority, its servants or agents acting in the course of their employment, the Authority shall not, without prejudice to any express provision of this Contract be liable to

the Contractor for any loss or damage which the Contractor may sustain as a result of relying on any such statement, information or advice whether in contract, tort under the Misrepresentation Act 1967 or otherwise and the Contractor shall not be entitled to rescind the Contract on account of any inaccuracy, incompleteness or insufficiency of the same.

- 15.7. Without prejudice to any express provision of this Contract and except in the case of fraud, the Authority shall not be liable to the Contractor in respect of any failure to disclose or make available to the Contractor (whether before, on or after the execution of this Contract) any information, nor any failure to review or to update any data, nor any failure to inform the Contractor (whether before, on or after execution of this Contract) of any inaccuracy, error, omission, defects or inadequacy in any information.

## 16. CONTRACTOR'S DUE DILIGENCE

- 16.1. Without prejudice and subject to any express provision of this Contract (including without limitation Clause 17 (Land Issues), Schedule 7 (March Anticipated Change) and Schedule 48 (Environmental Provisions)), the Contractor shall be deemed to have obtained for itself all necessary information as to risks, contingencies, due diligence and any other circumstances which might influence or affect its obligations under this Contract including without limitation current and projected Contract Waste tonnages and trends, potential markets for Recyclable Waste and IVC Acceptable Waste, Site conditions, Contamination, archaeological considerations, levels, services and the suitability of the Sites.

- 16.2. Without prejudice and subject to the generality of Clause 16.1 above and without prejudice and subject to any express provision of this Contract, (including without limitation Clause 17 (Land Issues), Schedule 7 (March Anticipated Change) and Schedule 48 (Environmental Provisions)), **the Contractor shall be deemed to have:**

- 16.2.1. **satisfied itself** before entering into this Contract **as to** all matters relating to the making Available of the Facilities and the provision of the Services including but not limited to:

16.2.1.1. the accuracy and sufficiency of the Financial Model, Base Case and other financial information stated by the Contractor in its tender, the Financing Agreements or any other Project Document;

16.2.1.2. the extent and condition of any **Assets to which it will acquire rights and the nature and extent of the risks assumed by it under this Contract**; and

- 16.2.1.3. the extent and nature of its obligations under this Contract; and
  - 16.2.2. **gathered all information necessary to perform its obligations under this Contract and other obligations assumed, including:**
    - 16.2.2.1. **information as to the nature, location and condition of the Sites (including hydrological, geological, geo-technical and sub-surface conditions); and**
    - 16.2.2.2. **information relating to archaeological finds, areas of archaeological scientific or natural interest, local conditions and facilities and the quality of existing structures.**
- 16.3. Except in respect of any statement, information or advice which was made or given fraudulently by the Authority, its servants or agents acting in the course of their employment, without prejudice and subject to any express provision of this Contract, **the Contractor shall not in any way be relieved from any obligation under this Contract nor shall it be entitled to claim against the Authority on grounds that any information, whether obtained from the Authority or otherwise (including information made available by the Authority) is incorrect or insufficient and shall make its own enquiries as to the accuracy and adequacy of that information.**

## **PART 2: DESIGN AND WORKS**

### **17. LAND ISSUES**

#### **17.1. Existing Authority Sites**

##### **17.1.1. General**

##### **17.1.1.1.**

- a) Save in respect of the March WTS the Authority will on the Contract Commencement Date grant and the Contractor will accept a Lease of each of the Existing Authority Freehold Sites save for those Sites where a Pre-emption Consent has not yet been obtained in which event the provisions of Clause 17.1.1.7 shall apply;
- b) The Authority will on the date agreed pursuant to the March Change Agreement grant and the Contractor will accept a Lease of the March WTS.

17.1.1.2. The Authority will on the Contract Commencement Date grant and the Contractor will accept an Underlease of each of the Existing Authority Leasehold Sites save for those Sites where a Superior Landlord's Consent has not yet been obtained in which event the provisions of Clause 17.1.1.6 shall apply or in respect of the HWRC Site at Wisbech where the Lease Condition has not been satisfied in which event the provisions of Clause 17.1.1.8 shall apply;

##### **17.1.1.3.**

- a) The term of each Lease and Underlease of the Existing Authority Sites shall commence on the Lease Commencement Date and shall expire on the Lease Expiry Date unless terminated earlier in accordance with this Contract;
- b) The term of the Lease of the March WTS shall commence on the date agreed pursuant to the March Change Agreement and expire on the Lease Expiry Date unless terminated earlier in accordance

with this Contract.

17.1.1.4. Subject to Clause 17.1.2 (Warranties), Clause 17.1.4.2 (Licensed Sites), Clause 17.1.4.3 (Changes to Existing Title Matters) and Clause 17.2 (Headleases) the Leases and Underleases (other than in respect of any Leases or Underleases granted in respect of the Sites at March or Milton) are granted subject to but where applicable with the benefit of:-

- a) all existing rights privileges easements liabilities (and in particular but without prejudice to the generality of the foregoing) drainage or other service rights or easements and quasi or reputed easements affecting the Existing Authority Sites;
- b) all local land charges (whether registered or not before the date hereof) and all matters capable of registration as local land charges (whether or not actually registered as such) affecting or relating to the Existing Authority Sites or any part thereof or any building or other structure thereon or any part thereof whether general or specific;
- c) all notices orders proposals or requirements whatsoever (whether registered or not before the date hereof) affecting or relating to the Existing Authority Sites or any part thereof given or made by any Relevant Authority including for the avoidance of doubt in this context the Environment Agency any Government department or by any statutory undertaker or by any public local authority or other competent authority;
- d) all actual or proposed charges orders proposals restrictions agreements notices or other matters whatsoever (whether registered or not before the date hereof) affecting or relating to the Existing Authority Sites or any part thereof or any building or other structure thereon or any part thereof under the Planning Act; and
- e) the matters mentioned or referred to in the

registers to the freehold or leasehold titles to the Existing Authority Sites as at the Contract Commencement Date

existing at the Contract Commencement Date ("Existing Title Matters") and the Contractor shall be deemed to take the Leases and Underleases with full knowledge thereof and shall raise no requisition thereon or objection thereto

17.1.1.5. For the avoidance of doubt the Contractor shall not be entitled to any compensation on the expiry or earlier determination of the Leases or Underleases save as expressly set out in this Contract

17.1.1.6. In relation to those Existing Authority Leasehold Sites for which a Superior Landlord's Consent has not been obtained on or before the Contract Commencement Date:-

- a) the Authority shall use all reasonable endeavours to obtain such consents as quickly as possible;
- b) if a Superior Landlord's Consent has not been obtained by the HWRC Date the Authority shall permit and procure that the Contractor shall be entitled to occupy the relevant Site from the HWRC Date as a licensee on the same terms as if the relevant Underlease had been granted;
- c) the Authority and the Contractor will on the date 10 Business Days following the obtaining of a Superior Landlord's Consent for a Site enter into the relevant Underlease for such Site in the form executed by the Parties and held in escrow pending only the fulfilment of this condition;
- d) the Authority acknowledges that it shall carry the risk of any disturbance or interference to the use occupation and operation of any Existing Authority Leasehold Site by the Contractor by reason of the absence of Superior Landlord's Consent and any such disturbance or interference shall for the purposes of Clause 36 (Compensation Event) and



Clause 46 (Service Delay) be treated and assessed as a Compensation Event.

17.1.1.7. In relation to those Existing Authority Freehold Sites for which a Pre-emption Consent has not been obtained on or before the Contract Commencement Date:-

- a) the Authority shall use all reasonable endeavours to obtain such consents as quickly as possible;
- b) if a Pre-emption Consent has not been obtained by the HWRC Date the Authority shall permit and procure that the Contractor shall be entitled to occupy the relevant Site from the HWRC Date as a licensee on the same terms as if the relevant Lease had been granted;
- c) the Authority and the Contractor will on the date 10 Business Days following the obtaining of a Pre-emption Consent for a Site enter into the relevant Lease for such Site in the form executed by the Parties and held in escrow pending only the fulfilment of this condition;
- d) the Authority acknowledges that it shall carry the risk of any disturbance or interference to the use occupation and operation of any Existing Authority Freehold Site by the Contractor by reason of the absence of a Pre-emption Consent and any such disturbance or interference shall for the purposes of Clause 36 (Compensation Event) and Clause 46 (Service Delay) be treated and assessed as a Compensation Event.

17.1.1.8. In relation to the HWRC Site at Wisbech where the Lease Condition has not been satisfied on or before the Contract Commencement Date:-

- a) the Authority shall use all reasonable endeavours to satisfy the Lease Condition as quickly as possible and shall be responsible for all Stamp Duty Land Tax Land Registry fees and other costs of registration incurred in satisfying the Lease Condition;

- b) if the Lease Condition has not been satisfied by the HWRC Date the Authority shall permit and procure that the Contractor shall be entitled to occupy the HWRC Site at Wisbech from the HWRC Date as a licensee on the same terms as if the relevant Lease had been granted;
  - c) the Authority and the Contractor will on the date 10 Business Days following satisfaction of the Lease Condition enter into the Lease of the HWRC Site at Wisbech in the form executed by the Parties and held in escrow pending only the fulfilment of this condition;
  - d) the Authority acknowledges that it shall carry the risk of any disturbance or interference to the use occupation and operation of the HWRC Site at Wisbech by the Contractor by reason of the Lease Condition not being satisfied by the HWRC Date and any such disturbance or interference shall for the purposes of Clause 36 (Compensation Event) and Clause 46 (Service Delay) be treated and assessed as a Compensation Event.
- 17.1.1.9. Following the grant of the relevant Lease or Underlease (as applicable) the Contractor shall not use the Existing Authority Sites otherwise than as expressly permitted by such Lease or Underlease.
- 17.1.1.10. The Standard Commercial Property Conditions (Second Edition) shall apply to the agreement to grant the Leases and Underleases herein contained save insofar as such conditions are inconsistent with the terms of this Contract in which event the terms of this Contract shall prevail.
- 17.1.1.11. The Contractor shall not, without prior written approval from the Authority (such approval not to be unreasonably withheld) except in the performance of the Contractor's obligations under this Contract interfere in any way with any materials, chattels, or other equipment (not forming part of the Contractor's Facilities or the Assets) contained on any of the Existing Authority Sites.

### 17.1.2. Warranties

The Authority warrants to the Contractor that:-

- 17.1.2.1. the information contained in the written replies to the enquiries raised by the Contractor's solicitors to the Authority in relation to the Existing Authority Sites are true complete and accurate in all material respects and not misleading in any material respect and there is no omission from such information where such omission makes such information misleading
- 17.1.2.2. the originals or copies of all Title Deeds and other documents and papers relating to the Existing Authority Sites in the Authority's possession have been made available to the Contractor's solicitors. The originals of such Title Deeds, documents and papers are held by the Authority free of charge or lien

and in the event that any of the warranties given in this Clause 17.1.2 is found to be inaccurate or misleading in any way or is otherwise breached, such inaccuracy, misleading or breach shall for the purposes of Clause 36 (Compensation Event) and Clause 46 (Service Delay) be treated and assessed as a Compensation Event.

### 17.1.3. Registration

- 17.1.3.1. The Contractor shall apply for, and procure, registration of each of the Leases and Underleases in respect of the Existing Authority Sites at the Land Registry as soon as reasonably practicable after completion of each of the Leases and Underleases and shall as soon as reasonably practicable after completion of each such application supply copies of the leasehold register entries and title plan to the Authority Provided That this obligation shall not apply in relation to any Existing Authority Sites to which the Council's title is unregistered until the Council procures first registration of its own title.
- 17.1.3.2. The Authority shall use all reasonable endeavours to assist the Contractor in responding to any proper requisitions raised by the Land Registry.

### 17.1.4. Title

- 17.1.4.1. Subject to Clause 17.1.4.2 (Licensed Sites), Clause 17.1.4.3 (Changes to Title Matters), and Clause 17.1.2 (Warranties) title to the Existing Authority Sites having been deduced to the Contractor or the Contractor's solicitors prior to the date hereof the Contractor shall take the Leases and the Underleases with full knowledge thereof and shall raise no objection, requisition or enquiry in respect of the same save that the Contractor can require the Authority's assistance with regard to registration as provided for in Clause 17.1.3.2
- 17.1.4.2. The Parties acknowledge that the Authority has not deduced title to the Contractor in respect of the Existing Authority Licensed Sites and the provisions of Clauses 17.4, 17.5 and 17.6 shall apply in respect of the Contractor's use and occupation of such sites.
- 17.1.4.3. If after the Contract Commencement Date but prior to the HWRC Date any Title Matters arise which are not Existing Title Matters the Authority shall notify the Contractor of such Title Matters and provide the Contractor with any relevant documentation as soon as the Authority becomes aware of the same and in the event any such Title Matters shall interfere with or otherwise restrict or prevent the Contractor's ability to provide the Services from the relevant Site then the existence of such Title Matters shall for the purposes of Clause 36 (Compensation Event) and Clause 46 (Service Delay) be treated and assessed as a Compensation Event.

## **17.2. Headleases**

- 17.2.1. The Authority shall not during the Contract Period without the Contractor's prior written consent surrender or assign any Headlease or enter into any underletting of the whole or part of the premises demised by a Headlease or enter into any dealings of whatsoever nature with the Authority's interest in a Headlease save to any statutory successor body of the Authority taking over the Authority's waste disposal authority functions or as the same may be permitted pursuant to Clause 131 (Assignment and Subcontracting).
- 17.2.2. If any Headlease is forfeited by a Superior Landlord following a breach by the Authority of its tenant covenants

(save to the extent due to a breach by the Contractor or any Contractor Related Party of the covenants or obligations set out in the relevant Underlease or in this Contract) then such forfeiture shall be treated and assessed as a Compensation Event for the purposes of Clause 36 (Compensation Event) and Clause 46 (Service Delay).

17.2.3. Nothing in this Clause 17.2 shall prevent the Contractor from seeking relief from forfeiture.

17.2.4. The Authority shall comply with the obligations on the part of the tenant under the Headleases (save to the extent that such obligations are owed by the Contractor under the terms of this Contract) provided that the Authority shall not carry out its obligations nor exercise any rights under the Headleases in such a manner as to interfere with the beneficial use and enjoyment of the Leasehold Sites by the Contractor or the due performance by the Contractor of its obligations under this Contract.

### 17.3. **Alterations**

Subject at all times to Clause 107 (Authority and Contractor Changes) if at any time after the Lease Commencement Date the Contractor wishes to carry out any alterations or additions of any kind to any of the Leasehold Sites the Contractor shall prior to the commencement of any such alterations or additions:-

17.3.1. Provide the Authority with all information (including plans and specifications where applicable) which the Authority shall reasonably require and/or which the relevant Superior Landlord shall require under the terms of the relevant Headlease to enable the Authority to apply for Superior Landlord's Consent to the proposed alterations or additions in accordance with the provisions of the relevant Headlease;

17.3.2. Bear all reasonable costs properly incurred in obtaining the Superior Landlord's Consent;

17.3.3. Provide such security and enter into such covenants as the relevant Superior Landlord may require in accordance with the terms of the relevant Headlease; and

17.3.4. save for the implementation of the Works or works required for the provision of Services to obtain the Authority's consent to the proposed alterations or additions which consent shall not be unreasonably withheld or delayed.

### 17.4. **Existing Authority Licensed Sites at St Neots and Grunty Fen**

17.4.1. From the HWRC Date the Authority shall permit and procure

that the Contractor shall be entitled to occupy the HWRC Sites at St Neots and Grunty Fen as a licensee on the same terms as if a Lease had been granted of the same together with all necessary rights in order for the Contractor to perform the HWRC Management Services at the relevant HWRC Site;

- 17.4.2. The Authority acknowledges that it shall carry the risk of any disturbance to the use occupation and operation of the HWRC Sites at St Neots and Grunty Fen by the Contractor and any such disturbance shall for the purposes of Clause 36 (Compensation Event) and Clause 46 (Service Delay) be treated and assessed as a Compensation Event.

**17.5. Existing Authority Licensed Site at March**

- 17.5.1. The Authority shall seek to obtain a Property Interest in the existing HWRC Site at March as quickly as possible;
- 17.5.2. On the date no later than 10 Business Days following the Authority obtaining a Property Interest at March the Authority will grant and the Contractor will accept a Lease or Underlease (as applicable depending on the nature of the Property Interest secured) of the HWRC Site at March and this Site shall be treated as an Existing Authority Site for the purposes of this Clause 17.
- 17.5.3. In the event the Authority has not secured a Property Interest in the existing HWRC Site at March by the date 24 months from the HWRC Date but has been able to secure a Property Interest in a Replacement Authority HWRC Site pursuant to Clause 17.8 then the provisions of Clause 17.8 shall apply with respect to the grant of a Lease or Underlease (as applicable) of such Replacement Authority HWRC Site and the Replacement Authority HWRC Site shall be treated as an Existing Authority Site for the purposes of this Clause 17.
- 17.5.4. In the event the Authority is unable to grant the Contractor a Lease or Underlease of either the existing HWRC Site at March or a Replacement Authority HWRC Site by the HWRC Date then the provisions of Clause 17.9 shall apply.
- 17.5.5. Without prejudice to Clause 17.5.4, as an Authority Change the Authority may require the Contractor to remain at the existing HWRC Site at March as a licensee in which event the provisions of Clauses 17.1.1.6 (b) and (d) shall apply (the duration of such licence to be agreed as part of the Authority Change).

**17.6. Existing Authority Licensed Site at Milton**

- 17.6.1. In the event that prior to the HWRC Date the Authority has secured a Property Interest in the existing HWRC Site at Milton and has supplied evidence of the same to the Contractor (but without being under any obligation to do so) and all necessary Consents are in place to secure operation of this Site as an HWRC beyond the HWRC Date then on the HWRC Date the Authority will grant and the Contractor will accept a Lease or Underlease (as applicable depending on the nature of the Property Interest secured) of the HWRC Site at Milton 10 Business Days following satisfaction of the same, the term expiry date of such lease to be no later than the expiry of any Consents and this Site shall be treated as an Existing Authority Site for the purposes of this Clause 17.
- 17.6.2. In the event the Authority has not secured a Property Interest in the existing HWRC Site at Milton with all necessary Consents in place or has not secured a Replacement Authority HWRC Site for Milton by the HWRC Date then the provisions of Clause 17.9 shall apply.

**17.7. Replacement Authority Sites – St Neots and Grunty Fen**

- 17.7.1. The Authority may prior to the date of either St Neots or Grunty Fen closing for whatever reason (including without limitation the Authority not having (or failing to acquire) a Property Interest in the relevant Site, the forfeiture of any Headlease, or the relevant Site not having all necessary Consents to allow the Contractor to deliver the HWRC Management Services) acquire a Property Interest in a new site suitable for use by the Contractor as an HWRC in accordance with the provisions of this Clause 17.7.
- 17.7.2. The Authority will keep the Contractor regularly informed in writing at all times as to its progress in identifying suitable Replacement Authority HWRC Sites and which Site (either St Neots or Grunty Fen) they are proposed to replace and shall provide to the Contractor as soon as reasonably practicable following receipt of the same all information and documentation available to the Authority regarding any Replacement Authority HWRC Site identified by the Authority as potentially being suitable for a Replacement Authority HWRC Site which for the avoidance of doubt must include:-
- 17.7.2.1. any Property Documents;
- 17.7.2.2. any necessary Consents (or in respect of the Waste Management Licence the parties have agreed the mechanism for obtaining and/or transferring a Satisfactory Waste Management Licence to the Contractor) for the use and

occupation of the Replacement Authority HWRC Site for the delivery of HWRC Management Services for the full Contract Period;

- 17.7.2.3. plans and specifications showing/detailing the proposed site layout and works to be undertaken by the Authority at the Replacement Authority HWRC Site;
- 17.7.2.4. a ground conditions survey prepared by an independent environmental consultant containing sufficient detail to enable the Contractor to take an informed decision as to the likely level of contamination at the proposed Replacement Authority HWRC Site;
- 17.7.2.5. such other information as could be reasonably required by the Contractor in order to make an informed decision as to the suitability of the proposed site;
- 17.7.2.6. all investigations and due diligence which would be expected of a prudent purchaser of a Property Interest in the proposed Replacement Authority HWRC Site.

together "the New HWRC Information Pack"

- 17.7.3. The Authority will carry out all investigations and due diligence which would be expected of a prudent purchaser of a Property Interest in the proposed Replacement Authority HWRC Site and shall forward the results of such due diligence exercise to the Contractor forthwith upon the results becoming available.
- 17.7.4. The Authority will (within the reasonable time following receipt of a request) provide (to the extent it is able to do so) further clarification of issues and/or information in response to any reasonable request by the Contractor relating to the Replacement Authority HWRC Site.
- 17.7.5. Subject to Clause 17.7.6, the Contractor shall as soon as practicable and in any event within forty (40) Business Days of receipt of all information required to form part of the New HWRC Information Pack (which in the case of a leasehold interest shall include confirmation in principle that any Superior Landlord is willing to issue a Superior Landlord's Consent) and all of the information and documentation referred to in Clauses 17.7.3 and 17.7.4 serve written notice on the Authority confirming whether or not the Contractor



(acting reasonably) is willing to treat the proposed Replacement Authority HWRC Site as an appropriate site ("the HWRC Approval"). In determining whether the proposed Replacement Authority HWRC Site is an appropriate site the Contractor may have regard to any matters which may relate to the suitability of the Site as a property from which HWRC Management Services are to be delivered and in particular suitability for the Intended Use. Without limitation the Contractor may take into account geographical location, size, access, site layout, title matters, ground conditions, the suitability or acceptability of any necessary Consents, the suitability or acceptability of the Authority's works specification (including the suitability or acceptability of any collateral warranties in respect of such works and requirements of this Contract in relation to that Site) and any other matters requirements or assumptions that could reasonably be relevant to site selection. Without prejudice to the aforementioned provisions the Contractor shall be reasonable in refusing to treat a proposed Replacement Authority HWRC Site as an appropriate site if such site would either adversely affect Third Party Income and/or increase staffing levels in comparison to the site being replaced.

- 17.7.6. If the Contractor fails to serve written notice pursuant to Clause 17.7.5 then the Authority shall be entitled to serve a further notice upon the Contractor expressly stating that if the Contractor fails to serve written notice within 5 Business Days of such further notice then the Contractor shall be deemed to have issued the HWRC Approval on the last day of the aforesaid period of five (5) Business Days.
- 17.7.7. If the Contractor serves notice refusing to give the HWRC Approval it shall provide full and detailed reasons for such refusal and the Authority shall take such reasonable action and/or provide such additional information as may be available to the Authority in order to deal with the Contractor's concerns.
- 17.7.8. If the Authority does not consider the Contractor has acted reasonably in refusing to give the HWRC Approval whether the Contractor's refusal to issue the HWRC Approval is reasonable shall be determined in accordance with Clause 113 (Dispute Resolution).
- 17.7.9. If the Parties agree or if it is determined in accordance with clause 113 (Dispute Resolution) that the Contractor's refusal to issue the HWRC Approval is reasonable and if any concerns reasonably raised by the Contractor cannot be dealt with satisfactorily then the Authority may propose an alternative Replacement Authority HWRC Site and the

provisions of this Clause 17.7 shall continue to apply in relation to any alternative proposal until the HWRC Approval is given.

17.7.10. If the Contractor issues an HWRC Approval to a Replacement Authority HWRC Site or it is determined that the Contractor's refusal to issue the HWRC Approval is not reasonable then:-

17.7.10.1. The Authority will enter into (or complete) the Proposed Acquisition;

17.7.10.2. The Authority's solicitors shall serve on the Contractor a Notice in the form set out in Schedule 1 to the Regulatory Reform (Business Tenancies) (England & Wales) Order 2003 ("the Order") in relation to the Lease/Underlease (as applicable) of the Replacement Authority HWRC Site to be granted pursuant to this Clause 17.7.10 together with the form of the declaration to be sworn by the Contractor as set out in paragraph 8 of Schedule 2 to the Order ("the Tenant's Declaration") and the Parties agree that the provisions of Sections 24 to 28 (inclusive) of the Landlord and Tenant Act 1954 (as amended) shall be excluded from the Lease/Underlease to be granted of the Replacement Authority HWRC Site and the Contractor shall issue such declaration prior to completion of such Lease/Underlease;

17.7.10.3. The Authority shall undertake any necessary construction works in accordance with the plans and specifications provided to the Contractor pursuant to Clause 17.7.2 and upon the satisfactory completion of such works (as determined by the Contractor acting reasonably) the Authority shall serve upon the Contractor a notice confirming completion of such works ("the New HWRC Works Completion Statement"). Any dispute as to whether such works have been satisfactorily completed shall be determined in accordance with Clause 113 (Dispute Resolution).

17.7.11. Within 10 Business Days of the receipt by the Contractor of the New HWRC Works Completion Statement or within 10 Business Days of it being determined the works have been satisfactorily completed in the event of a dispute under Clause 17.7.10.3 the Authority will grant and the Contractor

will accept a Lease (or Underlease if the Property Interest acquired is a Leasehold) of the Replacement Authority HWRC Site (the Superior Landlord's Consent for such grant having been obtained by the Authority at its own expense) for a term commencing on the date of grant and expiring on the Expiry Date unless terminated earlier in accordance with this Contract.

17.7.12. Simultaneously with the grant of the Lease or Underlease pursuant to clause 17.7.11 above the Contractor shall deliver to the Authority a deed of surrender in respect of the Lease or Underlease (as applicable) of the Site (either St Neots or Grunty Fen) which has been replaced by the Replacement Authority HWRC Site together with the Lease/Underlease (as applicable), all other relevant title deeds, releases from any charge and a direction to the Chief Land Registrar to cancel the registered titles relating to such Lease/Underlease.

17.7.13. The provisions of Clauses 17.1.1.4, 17.1.1.5, 17.1.2, 17.1.3, 17.2 and 17.3 above shall apply as if the Replacement Authority HWRC Site was an Existing Authority Site (with any necessary changes).

17.7.14. The Authority confirms it will be responsible for all costs associated with the acquisition of the Property Interest in the Replacement Authority HWRC Site and any other interest required to use the Replacement Authority HWRC Site for the Intended Use and all costs in relation to the development of the Replacement Authority HWRC Site including but not limited to costs of acquisition obtaining any Superior Landlord's Consent build costs legal and professional fees costs and expenses Stamp Duty Land Tax VAT Land Registry fees and other costs of registration.

**17.8. Replacement Authority Sites – all HWRC Sites other than St Neots and Grunty Fen**

17.8.1. The Authority may prior to the date of any Existing Authority Site or Replacement Site (but excluding St Neots and Grunty Fen) closing for whatever reason (including without limitation the Authority not having (or failing to acquire) a Property Interest in the relevant Site, the forfeiture of any Headlease, the existence of any Title Defects or the relevant Site not having all necessary Consents to allow the Contractor to deliver the HWRC Management Services) identify and take steps to secure a Property Interest in a new site suitable for use by the Contractor as an HWRC in accordance with the provisions of this Clause 17.8.

17.8.2. In the event that the Authority determines to deliver a

Replacement Authority HWRC Site then this shall be notified to the Contractor in an Authority Notice of Change in accordance with Clause 107.2 (Authority Change) and be subject to the provisions of this Clause 17.8 and Clause 107 (Authority Change).

17.8.3. The Authority will keep the Contractor regularly informed in writing at all times as to its progress in identifying and securing suitable Replacement Authority HWRC Sites and which Existing Authority Sites they are proposed to replace and shall provide to the Contractor as soon as reasonably practicable following receipt of the same, and in any event prior to the issuing of an Authority Notice of Change, all information and documentation available to the Authority regarding any Replacement Authority HWRC Site identified by the Authority as potentially being suitable for a Replacement Authority HWRC Site which for the avoidance of doubt must include:-

- 17.8.3.1. any Property Documents;
- 17.8.3.2. any necessary Consents for the use and occupation of the Replacement Authority HWRC Site for the delivery of HWRC Management Services for the full Contract Period;
- 17.8.3.3. plans and specifications showing/detailing the proposed site layout and works to be undertaken at the Replacement Authority HWRC Site;
- 17.8.3.4. a ground conditions survey prepared by an independent environmental consultant containing sufficient detail to enable the Contractor to take an informed decision as to the likely level of contamination at the proposed Replacement Authority HWRC Site;
- 17.8.3.5. such other information as could be reasonably required by the Contractor in order to make an informed decision as to the suitability of the proposed site;
- 17.8.3.6. all investigations and due diligence which would be expected of a prudent purchaser of a Property Interest in the proposed Replacement Authority HWRC Site.

17.8.4. If it is agreed pursuant to the Authority Notice of Change that the site in question is to be treated as a Replacement

Authority HWRC Site then:-

- 17.8.4.1. Clause 107 shall be implemented including as to any Capital Expenditure and/or Estimated Revised Project Costs arising;
- 17.8.4.2. The Authority will enter into (or complete) the Proposed Acquisition;
- 17.8.4.3. The Parties shall undertake all necessary acts to exclude the provisions of Sections 24 to 28 (inclusive) of the Landlord and Tenant Act 1954 (as amended) from the Lease/Underlease to be granted of the Replacement Authority HWRC Site;
- 17.8.4.4. On the date as agreed pursuant to the Authority Notice of Change the Authority will grant and the Contractor will accept a Lease (or Underlease if the Property Interest acquired is a Leasehold) of the Replacement Authority HWRC Site (the Superior Landlord's Consent for such grant having been obtained by the Authority at its own expense) for a term commencing on the date of grant and expiring on the Expiry Date unless terminated earlier in accordance with this Contract;
- 17.8.4.5. On the date as agreed pursuant to the Authority Notice of Change the Contractor shall deliver to the Authority a deed of surrender in respect of the Lease or Underlease (as applicable) of the Existing Authority Site which has been replaced by the Replacement Authority HWRC Site together with the Lease/Underlease (as applicable), all other relevant title deeds, releases from any charge and a direction to the Chief Land Registrar to cancel the registered titles relating to such Lease/Underlease.
- 17.8.5. The provisions of Clauses 17.1.1.4, 17.1.1.5, 17.1.2, 17.1.3, 17.2 and 17.3 above shall apply as if the Replacement Authority HWRC Site was an Existing Authority Site (with any necessary changes).
- 17.8.6. The Authority confirms it will be responsible for all costs associated with the acquisition of the Property Interest in the Replacement Authority HWRC Site and any other interest required to use the Replacement Authority HWRC Site for the Intended Use and all costs in relation to the

development of the Replacement Authority HWRC Site including but not limited to costs of acquisition obtaining any Superior Landlord's Consent build costs legal and professional fees costs and expenses Stamp Duty Land Tax VAT Land Registry fees and other costs of registration.

**17.9. Authority Failure to Secure a Replacement Site**

In the event that the Authority shall fail to grant the Contractor a Lease or Underlease of a Replacement Authority HWRC Site (having all necessary Consents and being ready for the immediate delivery of Services by the Contractor) on or before the date any Existing Authority Site has to be closed for whatever reason (including without limitation the Authority not having (or failing to acquire) a Property Interest in the relevant Site, the forfeiture of any Headlease, the existence of any Title Defects or the relevant Site not having all necessary Consents to allow the Contractor to deliver the Services) then such breach shall for the purposes of Clause 70 be deemed to be an Excusing Cause and treated and assessed as an Authority Change and the provisions of Clause 107 (Authority Changes) shall apply.

**17.10. Contractor Sites**

- 17.10.1. The Contractor will on the relevant Lease Commencement Date grant (or procure the grant) to the Authority and the Authority will accept a Contractor Site Lease of each of the Contractor Sites.
- 17.10.2. Immediately after the grant of the Contractor Site Leases pursuant to Clause 17.10.1 above the Authority will grant and the Contractor will accept a Contractor Site Sub-Lease of each of the Contractor Sites.
- 17.10.3. The term of each Contractor Site Lease and Contractor Site Sub-Lease shall commence on the relevant Lease Commencement Date and shall expire on the date set out in the relevant Contractor Site Lease or Sub-Lease unless terminated earlier in accordance with this Contract.
- 17.10.4. Subject to the receipt of an SDLT Land Transaction Certificate (which the Authority shall use all reasonable endeavours to obtain as quickly as possible), the Contractor shall apply for, and procure, registration of each of the Contractor Site Leases and Sub-Leases at the Land Registry as soon as reasonably practicable after completion of each of the Leases and Sub-Leases and the Authority shall use all reasonable endeavours (but without being required to incur any costs save any Land Registry fees payable in connection with the registration of the Contractor Site Leases which the Authority shall pay within 5 Business Days of request) to assist the Contractor in responding to

any proper requisitions raised by the Land Registry.

- 17.10.5. Following the grant of the Contractor Site Sub-Leases the Contractor shall not use the Contractor Owned Sites otherwise than as expressly permitted by such Sub-Lease.
- 17.10.6. The Standard Commercial Property Conditions (Second Edition) shall apply to the agreement to grant the Contractor Leases and Sub-Leases herein contained save insofar as such conditions are inconsistent with the terms of this Contract in which event the terms of this Contract shall prevail.
- 17.10.7. Title to the Contractor Sites having been deduced to the Authority prior to the relevant Lease Commencement Date the Authority shall take the Contractor Site Leases with full knowledge thereof and shall raise no objection, requisition or enquiry in respect of the same.
- 17.10.8. The Contractor Site Leases and the Contractor Site Sub-Leases shall be granted subject to but where applicable with the benefit:-
  - 17.10.8.1. all existing rights privileges easements liabilities (and in particular but without prejudice to the generality of the foregoing drainage and other service rights or easements) and quasi or reputed easements affecting the Contractor Sites;
  - 17.10.8.2. all Local Land Charges (whether registered or not before the date hereof) and all matters capable of registration as Local Land Charges (whether or not actually registered as such) affecting or relating to the Contractor Sites or any part thereof or any building or other structure thereof or on part thereof whether general or specific;
  - 17.10.8.3. all notices orders proposals or requirements whatsoever (whether registered or not before the date hereof) affecting or relating to the Contractor Sites or any part thereof given or made by any government department or by any statutory undertaker or by any public local authority or other Relevant Authority;
  - 17.10.8.4. all actual or proposed charges, orders, proposals, restrictions, agreements, notices or other matters whatsoever (whether registered or not before the date hereof) affecting or

relating to the Contractor Sites or any part thereof or any building or other structure thereon or any part thereof arising under the Planning Acts; and

- 17.10.8.5. the matters mentioned or referred to in the registers to the freehold or leasehold titles to the Contractor Sites as at the date of this Contract;

existing at the Contract Commencement Date and the Authority shall be deemed to take each Contractor Site Lease with full knowledge thereof and shall raise no requisition thereon or objection thereto.

- 17.10.9. The parties will complete the Supplemental Agreements on the Lease Commencement Date.

#### **17.11. Early Termination**

- 17.11.1. If this Contract is terminated for any reason prior to the Expiry Date, all the Leases, Underleases and Contractor Site Sub-Leases granted to the Contractor shall automatically cease and determine with effect from the date of termination of this Contract (or, if not granted at the time, the obligation to do so shall automatically cease to apply).
- 17.11.2. The Contractor shall forthwith deliver to the Authority the original of each Lease, Underlease and Contractor Site Sub-Lease together with any other relevant title deeds and releases from any charge. The Contractor shall take all steps as may be proper and reasonable to cancel or assist in the cancellation of all entries at the Land Registry and the Land Charges Registry in relation to the Leases, Underleases and Sub-Leases

#### **17.12. HWRC Schedules of Condition**

- 17.12.1. The Authority agrees that it shall ensure that at the HWRC Date the Existing Authority Sites shall be in no worse state and condition as evidenced by the Phase 1 Schedules of Condition and shall meet the Phase 1 HWRC Specification so as not to require the Contractor to undertake any works or incur any expenditure in order to properly deliver the HWRC Management Services.
- 17.12.2. The Contractor and the Authority agree that, no later than 2 months prior to the relevant Lease Commencement Date, they shall jointly appoint a firm of surveyors to prepare detailed schedules of condition for each of the Sites and in respect of any Replacement Authority HWRC Sites such



schedule shall be prepared prior to the date of a Lease or Underlease being granted ("the Phase 2 Schedules of Condition") and the costs of such survey shall be borne equally between the Parties.

- 17.12.3. Notwithstanding any other provisions of this Contract the Authority agrees that the Contractor shall be under no obligation to put the HWRC Sites in any better state of repair and condition as evidenced by the Phase 2 Schedules of Condition.

#### **17.13. Title Defects**

- 17.13.1. The Contractor shall notify the Authority in writing as soon as reasonably practicable after becoming aware of any impact of a Title Defect upon the provision of the Services and shall supply such other information as the Authority shall reasonably require.

- 17.13.2. In the event any Title Defect shall:-

17.13.2.1. interfere with or otherwise restrict or prevent the Contractor's ability to provide the Services from the relevant Site; or

17.13.2.2. cause any alteration in the manner of or any increased costs associated with the delivery of the Services from the relevant site;

then the existence of such Title Defect shall for the purposes of Clause 36 (Compensation Event) and Clause 46 (Service Delay) be treated and assessed as a Compensation Event.

- 17.13.3. In respect of any Title Defects, the Authority shall indemnify the Contractor, from and against all liability for third party actions, claims, demands and any costs charges and expenses reasonably and properly incurred (including legal expenses) associated with rectifying any such Title Defects or in respect of any third party actions, claims or demands arising as a result of or in connection with any Title Defect.

#### **17.14. SDLT Liability**

- 17.14.1. The Authority covenants with the Contractor to pay to the Contractor on demand an amount equal to any liability of the Contractor for stamp duty land tax arising in respect of, by reference to or in connection with any Lease, Underlease, Contractor Site Sub-Lease or licence of an Existing Authority Site (or any Site treated as such for the purposes of this Clause 17), any Lease or Underlease of a Replacement Authority HWRC Site and the acquisition of

any other Property Interest by the Contractor in connection with the Project, together with such interest or penalties thereon.

- 17.15. Subject to the terms of the Supplemental Agreements the Authority covenants with the Contractor that it shall observe and perform all obligations and covenants on the part of landlord contained in the Underleases and Leases of the Authority Sites and the Contractor Site Sub-Leases.

## 18. **CONSENTS**

The provisions of this Clause 18 (Consents) shall apply subject to the express provisions of Clause 17 (Land Issues), Clause 104 (Relief Events), Schedule 7 (March Anticipated Change) and Schedule 11 (Planning Permissions and PPC Permit).

### 18.1. The Contractor shall:

- 18.1.1. at its own expense obtain and maintain and renew as necessary all Consents which are from time to time required for the carrying out of the Works and the performance of the Services. Provided that if the Contractor is unable (having used all reasonable endeavours) to comply with this Clause 18.1 from time to time then (without prejudice to any other rights or remedies of the Authority including the right to terminate under any other limb of the definition of Contractor Default) no right of termination under limbs (a) or (b) of the definition of Contractor Default shall arise by reason of such non-compliance;
- 18.1.2. comply with the conditions attached to any Consents and procure that no such Consent is breached by it, its Sub-Contractors and/or any person under its control and use all reasonable endeavours to procure that no Consent is revoked and that all Consents continue in full force and effect for such time as is necessary for the Contractor to carry out the Works and/or the Services;
- 18.1.3. notify the Authority promptly of any notices received (whether from any Relevant Authority or any other person) relating in any way to any Consent and shall provide to the Authority a copy of any such notice within 5 Business Days of receipt by the Contractor;
- 18.1.4. supply copies to the Authority of any relevant correspondence relating to the discharge of Planning Obligations within 5 Business Days of receipt or sending thereof by the Contractor.

### 18.2. The Contractor shall not (and shall procure that no other person under

its control shall) without the prior consent in writing of the Authority (such consent not to be unreasonably withheld or delayed), apply for or agree to any variation, relaxation or waiver of any Consent (whether obtained before or after the Contract Commencement Date) or of any condition attached to any such Consent but, subject to compliance by the Contractor with its obligations under this Clause 18, references in this Contract to "Consents" shall be construed as referring to the Consents as from time to time varied, relaxed or waived.

- 18.3. The Contractor shall supply free of charge to the Authority a copy of every application for a Planning Permission and Waste Management Licence (with a copy of all accompanying drawings and other documents) and a copy of every Planning Permission and Waste Management Licence obtained;

#### **Delay in transfer of existing Consents**

18.4.

18.4.1.

- (a) As soon as reasonably practicable after the Contract Commencement Date, the Authority shall apply at its own cost to the Relevant Authority to transfer all Waste Management Licences (amended as necessary to ensure that such Waste Management Licences are Satisfactory Waste Management Licences as required under Clause 18.4.1(b)) in respect of the HWRC Sites to the Contractor or its nominated Sub-Contractor with effect from the relevant HWRC Date. The Authority and the Contractor shall use all reasonable endeavours to ensure the transfer of the Waste Management Licences in accordance with this Clause 18.4.1.
- (b) Notwithstanding the provisions of Clause 18.4.1(a) it shall be the responsibility of the Authority to ensure (and the Authority shall procure) that Satisfactory Waste Management Licences are transferred in respect of the HWRC Sites to the Contractor or its nominated Sub-Contractor with effect from the HWRC Date and any failure to comply with the consequences shall be treated and assessed as if they were the subject of an Authority Change and Clause 107 (Authority and Contractor Changes) shall apply.

- 18.4.2. Without limiting Clause 18.4.1 if the Contractor and the Authority are unable to procure the transfer of any existing Consent from the Authority (or from any third party) to the Contractor by the relevant Service Commencement Date, to the extent permitted by Legislation and Guidance, the

Authority agrees that, until the relevant Consents are obtained by the Contractor or transferred to the Contractor the Contractor shall operate as the Authority's agent under the existing Consents relevant to the provision of the Works and Services.

- 18.4.3. The Contractor shall pay WML Subsistence Fees to the Relevant Authority which shall be reimbursed by the Authority under Section 9 (Pass Through Element) of the Payment Mechanism.

19. **PLANNING PERMISSIONS AND PPC PERMIT**

The provisions of Schedule 11 (Planning Permissions and PPC Permit) shall apply notwithstanding the provisions of Clause 18 (Consents) in respect of the Consents referred to in that Schedule.

20. **[NOT USED]**

21. **[NOT USED]**

22. **THIRD PARTY CONSENTS OF ADJOINING OWNERS**

- 22.1. Subject at all times to Clause 17 (Land Issues) and Schedule 48 (Environmental Provisions), the Contractor shall not do or permit or suffer to be done anything which might:-

22.1.1. be or become a danger or unreasonable nuisance which danger or nuisance could be prevented by a contractor using reasonable and practicable measures or give rise to liability in tort to any Adjoining Owners or to members of the public generally provided that if the Contractor is unable (having used all reasonable endeavours) to comply with this Clause 22.1.1 from time to time then (without prejudice to any other rights or remedies of the Authority including the right to terminate under any other limb of the definition of Contractor Default) no right of termination under limbs (a) or (b) of the definition of Contractor Default shall arise by reason of such non-compliance; or

22.1.2. (unless permitted by a Third Party Consent and then only in accordance with the terms of the Third Party Consent) interfere with any Adverse Rights,

and the Contractor shall at its own expense in the carrying out of the Works and/or Services take all reasonable measures and precautions to avoid any such danger, unreasonable nuisance, tort, damage or interference and shall make good any damage so caused.

- 22.2. If the Works and/or Services cannot be carried out without interfering with any Adverse Right the Contractor shall promptly and at its own expense obtain all necessary Third Party Consents and shall pay such

sums as may be required for the giving of such Third Party Consent and shall supply to the Authority a copy of every Third Party Consents obtained.

- 22.3. The Contractor shall make good any damage to any roads, footpaths, Conduits, services landscaping and other works on any Adjoining Property which may be caused by the Contractor or any Contractor Related Party.
- 22.4. For the avoidance of doubt, Clause 115 (Indemnities) may apply where applicable in accordance with its terms to matters arising under this Clause 22 (Third Party Consents).

## 23. **PRINCIPAL OBLIGATIONS**

- 23.1. Subject to Clause 23.3, in respect of the MBT Facility
  - 23.1.1. the Contractor shall commence, or procure the commencement of, the Works no later than the Planned Works Commencement Date and shall thereafter continue the Works in accordance with the Works Programme;
  - 23.1.2. the Contractor shall complete, or procure the completion of, the Works so that the Initial Acceptance Date occurs on or before the Planned Initial Acceptance Date;
  - 23.1.3. the Contractor shall complete, or procure the completion of, the MBT Commissioning Process so that the Full Service Commencement Date occurs on or before the Planned Full Service Commencement Date.
- 23.2. In respect of the New Facilities (in the case of the March WTS, always subject to the March Trigger Date having occurred):
  - 23.2.1. the Contractor shall commence, or procure the commencement of, the Works relating to a New Facility no later than the relevant Planned Works Commencement Date and shall thereafter continue the Works in accordance with the Works Programme for such New Facility;
  - 23.2.2. the Contractor shall complete, or procure the completion of, the Works relating to a New Facility so that for each New Facility the New Facility Acceptance Date occurs in accordance with Clause 39 (Completion of Works to New Facilities) on or before the relevant Planned Service Commencement Date for that New Facility.
- 23.3. The provisions of Clause 23 (Principal Obligations) shall be subject to Clause 116.2 (Termination Rights and Compensation on Termination).
- 23.4. **Design and Works undertaken prior to Contract Commencement Date**

- 23.4.1. Any design, design development work or Works carried out in respect of any Facilities prior to the Contract Commencement Date will not obviate, diminish or alter the Contractor's obligations hereunder and will be deemed to have been carried out pursuant to this Contract.

## **24. CONDUCT OF THE WORKS**

- 24.1. The Contractor shall perform its obligations in relation to the Works under this Contract using all the reasonable skill and care as would a competent professional carrying out professional services of a similar scope, nature and complexity to the Works.
- 24.2. Without prejudice to the generality of Clause 24.1, the Contractor shall exercise the standard of skill and care referred to in Clause 24.1 in the carrying out or procuring the carrying out of, the design (including the preparation of Design Data) construction, completion, commissioning and testing of the Works to ensure that:-
- 24.2.1. the Works comply with and meet all the requirements of the Final Design Proposals, Contract, the Specification, the Contractor's Works Proposals, Good Industry Practice, Guidance, all Consents and all applicable Legislation;
- 24.2.2. new materials or recycled materials of equivalent quality only will be used in carrying out the Works (unless the Authority agrees otherwise in writing) or the contrary is set out in the Specification and/or the Contractor's Proposals) and the Contractor shall exercise the standard of reasonable skill and care referred to in Clause 24.1 to ensure that all goods used or included in the Works will be of satisfactory quality, and that no products or materials will be used or included in the Works which are not in conformity with relevant British Standards (or European equivalent) or codes of practice which at the time of use are widely known to construction contractors or members of the relevant design profession within the European Union to be deleterious to health or safety or to the durability of buildings and/or other structures and/or finishes and/or plant and machinery in the particular circumstances in which they are used;
- 24.2.3. all persons employed in connection with the performance of the Works will be skilled and experienced in their several professions, trades and callings or adequately supervised by a person or persons in accordance with Clause 24.2.4;
- 24.2.4. all aspects of the Works will be supervised by sufficient numbers of persons having adequate knowledge of such matters for the satisfactory and safe performance of the Works in accordance with this Contract and having regard to

the activities which are carried on at the Sites;

- 24.2.5. the Works are maintained in good order, kept in a safe condition and protected from damage, and shall use all reasonable endeavours in accordance with Good Industry Practice to ensure that working areas of the Sites are secure against trespassers and clean and tidy so far as practicable having regard to the nature of the Works; and
  - 24.2.6. adequate retaining and supporting walls are provided to support any land adjacent to the Site during the carrying out of the Works.
- 24.3. During the carrying out of the Works the Contractor shall (or shall procure that its Sub-Contractors or their sub-contractors shall):-
- 24.3.1. save in respect of the Alconbury Site and the IVC Site not use or occupy or permit the Sites upon which the Works are being undertaken to be used or occupied for any purpose other than the carrying out of the Works;
  - 24.3.2. save in respect of the Alconbury Site and the IVC Site not deposit or manufacture or permit to be deposited or manufactured on the Sites upon which the Works are being undertaken any materials which are not required for the carrying out of the Works;
  - 24.3.3. in respect of the Works relating to March WTS not sell or dispose of any earth, clay, sand, gravel, chalk or other material from the Sites upon which the Works are being undertaken or permit or suffer the same to be removed, except so far as shall be necessary for the proper execution of the Works, without the consent of the Authority which shall not be unreasonably withheld or delayed;
  - 24.3.4. at the Contractor's sole cost transport all surplus materials arising from the Works and arrange for the tipping of the same at such places as may lawfully be used for tipping and the Contractor shall ensure (until such time as the material is lawfully tipped) that such materials will not cause or give rise to pollution of the environment as defined by section 29(3) Environmental Protection Act 1990;
  - 24.3.5. not permit or suffer the storage of materials or the parking of vehicles in the immediate external vicinity of the boundaries of the Sites by the Contractor, or any Sub-Contractor other than for reasonable periods necessary for the carrying out of the Works or for loading and unloading or as set out in the Contractor's Works Proposals;
  - 24.3.6. exercise the standard of reasonable skill and care referred

to in Clause 24.1 to ensure that all vehicles used in the Works leaving the Sites are adequately cleaned to prevent the deposit of waste materials and debris on any Adjoining Property;

- 24.3.7. subject at all times to Schedule 48 (Environmental Provisions) not, in breach of any Legislation, Guidance or Consents, permit any Contamination from the Sites to enter into any rivers or any ditches or services media on the Sites and/or any Adjoining Property and shall not in breach of any Legislation, Guidance or Consents permit or suffer the blockage of any such rivers, ditches and services media by reason of anything done or omitted on the Sites or any land upon which the Works are being undertaken;
- 24.3.8. save in the case of Emergency, not gain access to or egress from the Sites except in accordance with lawful rights of access, any Consents or as contemplated by the Contractor's Works Proposals;
- 24.3.9. not without the written consent of the Authority (such consent not to be unreasonably withheld or delayed) erect or permit or suffer to be erected on the Sites any temporary structure except as is reasonably required for the carrying out of the Works or as contemplated by the Contractor's Works Proposals or in the case of the IVC Site as reasonably required for the carrying out of the Services;
- 24.3.10. save in respect of the Alconbury Site not erect or exhibit or permit or suffer to be erected or exhibited on any part of the Sites any signs or trade boards save those previously approved in writing by the Authority (such approval not to be unreasonably withheld or delayed); and
- 24.3.11. take all necessary steps required in accordance with Legislation with regard to ensuring the health and safety of all:-
  - 24.3.11.1. occupants of the Sites;
  - 24.3.11.2. individuals invited or trespassing onto the Sites; and
  - 24.3.11.3. occupants of Adjoining Properties,is not adversely impacted upon by the undertaking of the Works;
- 24.3.12. be responsible at its own cost for obtaining all road closure and/or orders necessary to enable the Works to proceed;
- 24.3.13. subject to the provisions of Schedule 11 (Planning



Permissions and PPC Permit) at its own cost comply with the terms of such agreements under sections 38 and 278 of the Highways Act 1980 and section 104 of the Water Industry Act 1990 as may be required in respect of the Works and procure the provision of such bonds as the Relevant Authority or undertaking may require in connection with such agreements. Provided that this obligation shall not apply to the Contractor in respect of the March WTS save as part of any agreement pursuant to Schedule 7 (March Anticipated Change);

- 24.3.14. in respect of the Works relating to the March WTS notify the Authority immediately of any articles of value or of archaeological or geological interest that are discovered in the course of carrying out of the Works and (subject to the rights of the Crown) the Authority shall have the sole property in any such articles and they shall be dealt with as the Authority shall reasonably direct provided that any such directions shall constitute an Authority Change; and
- 24.3.15. ensure that the laying of the Conduits and all service media connections to Conduits required in connection with the Works are correctly made and rectify at the Contractor's own expense any Conduits wrongly laid and any wrong or crossed connection.

## 25. **PROFESSIONAL TEAM**

- 25.1. The Contractor shall engage or appoint such professional advisers as are necessary to provide the Contractor with such professional advice as may be reasonably necessary for the design, construction and equipping of the Facilities in accordance with the Project Documents.
- 25.2. In accordance with Clause 11 (Collateral Warranties) the Contractor shall procure a Collateral Warranty from the Professional Team.

## 26. **PROJECT MANAGEMENT**

- 26.1. The Contractor and the Authority shall ensure that at all reasonable times during the Works the Authority's Representative and the Contractor's Representative shall be available for consultation and liaison. Further, during the Works the Authority shall use its reasonable endeavours to ensure that the Contractor and its Sub-Contractors are afforded sufficient access to the Authority's Representative to enable the Contractor to discuss ideas and requirements.
- 26.2. The Contractor shall liaise with the Authority's Representative in relation to the Works and the Contractor shall provide regular progress reports to the Authority's Representative relating to the design and construction of the Works.

## 27. **MARCH WTS**

- 27.1. The provisions of Schedule 7 (March Anticipated Change) shall apply and the Parties shall comply with the provisions therein. For the avoidance of doubt, the March WTS shall not be a Facility nor shall any provision of this Contract apply to March WTS unless and until the March Trigger Date occurs and to the extent provided in Schedule 7. Clause 107 (including Clauses 107.24 to 107.28) shall not apply to the March WTS except to the extent set out in Schedule 7.

## 28. **CHANGES TO THE CONTRACTOR'S WORKS PROPOSALS**

- 28.1. The Contractor shall be entitled to propose variations to the Contractor's Works Proposals by submitting the relevant variation to the Authority for review under Schedule 14 (Review Procedure) provided that (providing pursuant to Clause 122 (Contractor's Records), the Contractor keeps full records of any such variations for inspection on request by the Authority) the Contractor shall not be required to submit variations which relate to the management of the Works Programme which do not prejudice the Contractor's ability to achieve the applicable Service Commencement Date by the relevant Planned Service Commencement Date.
- 28.2. Save in respect of those matters referred to in the proviso to Clause 28.1, the Contractor shall not implement any variation to the Contractor's Works Proposals until the Authority consents to the variation in accordance with the Review Procedure. Once consented to, a proposed variation will form part of the Contractor's Works Proposals.

## 29. **CAPITAL CONTINGENCY**

This Clause 29 (Capital Contingency) applies notwithstanding any other provisions of this Contract.

- 29.1. The Authority and the Contractor acknowledge that the Contractor has included within the Base Case additional finance of £1.24 million which may be available to it in order to meet any additional Capital Expenditure which is incurred by the Contractor in carrying out and completing the Works (the "**Existing Capex Contingency**").
- 29.2. The Parties agree that, if the Capital Expenditure incurred by the Contractor in carrying out the Works to the standard required to provide the Service pursuant to this Contract (the "**Actual Capex Requirement**") exceeds the sum of £48,633,126.00 (which includes, inter alia, the Existing Capex Contingency) (the "**Available Capex Funding**"), then the Authority shall reimburse to the Contractor the difference between the Actual Capex Requirement and the Available Capex Funding (the "**Capex Shortfall**") pursuant to Clause 29.4, provided always that such sum shall not be payable by the Authority:

29.2.1. unless the Contractor:

- 29.2.1.1. in advance of any commitment to incur the additional Capital Expenditure, has provided written notice to the Authority that such sums are likely to be incurred, to enable the Parties to discuss and agree steps to mitigate the extent of any additional Capital Expenditure and the Authority's liability in relation to any associated Capex Shortfall;
- 29.2.1.2. has provided evidence that it has used all reasonable endeavours to oblige its Sub-Contractors to minimise any increase in costs and maximise any reduction in costs;
- 29.2.1.3. has demonstrated how any additional Capital Expenditure to be incurred is being measured in a cost effective manner;
- 29.2.1.4. has made available to the Authority a cost breakdown of the additional Capital Expenditure and associated Capex Shortfall;
- 29.2.1.5. has provided the Authority with such other evidence as it may reasonably require in order to verify the additional Capital Expenditure incurred by the Contractor; and/or

29.2.2. to the extent that the Capex Shortfall arises as a result of any default or negligence of the Contractor.

- 29.3. The Authority's liability under Clause 29.2 in respect of the Capex Shortfall shall be calculated by the Contractor and notified to the Authority within 60 days after the date which is the later of the completion of the Works and achievement of the Full Service Commencement Date and shall be limited in any event to an amount of £2.0 million.

**Method of Payment**

- 29.4. Any Capex Shortfall payable by the Authority pursuant to Clause 29.2 shall be paid in accordance with one of the following payment options to be agreed by the Parties:

- 29.4.1. either within 30 days after the Contractor has provided to the Authority an invoice for such amount (complete in all material respects), together with all evidence reasonably required by the Authority of the amounts incurred by the Contractor (the Capex Shortfall Invoice); or

- 29.4.2. by way of an adjustment to the Annual Unitary Charge

agreed and calculated in accordance with Clause 110  
(Financial Adjustments)

provided that the Authority shall not be obliged to pay any such Capex Shortfall Invoice or adjustment to the Annual Unitary Charge arising from any Capex Shortfall until after 1<sup>st</sup> April 2010.

- 29.5. Any dispute arising between the Parties in relation to either the Authority's liability to pay the Capex Shortfall pursuant to Clause 29.2 or the method of payment pursuant to Clause 29.4 then the dispute will be determined in accordance with the Dispute Resolution Procedure.

### 30. **EFFECT OF THE AUTHORITY'S AGREEMENT**

- 30.1. The agreement, consent, certification or approval by the Authority or the Authority's Representative is required for any matter where:

30.1.1. this Contract provides that such must be sought or obtained; and/or

30.1.2. the Contractor seeks such agreement voluntarily.

Subject to the express terms of this Contract the giving of such agreement, consent, certification or approval shall not under any circumstances limit, diminish, obviate or reduce the Contractor's obligation to design and construct the Facilities, make them Available and perform the Services in accordance with this Contract.

- 30.2. Further, and for the avoidance of doubt, in the event that the Authority or the Authority's Representative provide any assistance, proffer an opinion or give advice to the Contractor the same shall not, subject to the express terms of this Contract, diminish or limit the Contractor's obligations under this Contract and in particular shall not detract from the Contractor's responsibilities under Schedule 26 (Payment Mechanism).

### 31. **SITE MATTERS**

- 31.1. Subject to Clauses 31.3 below and 61 and the provisions of Schedule 48 (Environmental Provision) and without prejudice to and subject to any other express provisions of this Contract which may provide otherwise, the Site Conditions shall be the sole responsibility of the Contractor and accordingly (but without prejudice to any other obligation of the Contractor under this Contract) the Contractor shall be deemed to have:-

31.1.1. carried out a ground physical and geophysical investigation and to have inspected and examined the Sites and their surroundings and (where applicable) any existing structures or works on, over or under the Sites;

- 31.1.2. satisfied itself as to the nature of the Site Conditions, the ground and the subsoil, the form and nature of the Sites, the load bearing and other relevant properties of the Sites, the risk of injury or damage to property affecting the Sites, the nature of the materials (whether nature or otherwise) to be excavated and the nature of the design, works and materials necessary for the execution of the Works;
  - 31.1.3. satisfied itself as to the adequacy of the means and rights of access to and through the Sites and any accommodation it may require for the purposes of fulfilling its obligations under this Contract (such as additional land or buildings outside the Sites);
  - 31.1.4. satisfied itself as to the possibility of interference by persons of any description whatsoever (other than the Authority) with access to or use of, or rights in respect of, the Sites with particular regard to Adjoining Owners; and
  - 31.1.5. satisfied itself as to the precautions, times and methods of working necessary to prevent any nuisance or interference, whether public or private, being caused to third parties.
- 31.2. Subject to Clause 61 and Clause 31.3 below and the provisions of Schedule 48 (Environmental Provisions) and without prejudice to any other express provisions of this Contract which may provide otherwise, the Contractor shall not be entitled to make any claim against the Authority in relation to Site Conditions, on any grounds including the fact that incorrect or insufficient information on any matter relating to the Sites was given to it by any person, whether or not a Authority Related Party.

**31.3. March WTS Site Conditions**

For the avoidance of doubt, it is agreed by the Parties that Clause 31.1 and 31.2 do not apply in respect of the March WTS which shall be regulated as agreed by Schedule 7 (March Anticipated Change).

**32. HEALTH SAFETY AND CDM REGULATIONS**

- 32.1. The Contractor shall take all reasonably practicable steps to ensure the observance by itself, or by its staff and Sub-Contractors, and its and their agents and representatives of all current and relevant health and safety precautions appropriate in accordance with Good Industry Practice for the protection of itself, its staff, the Sub-Contractors and any other persons invited on to or visiting the Sites or the Facilities including all precautions required to be taken by or under any Legislation including the CDM Regulations.
- 32.2. To the extent that any of the Works come within the scope of the CDM Regulations the Contractor shall be the 'client' for the purposes of the

CDM Regulations and the Contractor agrees with and warrants to the Authority that it shall during the subsistence of this Contract and without charge act as such client.

- 32.3. The Contractor shall make available to the Authority prior to the relevant Planned Service Commencement Date, upon notice and without charge a copy of any final draft Health and Safety File (as defined in the CDM Regulations) in respect of the completed MBT Facility or New Facility as appropriate.
- 32.4. On termination or expiry of this Contract, the Contractor shall hand over to the Authority copies of all and any Health and Safety Files (as defined in the CDM Regulations) in respect of the MBT Facility and New Facilities as required by the CDM Regulations.

### 33. **MANAGEMENT OF CONSTRUCTION CONTRACTS**

- 33.1. The Contractor shall ensure that regular programmed meetings and other progress critical meetings relating to the Works are fully and properly minuted in accordance with the Contractor's Integrated Management System.
- 33.2. The Contractor shall on a monthly basis from the relevant Works Commencement Date in respect of the MBT Facility send to the Authority's Representative copies of all certificates, instructions, variations or equivalent contract documentation issued under the terms of the Construction Contract sorted into chronological order.
- 33.3. The Contractor shall:
  - 33.3.1. take reasonable steps to ensure that the Construction Sub-Contractor and/or the New Facilities Construction Sub-Contractor and all other persons employed by the Contractor in connection with the Works comply with all relevant Legislation relating to employment including (without limitation) the Race Relations Act 1976 and Sex Discrimination Act 1975;
  - 33.3.2. notify the Authority promptly of any notices received by the Contractor (whether from any local or other relevant authority or from any Adjoining Owner) relating in any way to the Sites and shall supply a copy of every such notice to the Authority within five Business Days after the receipt of it; and
  - 33.3.3. pay all fees charges and other payments whatever which may at any time be payable to any local or other Relevant Authority in respect of the Works except where this Contract and/or a decision in accordance with Clause 113 (Dispute Resolution Procedure) provides otherwise.

## **34. INSPECTION AND MONITORING**

### **34.1. Right of inspection**

- 34.1.1. The Contractor shall procure that the Authority or any duly authorised representative or adviser of the Authority shall have, at all reasonable times and upon giving reasonable prior notice, the right (but in so doing the Authority shall not and procure that its representatives or advisers shall not delay or hinder the progress of the Works or Services or compliance with other obligations under the Contract) to enter the Sites in order to inspect the state and progress of the Works (and to ascertain whether they are being properly executed), the operation and maintenance of the Project and to monitor compliance by the Contractor with its obligations under this Contract.
- 34.1.2. In exercising its rights under Clause 34.1.1 the Authority shall and shall procure that any and all of its representatives or advisers shall at all times comply with all relevant site rules in relation to the Sites.

### **34.2. Right to open up**

- 34.2.1. Subject to Clause 34.2.2 (and provided that in doing so the Authority shall use and procure that the Authority's Representative shall use all reasonable endeavours to minimise disruption to the carrying out of the Works), the Authority's Representative shall have the right at any reasonable time on reasonable notice prior to the Initial Acceptance Date in respect of the MBT Facility and the New Facility Acceptance Date in respect of the New Facility to request the Contractor to open up and inspect any part or parts of the relevant Works where the Authority's Representative reasonably believes that such part or parts of the Works is or are defective and the Contractor shall comply with such request.
- 34.2.2. Prior to exercising his right pursuant to Clause 34.2.1 above, the Authority's Representative shall notify the Contractor of his intention to exercise such right, setting out detailed reasons and providing reasonable prior notice.
- 34.2.3. If, following the exercise by the Authority's Representative of his right pursuant to Clause 34.2.1, the inspection shows that the relevant part or parts of the Works are not defective, any delay, increased cost, loss and/or other detriment caused to the Contractor by the exercise of such rights shall, subject to (and in accordance with) the provisions of Clause 36 (Compensation Events), be treated as if they had arisen due to a Compensation Event.

34.2.4. If, following the exercise by the Authority's Representative of his right pursuant to Clause 34.2.1, the inspection shows that the relevant part or parts of the Works is or are defective, the Contractor shall, subject to Clause 34.2.5, rectify and make good such defect(s) and any consequence of such rectification and/or making good defect(s) shall be carried out by the Contractor at no cost to the Authority and the Contractor shall not be entitled to any extension of time in relation to such rectification and making good of the Works.

34.2.5. If, following the exercise by the Authority's Representative of his right pursuant to Clause 34.2.1, the Authority's Representative is of the opinion that the inspection shows that the relevant part or parts of the Works is or are defective and the Contractor does not agree with such opinion, the matter shall be determined in accordance with Clause 113 (Dispute Resolution).

34.2.6. Without prejudice to the rights of the Authority's Representative pursuant to this Clause 34.2 the Parties acknowledge that the exercise of such rights shall not in any way affect the obligations of the Contractor under this Contract save as expressly set out in this Clause 34.

**34.3. Health and safety requirements**

The Authority and its representative or advisor shall at all times comply with any health and safety requirements when exercising its rights under this Clause 34 (Inspection and Monitoring).

**34.4. Supply of information**

The Contractor shall supply to the Authority and any representative or adviser of the Authority visiting the Sites pursuant to this Clause 34 (Inspection and Monitoring) such information in respect of the Works as may reasonably be required.

**34.5. Increased monitoring**

If, following any viewing, visit or inspection made by the Authority, it is discovered that there are defects in the Works or that the Contractor has materially failed to comply with the Specification or the Contractor's Works Proposals, the Authority may (without prejudice to any other right or remedy available to it) by notice to the Contractor increase the level of its monitoring in relation to the Works until such time as the Contractor shall have demonstrated to the reasonable satisfaction of the Authority that it is capable of performing and will perform all its obligations under this Contract.

**35. DELAYS TO THE WORKS**



### 35.1. **Notice**

If at any time the Contractor becomes aware that there will be or is likely to be a delay in the Works, such that the relevant Planned Works Commencement Date or the relevant Planned Service Commencement Date may not be achieved, the Contractor shall as soon as reasonably practicable and in any event within 20 Business Days of becoming aware of the likely delay give notice to the Authority to that effect specifying:

- 35.1.1. the reason for the delay or likely delay; and
- 35.1.2. an estimate of the likely effect of the delay on the Works including the Planned Works Commencement Date or the Planned Service Commencement Date (taking into account any measures that the Contractor proposes to adopt to mitigate the consequences of the delay in accordance with Clause 35.3 (Duty to Mitigate)).

### 35.2. **Supply of information**

Following service of a notice by the Contractor pursuant to Clause 35.1 (Notice), the Contractor shall promptly supply to the Authority any further information relating to the delay as may reasonably be requested by the Authority.

### 35.3. **Duty to mitigate**

The Contractor shall take all reasonable steps to mitigate the delay and consequences of any delay which is the subject of a notice pursuant to Clause 35.1 (Notice).

### 35.4. **Delays**

- 35.4.1. If the carrying out of the Works or any part thereof is delayed (whether before or after the relevant Planned Service Commencement Date) or any anticipated failure to meet the relevant Planned Service Commencement Date is notified to the Authority by the Contractor as being attributable to:-
  - 35.4.1.1. a Compensation Event, then the provisions of Clause 36 (Compensation Events) shall apply;
  - 35.4.1.2. an Excusing Cause, then the provisions of Clause 70 (Excusing Causes) shall apply;
  - 35.4.1.3. a Relief Event, then the provisions of Clause 104 (Relief Events) shall apply;
  - 35.4.1.4. a Force Majeure Event, then the provisions of Clause 89 (Force Majeure) shall apply.

## 36. **COMPENSATION EVENTS**

36.1. Save to the extent provided in Clause 46 (Service Delay) Compensation Events are only applicable in relation to breaches of Contract by the Authority which relate to the Works. PROVIDED THAT this Clause 36.1 shall not in any way limit the compensation which may be payable pursuant to the provisions of this Clause 36 which may relate to the Works Period or the Services Period.

36.2. **If on or before the Service Commencement Date for a Facility as a direct result of the occurrence of a Compensation Event:**

36.2.1. in respect of the MBT Facility only, the Contractor is unable to achieve the Initial Acceptance Date on or before the Planned Initial Acceptance Date or following the Planned Initial Acceptance Date, the Initial Acceptance Longstop Date; and/or

36.2.2. in respect of the MBT Facility only, **the Contractor is unable to achieve the Full Service Commencement Date on or before the Planned Full Service Commencement Date or following the Planned Full Service Commencement Date, the Full Service Longstop Date;** and/or

36.2.3. in respect of any Facility other than the MBT Facility, the Contractor is unable to achieve Service Commencement on or before the relevant Planned Service Commencement Date or following the Planned Service Commencement Date, will be delayed in achieving Service Commencement; and/or

36.2.4. in respect of any Facility the Contractor is unable to achieve the Works Commencement Date before the Planned Works Commencement Date; and/or

36.2.5. **the Contractor is unable or is likely to be unable to comply with its obligations under this Contract; and/or**

36.2.6. **the Contractor incurs costs or loses revenue** (including any Third Party Income),

**then the Contractor is entitled to apply for relief from its obligations and/or claim compensation under this Contract.**

36.3. **Subject to Clause 36.4 below, to obtain relief and/or claim compensation the Contractor must:**

36.3.1. **as soon as practicable and in any event within 20 Business Days after it became aware that the Compensation Event has caused or is likely to cause delay or breach of an obligation under this Contract**

**and/or the Contractor to incur costs or lose revenue (including Third Party Income), give to the Authority a notice of its claim for an extension of time for Service Commencement, payment of compensation and/or relief from its obligations under this Contract; and**

**36.3.2. within 15 Business Days of receipt by the Authority of the notice referred to in Clause 36.3.1 above, give full details of the Compensation Event and the extension of time, and/or any Estimated Change in Project Costs and/or loss of revenue (including Third Party Income) claimed; and**

**36.3.3. demonstrate to the reasonable satisfaction of the Authority that:-**

**36.3.3.1. the Compensation Event was the direct cause of the Estimated Change in Project Costs and/or loss of revenue (including Third Party Income) and/or any delay in the achievement of the Planned Works Commencement Date and/or Planned Service Commencement Date and/or breach of the Contractor's obligations under this Contract; or, following the Planned Service Commencement Date, delay in achieving Service Commencement before the Long Stop Date;**

**36.3.3.2. the Estimated Change in Project Costs, and/or loss of revenue (including Third Party Income), time lost, and/or relief from the obligations under the Contract claimed, could not reasonably be expected to be mitigated or recovered by the Contractor acting in accordance with Good Industry Practice.**

**36.4. In the event that the Contractor has complied with its obligations under Clause 36.3 above, then:**

**36.4.1. in the case of a delay:**

**36.4.1.1. in respect of the MBT Facility the Planned Initial Acceptance Date or following the Planned Initial Acceptance Date, the Initial Acceptance Longstop Date;**

**36.4.1.2. in respect of the MBT Facility the Planned Full Service Commencement Date or following the Planned Full Service Commencement**

**Date, the Full Service Longstop Date;**

36.4.1.3. in respect of any Facility other than the MBT Facility the Planned Service Commencement Date;

36.4.1.4. in respect of any Facility the Planned Works Commencement Date,

**shall be postponed by such time as shall be reasonable for such a Compensation Event taking into account the likely effect of the delay;**

36.4.2. **in the case of an additional cost being incurred or revenue (including Third Party Income) being lost by the Contractor:-**

36.4.2.1. **on or before the Service Commencement Date for the relevant Facility; or**

36.4.2.2. **as a result of Capital Expenditure being incurred by the Contractor at any time,**

**the Authority shall compensate the Contractor for the actual Estimated Change in Project Costs as adjusted to reflect the actual costs reasonably incurred and, without double counting, for revenue actually lost including on the basis set out in the Appendix to Schedule 39 (Unitary Charge Adjustment Protocol) lost Third Party Income (to the extent it could not reasonably have been mitigated) within 30 days of its receipt of a written demand by the Contractor supported by all relevant information;**

36.4.3. **in the case of a payment of compensation for the Estimated Change in Project Costs and/or without double counting, loss of revenue (including on the basis set out in the Appendix to Schedule 39 (Unitary Charge Adjustment Protocol) loss of Third Party Income) that are not subject to Clause 36.4.2 above but which reflects a change in the costs being incurred or loss of revenue (including on the basis set out in the Appendix to Schedule 39 (Unitary Charge Adjustment Protocol) Third Party Income) received by the Contractor after the Service Commencement Date, the Authority shall compensate the Contractor in accordance with Clause 36.7 below by an adjustment to the Annual Unitary Charge; and/or**

36.4.4. **the Authority shall give the Contractor such relief from its obligations under this Contract as is reasonable for such a Compensation Event.**

### **Late provision of information**

- 36.5. In the event that information is provided after the dates referred to in Clauses 36.3.1 and 36.3.2 above, then the Contractor shall not be entitled to any extension of time, compensation or relief from its obligations under this Contract in respect of the period for which the information is delayed.

### **Failure to agree**

- 36.6. If the Parties cannot agree the extent of any compensation, delay incurred, relief from the Contractor's obligations under the Contract, or the Authority disagrees that a Compensation Event has occurred (or as to its consequences), or that the Contractor is entitled to relief under this Clause 36, the Parties shall resolve the matter in accordance with Clause 113 (Dispute Resolution).

### **Method of calculating compensation**

- 36.7. Any payment of compensation referred to in Clause 36.4.3 above shall be calculated in accordance with Clause 110 (Financial Adjustments) and Schedule 39 (Unitary Charge Adjustment Protocol) and to the extent such compensation includes lost Third Party Income, the Appendix to Schedule 39 (Unitary Charge Adjustment Protocol).

## **36A MBT COMMISSIONING PROCESS**

- 36.A.1 Following the Initial Acceptance Date the Contractor shall implement the MBT Commissioning Process on the basis set out in this Clause 36A (MBT Commissioning Process).

36. A.2 Notwithstanding any other provision of this Contract the Contractor shall be entitled (but not bound) to process Contract Waste in the MBT Facility during and prior to the MBT Commissioning Period.

36. A.3 The MBT Commissioning Period shall terminate on the Full Service Commencement Date.

## **37. COMPLETION OF MBT FACILITY**

### **37.1. Acceptance**

- 37.1.1. Schedule 19 (Initial Acceptance Tests and Full Service Acceptance Criteria) and this Clause 37 (Completion of MBT Facility) set out the two stage certification process to be undertaken by the Technical Adviser as follows:

- 37.1.1.1. Stage 1 (Initial Acceptance) certification that all Initial Acceptance Tests have been satisfactorily passed; and

- 37.1.1.2. Stage 2 (Full Service Acceptance) certification

that the Full Service Acceptance Criteria have been satisfied.

- 37.1.2. The Initial Acceptance Date for the MBT Facility shall be:
  - 37.1.2.1. the date on which the Initial Acceptance Certificate is issued; or
  - 37.1.2.2. in the event of referral to the Disputes Resolution Procedure pursuant to Clause 37.5.3 the date on which it is determined that the Initial Acceptance Certificate should have been issued;
- 37.1.3. The Full Service Commencement Date for the MBT Facility shall be:
  - 37.1.3.1. the date on which the Full Service Acceptance Certificate is issued in respect of the MBT Facility; or
  - 37.1.3.2. in the event of referral to the Dispute Resolution Procedure pursuant to Clause 37.5.3 below, the date on which it is determined that the Full Service Acceptance Certificate should have been issued;

## **37.2. Initial Acceptance Tests**

- 37.2.1. The Contractor shall provide to the Authority and the Technical Adviser not less than 10 Business Days notice of the anticipated date upon which the Contractor considers that the MBT Facility will be in a condition to proceed with the Initial Acceptance Tests and the Contractor shall keep the Authority informed of any alterations to the proposed date and each Party will act reasonably in relation to any delays to the timetable notified.
- 37.2.2. The Contractor shall undertake the Initial Acceptance Tests in accordance with the provisions of Schedule 19 (Initial Acceptance Tests and Full Service Acceptance Criteria).
- 37.2.3. When the Contractor is of the opinion that the Initial Acceptance Tests have been satisfactorily passed it shall promptly notify the Technical Adviser and the Authority of the same.
- 37.2.4. The Parties shall procure in accordance with the Technical Adviser's Appointment that the Technical Adviser shall, within the period of 10 Business Days of its receipt of the Contractor's notice given under Clause 37.2.3 either:-

37.2.4.1. issue the Initial Acceptance Certificate stating the date upon which the Initial Acceptance Tests were satisfactorily passed; or

37.2.4.2. notify the Authority and the Contractor that the Initial Acceptance Tests have not been satisfactorily passed (a "Notice of Non Completion") and provide a report setting out the respects in which it considers that such Initial Acceptance Tests have not been satisfactorily passed.

37.2.5. Representatives from the Authority, the Senior Lender and the Technical Adviser shall be entitled to witness the performance of the Initial Acceptance Tests.

37.2.6. The Initial Acceptance Certificate may be issued notwithstanding that there remain Snagging Items.

### **37.3. Joint inspection**

37.3.1. A representative of the Senior Lenders and the Authority shall be entitled to witness the Full Service Acceptance Tests.

37.3.2. The Contractor shall give the Authority and the Technical Adviser not less than 5 Business Days' notice of the date when the Contractor proposes to inspect the MBT Facility with a view to verifying whether the MBT Facility meets the Full Service Acceptance Criteria.

37.3.3. Representatives from the Authority, the Senior Lender and the Technical Adviser shall be entitled to make a joint inspection with the Contractor to enable the Technical Adviser to consider whether the Full Service Acceptance Criteria has been met.

### **37.4. Full Service Acceptance Certificate**

37.4.1. Within 10 Business Days of any inspection referred to in Clause 37.3 the Technical Adviser shall either:

37.4.1.1. provided always that the Technical Adviser has issued (or deemed to have issued) an Initial Acceptance Certificate, issue a Full Service Acceptance Certificate confirming that he is satisfied that the Full Service Acceptance Criteria have been met in respect of the MBT Facility; or

37.4.1.2. issue a notice to the Authority and the Contractor stating that the Full Service

Acceptance Certificate has not been issued (a "Notice of Non Completion") and provide a report setting out the respects in which it considers that the Full Service Acceptance Criteria have not been met.

- 37.4.2. If the Full Service Acceptance Criteria have been met, the Parties agree that the Technical Adviser shall issue a Full Service Acceptance Certificate in respect of the MBT Facility notwithstanding that there remain Snagging Items.

**37.5. Technical Adviser Outcomes**

If a Notice of Non-Completion is served pursuant to Clauses 37.2.4.2 or 37.4.1.2 the Contractor shall (when it is of the opinion that the aspects referred to in the Technical Advisers report have been rectified) repeat the steps set out in Clauses 37.2 to 37.4 (although the period of notice referred to in Clause 37.2.1 shall be reduced to 5 Business Days) until (as appropriate):

- 37.5.1. the Initial Acceptance Tests have been satisfactorily passed and the Initial Acceptance Certificate is issued pursuant to Clause 37.2.4.1 or it is determined that it should have been issued pursuant to Clause 37.1.2.2; and/or
- 37.5.2. the Full Service Acceptance Certificate is issued pursuant to Clause 37.4.1 or it is determined that it should have been issued pursuant to Clause 37.1.3.2.
- 37.5.3. If the Technical Adviser fails to issue:
- 37.5.3.1. the Initial Acceptance Certificate in accordance with Clause 37.2.4.1; and or
- 37.5.3.2. the Full Service Acceptance Certificate in accordance with Clause 37.4.1.1

and either Party wishes to challenge the same or any aspect of the Technical Adviser's report referred to in Clauses 37.2.4.2 or 37.4.1.2, the relevant Party shall be entitled to refer the matter for determination by an Adjudicator under the Dispute Resolution Procedure as if it constituted a dispute.

**37.6. Effect of issue of Initial Acceptance Certificate and Full Service Acceptance Certificate**

- 37.6.1. The Parties agree that:
- 37.6.1.1. the Initial Acceptance Certificate shall be final binding and enforceable upon the Parties; and



- 37.6.1.2. the Full Service Acceptance Certificate shall be final, binding and enforceable upon the Parties (including as to the end of the Works Period for the MBT Facility and the commencement of the Full Service Period),

in each case except in the case of fraud, collusion, bias or manifest error and provided that the matter is referred to determination by an Adjudicator pursuant to Clause 113 (Dispute Resolution Procedure) within 10 Business Days of the receipt of the Initial Acceptance Certificate or Full Service Acceptance Certificate respectively.

- 37.6.2. The Full Service Acceptance Certificate shall be without prejudice to:

- 37.6.2.1. the Authority's rights to levy Deductions pursuant to Schedule 26 (Payment Mechanism) and Schedule 27 (Performance Mechanism) whether or not the reason for such Deductions arose or could have been detected prior to the Full Service Acceptance Certificate;
- 37.6.2.2. the Authority's rights and remedies under the Collateral Warranty; and
- 37.6.2.3. either Parties' rights and remedies under the Technical Adviser's Appointment.

### 37.7. **Snagging Items**

- 37.7.1. In the event that the Initial Acceptance Certificate or the Full Service Acceptance Certificate for the MBT Facility is expressed to be subject to Snagging Items:
  - 37.7.1.1. The Technical Adviser shall within 5 Business Days of the issue of the relevant certificate issue to the Contractor and the Authority a list of the Snagging Items for the MBT Facility (the "Snagging List");
  - 37.7.1.2. The Contractor shall procure that each Snagging Item is made good as soon as reasonably practicable in the circumstances and shall keep the Authority informed regarding the progress in addressing the Snagging Items.

## 38. **TECHNICAL ADVISER**

- 38.1. The Contractor and the Authority shall jointly appoint a Technical

Adviser to certify Initial Acceptance and Full Service Acceptance of the MBT Facility following the Contract Commencement Date in sufficient time to enable the Technical Adviser to familiarise himself with the Contract and technical requirements in relation to the MBT Facility and the Initial Acceptance Tests and Full Service Acceptance Criteria.

- 38.2. Schedule 15 (Technical Adviser's Appointment) specifies the duties of the Technical Adviser owed to the Authority and the Contractor and the Technical Adviser will be appointed substantially in the form set out in Schedule 15.
- 38.3. Neither the Authority or the Contractor shall without the other's prior written approval (not to be unreasonably withheld or delayed):
- 38.3.1. terminate, repudiate or discharge the Technical Adviser's Appointment or treat the same as having been terminated, repudiated or otherwise discharged;
  - 38.3.2. waive, settle, compromise or otherwise prejudice any rights or claims which the other may from time to time have against the Technical Adviser; or
  - 38.3.3. vary the terms of the Technical Adviser's Appointment or the service performed or to be performed by the Technical Adviser.
- 38.4. The Parties shall comply with and fulfil their respective duties and obligations arising under or in connection with the Technical Adviser.

### **Co-operation**

- 38.5. The Parties agree to co-operate with each other generally in relation to all matters within the scope of or in connection with the Technical Adviser's Appointment. All instructions and representations issued or made by either of the Parties to the Technical Adviser shall be simultaneously copied to the other and both Parties shall be entitled to attend all inspections undertaken by or meetings involving the Technical Adviser.

### **Replacement**

- 38.6. In the event of the Technical Adviser's Appointment being terminated otherwise than for full performance, the Parties shall liaise and co-operate with each other and the Senior Lender in order to appoint a replacement independent consultant to act as the Technical Adviser as soon as reasonably practicable. The identity of any such replacement shall be as agreed by the Parties and the terms of his appointment shall, unless otherwise agreed, be as set out in the Technical Adviser's Appointment.
- 38.7. In the event the Parties fail to agree the identity and/or terms of a replacement Technical Adviser in accordance with Clause 38.6 within

ten (10) Business Days of the original Technical Adviser's Appointment being terminated, then such disagreement shall be referred for resolution in accordance with Schedule 113 (Dispute Resolution Procedure).

### **39. COMPLETION OF WORKS TO NEW FACILITIES**

#### **39.1. General Provisions**

- 39.1.1. The provisions of this Clause 39 relate to the design and construction of the New Facilities.
- 39.1.2. The provisions of Clauses 37 (Completion of the MBT Facility), shall not apply to the New Facilities.
- 39.1.3. For the avoidance of doubt, this Clause 39 shall apply to the March WTS to the extent provided for pursuant to Schedule 7 (March Anticipated Change).

#### **39.2. New Facilities Construction Contracts**

- 39.2.1. The Contractor has on or before the Contract Commencement Date entered into the New Facilities Construction Contracts in respect of the Alconbury WTS and the IVC Facility.
- 39.2.2. Subject to the March Trigger Date having occurred, the Contractor shall keep the Authority informed as reasonably required by the Authority as to the negotiations upon and documentation in respect of the New Facilities Construction Contract in respect of March WTS and any material amendments or variations thereto.
- 39.2.3. The Contractor shall not enter into the New Facilities Construction Contract in respect of March WTS without first:
  - 39.2.3.1. providing the Authority with a copy of the relevant draft contract and affording the Authority a reasonable opportunity (not to exceed 10 Business Days) to conduct due diligence over the same to ensure that the proposed form is substantially the form set out in Part 2 of Schedule 16 (Construction Contracts) and (in so far as the same are not contained expressly in the draft contract); and
  - 39.2.3.2. providing the Authority with a proposed Works Programme containing an anticipated date of completion in respect of March WTS.
- 39.2.4. The Contractor shall enter into the New Facilities Construction Contract in relation to March WTS prior to the

commencement of any works in relation to the March WTS.

- 39.2.5. Promptly upon execution of the New Facilities Construction Contract in relation to the March WTS, the Contractor shall deliver a copy certified as true and accurate of such New Facilities Construction Contract to the Authority.

39.3. **[Not used]**

39.4. **Commencement and carrying out of the Works**

- 39.4.1. Subject to Clause 39.4.2 (and in the case of the March WTS subject to the March Trigger Date having occurred) the Contractor shall commence the Works in relation to the New Facilities as soon as reasonably practicable after it has obtained a Satisfactory Planning Permission relating to that New Facility and thereafter carry out the Works diligently and in accordance with the applicable provisions of Clauses 17 to 40.

- 39.4.2. The Contractor may at its own risk and at its own discretion commence the Works in relation to the New Facilities prior to the expiry of the Challenge Period relating to any applicable Satisfactory Planning Permission.

39.5. **Construction Longstop Date**

- 39.5.1. If the Alconbury WTS and/or (subject to the March Trigger Date having occurred) the March WTS fails to achieve the New Facilities Acceptance Date by the relevant Planned Services Commencement Date, the provisions of Section 10 (Deductions) of Schedule 26 (Payment Mechanism) shall apply to the extent applicable to the Alconbury WTS (or the March WTS as appropriate) from the relevant Planned Services Commencement Date until the earlier of:

39.5.1.1. the Expiry Date;

39.5.1.2. the date upon which the Parties agree a Contractor Change in respect of the Alconbury WTS (or as appropriate the March WTS) or alternative delivery arrangements in respect thereof, pursuant to Clause 107 provided that the Authority confirms that it will not unreasonably withhold or delay its consent to any such Contractor Change.

- 39.5.2. If the IVC Services Commencement Date is not achieved by the Planned IVC Service Commencement Date then:

39.5.2.1. subject always to the provisions of Clause 52 (obligation to Compost IVC Acceptable

Waste), the Contractor shall continue to Compost IVC Acceptable Waste; and

39.5.2.2. from the Planned Service Commencement Date, the Authority shall be entitled to make a deduction from the Unitary Charge at a rate of £150 (Indexed) per Day (the IVC Unavailability Daily Deduction). The Authority shall be entitled to make the IVC Unavailability Daily Deduction until the earlier of:

- a) the New Facilities Acceptance Date in respect of the IVC Facility; or
- b) the Expiry Date; or
- c) the date upon which the Parties agree a Contractor Change in respect of the IVC Facility or alternative service delivery arrangements in respect thereof pursuant to Clause 107 provided that the Authority confirms that it will not unreasonably withhold or delay its consent to any such Contractor Change.

39.5.3. The provisions of Clauses 39.5.1 and 39.5.2 above are subject always to Clause 36 (Compensation Event), and/or Clause 46 (Service Period Compensation Event), and/or Clause 70 (Excusing Cause), and/or Clause 104 (Relief Event) applying.

39.6. **[Not used]**

39.7. **Completion of Works relating to New Facilities**

The New Facility Acceptance Date for each New Facility shall be deemed to have occurred on the date that the certificate of "Completion" (or equivalent certificate certifying that practical completion has been achieved) as defined under the relevant New Facilities Construction Contract or in the case of the IVC Facility under the IVC sub-sub Contract is issued by the Contractor's Professional Team member (or on the date that it is determined relevant pursuant to the dispute resolution procedure in the New Facilities Construction Contract or IVC sub-sub Contract that it should have been issued) and the Contractor shall within 5 Business Days of the issue provide a copy of such Completion certificate (or equivalent) to the Authority.

39.8. **Effect of Issue of New Facilities Acceptance Certificate**

39.8.1. The Contractor shall procure that any Snagging Items identified in the certificate of Completion referred to in

Clause 39.7 are attended to in accordance with the relevant New Facilities Construction Contract or IVC Sub-Sub Contract as appropriate and the Contractor shall keep the Authority informed regarding the progress in addressing such Snagging Items.

39.8.2. The occurrence of the New Facility Acceptance Date shall be final, binding and enforceable upon the Parties as to the end of the relevant Works and the commencement of the relevant Service Period.

39.8.3. The New Facility Acceptance Date shall be without prejudice to:

39.8.3.1. the Authority's rights and remedies under the Collateral Warranty; and

39.8.3.2. either Parties' rights and remedies under the Technical Adviser's Appointment.

#### 40. **DEPOSIT OF AND ACCESS TO AS-BUILT DRAWINGS**

40.1. The Contractor shall provide to the Authority, in respect of each Facility a set of As-Built Drawings on the earlier of the date falling 30 Business Days after the date they become available to the Contractor or within 6 months after the Service Commencement Date in respect of the relevant Facility.

40.2. Copyright in the As-Built Drawings shall not pass to the Authority but the Authority may make or obtain copies of all or any part of the As-Built Drawings but only for the purposes of this Contract.

40.3. The Authority shall be entitled to keep a set of As-Built Drawings. The Authority will allow access to the As-Built Drawings only to such persons as they consider have legitimate interests in viewing and/or using the As-Built Drawings resulting from the exercise by the Authority of their rights under Clause 108 (Authority Step In) and on termination or expiry of the Contract in circumstances in which any of the Handback Facilities forming part of the Works passes into the ownership or control of the Authority or any replacement contractor or sub-contractor.

## PART 3: SERVICE PERIOD

### 41. PRINCIPAL OBLIGATIONS

- 41.1. Subject to the express provisions of this Contract (including without limitation Schedule 11 (Planning Permissions and PPC Permit) and subject to any waiver which the Authority may grant expressly in writing in its absolute discretion, the Contractor shall not be relieved of its obligation in whole or in part under this Clause 41 by its failure to obtain and maintain any Consents.
- 41.2. During the applicable Service Period the Contractor shall perform and procure that the Services are performed:
- 41.2.1. in accordance with the terms and conditions of this Contract including the Specification, the Payment Mechanism, the Performance Framework, the Service Standards and the Contractor's Service Proposals;
  - 41.2.2. in accordance with Good Industry Practice;
  - 41.2.3. in accordance with the Quality Manuals;
  - 41.2.4. in a manner, that is consistent with all current relevant health and safety precautions required to comply with Good Industry Practice for the protection of the Contractor, its staff and Sub-Contractors, the Authority's employees and any other persons invited onto or visiting the Sites;
  - 41.2.5. in compliance with all applicable Legislation;
  - 41.2.6. in accordance with the terms and conditions of any Consents and Third Party Consents but only insofar as such are applicable to the provisions of the Services;
  - 41.2.7. so as to minimise inconvenience and disruption to the extent reasonably practicable to:
    - 41.2.7.1. the Authority and Authority's employees; and
    - 41.2.7.2. the WCAs and their employees and collection contractors; and/ or
    - 41.2.7.3. any lawful visitor to any of the Sites;
  - 41.2.8. subject to Clause 17 (Land Issues), **in accordance with the terms of any relevant tenure (including the Leases and Underleases (as applicable))** to which the Contractor is a party.

## **42. EMERGENCIES**

- 42.1. If an Emergency arises during the Service Period (and whether or not an Emergency has arisen shall be determined in the case of any dispute by the Authority's Representative acting reasonably) which cannot be dealt with by performance of the Services the Contractor shall use its reasonable endeavours to procure that such additional or alternative services are undertaken by the Contractor as and when required by a duly authorised representative of the Authority in writing to ensure that the emergency is dealt with and normal operation of the affected Facility and Services resumes as soon as is reasonably practicable and any such requirement of the Authority shall be confirmed as soon as practicable by an Authority Notice of Change which the Authority Change shall be applied retrospectively to the extent that additional or alternative services have been and/or are already being provided by the Contractor.
- 42.2. To permit the Authority's Representative to deal with the threat of Emergencies the Contractor will provide the names, addresses and out of office hours telephone numbers for two members of the Contractor's staff of sufficient standing and seniority to successfully implement a plan (the "Local Emergency Plan").
- 42.3. At any time being no later than 3 months from the Initial Services Commencement Date the Contractor shall supply its Local Emergency Plan to the Authority's Representative.

## **43. [NOT USED]**

## **44. VOLUME OF CONTRACT WASTE AND EXCLUSIVITY**

### **Exclusivity over Contract Waste**

- 44.1. Subject to:
- 44.1.1. the provisions of Schedule 8 (Service Commencement Dates);
  - 44.1.2. the provisions of Clause 44.1.5 below,
  - 44.1.3. the provisions of Clause 44.7 (Marshalls' Waste); and
  - 44.1.4. the provisions of Clause 53 (Composition Changes) and Schedule 23 (WCA Baseline)

from the Initial Services Commencement Date, the Contractor shall be entitled to (and the Authority shall procure that the Contractor shall have) the exclusive right to receive all Contract Waste arising in the Authority's Administrative Area from time to time in accordance with Schedule 21 (Delivery Points and Contingency Delivery Points) but subject to the provisions of Clause 45 (Capacity).



- 44.1.5. The provisions of Clause 44.1 above (Exclusivity over Contract Waste) and the exclusivity rights therein shall not apply to Contract Waste which the Authority Handles itself or arranges to have Handled by a third party as a direct result of the Contractor's failure or incapacity to Receive the Contract Waste arising from an instance of Unavailability in respect of which the Contractor makes no Contingency Delivery Point Available.
- 44.2. For the avoidance of doubt, breach by the Authority of its obligation to procure pursuant to Clause 44.1 above (Exclusivity over Contract Waste) or failure by the Authority to procure delivery of Contract Waste to the relevant Delivery Point or Contingency Delivery Points (as the case may be) shall be treated and assessed as a Compensation Event.

### **WCA Activity**

- 44.3. In accordance with Clause 53 (Composition Changes), Clause 55 (Composition Risk) and Schedule 23 (WCA Baseline) changes in WCA activity to the extent provided for in those provisions shall be treated and assessed as an Authority Change pursuant to Clause 107 (Authority Change) and/or as an Excusing Cause.

### **Volume of Contract Waste**

- 44.4. If Contract Waste Received by the Contractor in any Contract Year is below the Minimum Tonnage, Sections 3.5 and 3.6 of the Payment Mechanism shall apply but for avoidance of doubt (provided that the Authority has complied with its obligations under Clauses 44.1 (Exclusivity over Contract Waste) and 44.3 (WCA Activity) and such shortfall has not arisen due to a breach by the Authority of one of its express obligations in the Contract) such shortfall will not be treated as a Compensation Event or an event of Authority Default.
- 44.5. The Authority shall be entitled to deliver (or arrange to be delivered) Municipal Waste from outside its Administrative Area to make up any shortfall in Contract Waste below the Minimum Tonnage provided that it is not materially different from Contract Waste PROVIDED that the introduction of any such Municipal Waste shall be treated as an Authority Change and the Authority shall propose an Authority Notice of Change prior to introducing any such Municipal Waste.

### **IVC Acceptable Waste**

- 44.6. The Authority shall use all reasonable endeavours to procure that the WCAs:
- 44.6.1. make arrangements for the separate collection of IVC Waste and;
- 44.6.2. implement reasonable measures in accordance with

Legislation and guidance applicable to the WCAs to educate and keep informed householders within the relevant Administrative Area in respect of (and so as to promote) collections for IVC Acceptable Waste;

- 44.6.3. use reasonable endeavours in accordance with Legislation and guidance applicable to the WCAs to ensure that Waste so collected is IVC Acceptable Waste.

#### 44.7. **Marshalls' Waste**

- 44.7.1. Without prejudice to the provisions of Schedule 8 (Service Commencement Dates) if at any time up to the 1<sup>st</sup> August 2010, Marshalls Limited cannot accept Kerbside collected Kitchen and Garden Waste from Huntingdonshire District Council (Marshalls' Waste) as anticipated by the provisions of Schedule 8 (Service Commencement Dates) then:

- 44.7.1.1. the Contractor shall be entitled to Receive the Marshalls' Waste for such period only as Marshalls Limited is unable to accept the said Waste, PROVIDED THAT the Contractor is able to Compost such Waste in accordance with the provisions of this Contract;

- 44.7.1.2. if the Contractor is unable to Compost the Marshalls' Waste and, acting in good faith the Authority is able to demonstrate that it can secure (and does so secure) alternative arrangements to Compost the Marshalls' Waste the Authority shall be entitled to withhold such Waste from the Contractor.

#### 45. **CAPACITY**

- 45.1. If during the course of any Contract Year in preparing its evidence in support of its invoices in accordance with Section 12 of the Payment Mechanism (Payment Provisions) and Clause 73 (Invoicing and Payment) the Projected Tonnages indicate that the amount of Contract Waste anticipated to be Received by the Contractor (assuming compliance by the Authority with the provisions of Clause 44 (Volume of Contract Waste and Exclusivity) will exceed the Maximum Capacity (the amount in tonnes of such Contract Waste so identified or actually arising over the Maximum Capacity to be known as the "Excess Tonnage") (without prejudice to the generality of Clause 45.2 the Authority shall propose an Authority Change in accordance with Clause 107 (Authority Change) failing which one shall be deemed to have been served and require the Contractor to make proposals to Handle any such Excess Tonnage and the provisions of Clause 107 shall apply.

- 45.2. Notwithstanding the provisions of Clause 45.1 in the event that during or at the end of any Contract Year Excess Tonnage is identified, then any measures taken to handle such Excess Tonnage and the impact on the performance of the Services (including for the purposes of Schedule 26 (Payment Mechanism) shall be deemed to have been required as a result of an Authority Change and the provisions of Clause 107 (Authority Change) shall be applied (retrospectively as necessary) in respect of such Excess Tonnage, such measures taken in respect of the Excess Tonnage and the impact on the performance of the Services.

**46. SERVICE DELAY**

- 46.1. The Parties have agreed that:-

46.1.1. the provisions of Clause 36 (Compensation Events) shall apply generally in respect of breaches of Authority obligations relating to the Works pursuant to Clause 36 (Compensation Events); and

46.1.2. the provisions of Clause 46 (Service Delay) shall apply in respect of breaches of this Contract (other than breaches relating to the Works as referred to in Clause 46.1.1) only in respect of those Authority obligations which are expressly stated in Clause 46.3 below (subject to Clause 46.12),

and this Clause 46 (Service Delay) shall apply without prejudice to the application of Clause 36 (Compensation Events) in respect of the Works.

- 46.2. For the avoidance of doubt, subject to the provisions of Clause 116 (Exclusive Remedies), this Clause 46 shall not operate as a waiver by the Contractor of or otherwise to reduce or prejudice in any way the rights of the Contractor in respect of a breach by the Authority of its obligations whether arising under this Contract, in common law, statute, in equity (including tort) or howsoever otherwise.

- 46.3. Accordingly pursuant to Clause 46.1.2, the Contractor shall be entitled to claim relief and/or compensation in accordance with the provisions of Clause 46 (Service Delay) in the event of breach by the Authority of the following provisions or matters:

46.3.1. Clause 14 (General Obligations of the Authority);

46.3.2. Clause 17 (Land Issues) in respect of the various obligations of the Authority therein;

46.3.3. Clause 44 (Volume of Contract Waste and Exclusivity);

46.3.4. Clause 53.8 (Composition Changes).

- 46.4. Breach by the Authority of any of the provisions referred to in Clause

46.3.1 to 46.3.4 shall be treated and assessed as a Service Period Compensation Event. If and to the extent that a Service Period Compensation Event occurs the following provisions of Clauses 46.5 to 46.11 shall apply.

**46.5. If as a direct result of the occurrence of a Service Period Compensation Event:**

**46.5.1. the Contractor is unable or is likely to be unable to comply with its obligations under this Contract; and/or**

**46.5.2. the Contractor incurs costs or loses revenue (including any Third Party Income),**

**then the Contractor is entitled to apply for relief from its obligations and/or claim compensation under this Contract.**

**46.6. Subject to Clause 46.7 below, to obtain relief and/or claim compensation the Contractor must:**

**46.6.1. as soon as practicable and in any event within 20 Business Days after it became aware that the Service Period Compensation Event has caused or is likely to cause delay or breach of an obligation under this Contract and/or the Contractor to incur costs or lose revenue (including Third Party Income), give to the Authority a notice of its claim for an extension of time, payment of compensation and/or relief from its obligations under this Contract; and**

**46.6.2. within 15 Business Days of receipt by the Authority of the notice referred to in Clause 46.6.1 above, give full details of the Service Period Compensation Event and the extension of time, and/or any Estimated Change in Project Costs and/or loss of revenue (including Third Party Income) claimed; and**

**46.6.3. demonstrate to the reasonable satisfaction of the Authority that:-**

**46.6.3.1. the Service Period Compensation Event was the direct cause of the Estimated Change in Project Costs and/or loss of revenue (including Third Party Income) and/or any delay and/or breach of the Contractor's obligations under this Contract;**

**46.6.3.2. the Estimated Change in Project Costs, and/or loss of revenue (including Third Party Income), time lost, and/or relief from the obligations under the Contract claimed,**

**could not reasonably be expected to be mitigated or recovered by the Contractor acting in accordance with Good Industry Practice.**

**46.7. In the event that the Contractor has complied with its obligations under Clause 46.6 above, then:**

**46.7.1. in the case of a delay** the time period for compliance by the Contractor with any related obligation **shall be postponed by such time as shall be reasonable for such a Service Period Compensation Event taking into account the likely effect of the delay;**

**46.7.2. in the case of an additional cost being incurred or revenue (including Third Party Income) being lost by the Contractor:-**

**46.7.2.1. on or before the Service Commencement Date** for the relevant Facility; or

**46.7.2.2. as a result of Capital Expenditure being incurred by the Contractor at any time,**

**the Authority shall compensate the Contractor for the actual Estimated Change in Project Costs as adjusted to reflect the actual costs reasonably incurred and, without double counting, for revenue actually lost including on the basis set out in the Appendix to Schedule 39 (Unitary Charge Adjustment Protocol) lost Third Party Income (to the extent it could not reasonably have been mitigated) within 30 days of its receipt of a written demand by the Contractor supported by all relevant information;**

**46.7.3. in the case of a payment of compensation for the Estimated Change in Project Costs and/or without double counting, loss of revenue (including on the basis set out in the Appendix to Schedule 39 (Unitary Charge Adjustment Protocol) loss of Third Party Income) that are not subject to Clause 46.7.2 above but which reflects a change in the costs being incurred or loss of revenue (including on the basis set out in the Appendix to Schedule 39 (Unitary Charge Adjustment Protocol) Third Party Income) received by the Contractor after the Service Commencement Date, the Authority shall compensate the Contractor in accordance with Clause 46.10 below by an adjustment to the Annual Unitary Charge; and/or**

**46.7.4. the Authority shall give the Contractor such relief from its obligations under this Contract as is reasonable for**

**such a Compensation Event.**

**Late provision of information**

- 46.8. In the event that information is provided after the dates referred to in Clauses 46.6.1 and 46.6.2 above, then the Contractor shall not be entitled to any extension of time, compensation or relief from its obligations under this Contract in respect of the period for which the information is delayed.

**Failure to agree**

- 46.9. If the Parties cannot agree the extent of any compensation, delay incurred, relief from the Contractor's obligations under the Contract, or the Authority disagrees that a Service Period Compensation Event has occurred (or as to its consequences), or that the Contractor is entitled to relief under this Clause 46, the Parties shall resolve the matter in accordance with Clause 113 (Dispute Resolution).

**Method of calculating compensation**

- 46.10. Any payment of compensation referred to in Clause 46.7.3 above shall be calculated in accordance with Clause 110 (Financial Adjustments) and Schedule 39 (Unitary Charge Adjustment Protocol) and to the extent such compensation includes lost Third Party Income, the Appendix to Schedule 39 (Unitary Charge Adjustment Protocol).

**No variation to Planning Longstop Date**

- 46.11. For the avoidance of doubt, neither Clause 36 (Compensation Events) nor this Clause 46 (Service Delay) shall vary any Planning Longstop Date in any circumstances.
- 46.12. Where any event or occurrence is stated to be deemed to be or is to be treated as a Compensation Event or to be deemed to have arisen as a result of a Compensation Event, such event or occurrence shall be deemed to be a Compensation Event for the purposes of both Clause 36 and Clause 46.

**47. HANDLING OF CONTRACT WASTE AND PRIORITY**

- 47.1. Subject to the express provisions of Clause 48 (Non Contract Waste) in relation to agreed arrangements for Spare Capacity Contracts, throughout the Service Period the Contractor shall Handle Contract Waste in priority to Non-Contract Waste.

**48. NON CONTRACT WASTE**

- 48.1. In accordance with the provisions of Schedule 2 (Specification) and the Authority Policies (subject to Clauses 48.2 to 48.4) the Contractor shall use all reasonable endeavours in accordance with Good Industry

Practice to ensure that it shall not accept Non Contract Waste at HWRC Sites.

48.2. Subject to the provisions of Clauses below (Pre-Agreed Arrangement for Spare Capacity Contracts), the Contractor may accept Non Contract Waste at the Facilities subject to the following provisions:

- 48.2.1. that the Authority is given first refusal and a reasonable time to accept the use of the capacity which will be the subject of the Spare Capacity Contract;
- 48.2.2. that prior consent is sought and received from the Authority in writing, such consent not to be unreasonably withheld or delayed;
- 48.2.3. in considering whether to give consent pursuant to Clause 48.2.2 the Authority shall be entitled to take into account the composition of the Non Contract Waste and any assurances from the Contractor that the introduction of the Non Contract Waste will not affect the efficiency and effectiveness of the Facilities nor detrimentally affect the Contractor's ability to achieve Contract Targets and Performance Standards nor prejudice or otherwise hinder the measurement of the relevant characteristics of Contract Waste in accordance with Schedule 25 (Organic Fraction Measurement Protocol) and/or Schedule 22 (Facility Input Specifications);
- 48.2.4. that no consent will reduce, obviate or diminish the Contractor's obligations or the application of Schedules 26 (Payment Mechanism) and 27 (Performance Framework);
- 48.2.5. that even if consent has been given to accept Non Contract Waste, Contract Waste always takes priority in the MBT and IVC Facilities up to the Maximum Capacity unless expressly agreed otherwise by the terms of any such Consent.

48.3. **Acceptance of Non Contract Waste**

Without prejudice to the foregoing and for the avoidance of doubt, if the Contractor accepts Non Contract Waste at any of the Facilities such Non Contract Waste shall not be treated as Contract Waste.

49. **PLANNED MAINTENANCE**

The provisions of this Clause 49 (Planned Maintenance) shall apply to the MBT Facility, the New Facilities and (subject to Clause 97.5) the HWRCs and do not apply to Contamination or ground conditions in respect of the Sites upon which such Facilities reside.

49.1. **The Contractor shall ensure on a continuing basis that at all times its maintenance and operating procedures are sufficient to ensure that:-**

- 49.1.1. **the Service is continuously available** in accordance with Schedule 2 (Specification) and the Contractor's Service Proposals;
- 49.1.2. the Facilities are Available;
- 49.1.3. **it can maintain the design intention of the Facilities and Equipment to achieve their full working life** in accordance with the Contractor's Works Proposals and the Contractor's Service Proposals; **and**
- 49.1.4. the Handback Facilities **are handed back to the Authority on the Expiry Date in a condition complying with this Clause 49 (Planned Maintenance).**
- 49.2. The Contractor shall develop a detailed maintenance programme ("Maintenance Programme") for each Facility setting out the maintenance to be carried out at each Facility and the Contractor shall develop such a Maintenance Programme in accordance with the principles set out at Clause 49.1, Method Statement 4 and in accordance with Good Industry Practice.
- 49.3. The Contractor shall deliver to the Authority's Representative within 3 months of the HWRC Date, Service Commencement Date or Full Service Commencement Date as relevant a complete and accurate copy of the relevant Maintenance Programme. The Contractor shall keep the Maintenance Programme up to date in accordance with Good Industry Practice and promptly supply updates as and when any changes are made thereto.
- 49.4. Throughout the Contract Period, the Contractor shall carry out maintenance of the Facilities to comply with the relevant Maintenance Programme including for, the avoidance of doubt, as to the length and timing of any planned shutdown.
- 49.5. Without prejudice to the provisions of Clause 49.6, the Contractor shall give notice to the Authority's Representative of any maintenance to be carried out by the Contractor pursuant to any Maintenance Programme if it is to be carried out at times materially different from those specified in such Maintenance Programme. Any such different times shall be set so as to minimise the disruption to the Authority, the WCAs, and/or delivery of the Services and shall require prior agreement of the Authority's Representative under the Review Procedure (such agreement not to be unreasonably withheld or delayed).
- 49.6. Within 10 Business Days after each anniversary of the Contract Commencement Date the Contractor shall produce to the Authority a report setting out the following:
  - 49.6.1. the works, services or other matters carried out by way of maintenance in the previous Contract Year detailing whether



such works services or other matters were in accordance with the Maintenance Programme and, if not, an explanation as to why such works, services or other matters were carried out or not carried out (as the case may be); and

49.6.2. statistics identifying in all material respects the consolidated maintenance records of the various components of the Facility and where reasonably required by the Authority any further information relating to the statistics that the Authority may reasonably require in order to verify the report.

49.7. The Contractor shall promptly provide to the Authority such information as the Authority reasonably requires in order to verify the report referred to in Clause 49.6 above.

## 50. **EQUIPMENT**

50.1. On or before the relevant Service Commencement Date, or as the case may be, on or before the relevant HWRC Date (as set out in Schedule 10), in consideration of the sum of £1 paid by the Contractor receipt of which is hereby acknowledged and subject to Clause 50.2 below, the Authority shall transfer title and possession to the Transferred Equipment set out in Schedule 10 to the Contractor.

50.2. In respect of each item of Transferred Equipment to be transferred pursuant to Clause 50.1 the Authority warrants to the Contractor as at the Contract Commencement Date and the date upon which such equipment is to be transferred to the Contractor that:

50.2.1. the Authority has good title to such Equipment free from any charge or encumbrances and that the Equipment will not be the subject of any leasing, hiring or hire purchase or agreement for payment on deferred terms or assignment or factoring or similar agreement; and

50.2.2. that such Equipment is physically present at the Site in relation to which it is identified in the Schedule 10 (Equipment) and is in serviceable condition.

50.3. The Contractor shall from the relevant Service Commencement Date:

50.3.1. provide (without prejudice to the provisions of Clause 50.1 above) to a suitable standard all Equipment necessary for the provision of the Services;

50.3.2. maintain all Equipment in accordance with Clause 49 (Planned Maintenance);

50.3.3. use its reasonable endeavours to ensure that all Equipment and related contracts, agreements, guarantees, warranties, bonds and insurances are assignable/novatable to the Authority or any third party who may provide the Services on

expiry or termination;

- 50.3.4. at the end of each Contract Year prepare and provide to the Authority an updated Equipment List; and
- 50.3.5. six months prior to the Expiry Date, or, in the case of early termination of this Contract, 20 Business Days following service of the relevant termination notice, prepare and provide to the Authority a final Equipment List ("Final Equipment List").

## 51. **DELIVERY POINTS AND TIPPING AWAY**

- 51.1. The Authority shall direct the WCAs to certain Delivery Points identified in Schedule 21 (Delivery Points and Contingency Delivery Points) or such other delivery points as shall be agreed by the Parties pursuant to Section 10 of Schedule 26 (Payment Mechanism).
- 51.2. During any period of Unavailability of any Delivery Point and/or Contingency Delivery Point:
  - 51.2.1. the Contractor shall implement the Contingency Arrangements set out in Method Statement 6 of Schedule 3 (Contractor's Service Proposals) in order to continue to Handle Contract Waste;
  - 51.2.2. the remedies of the Authority set out in Schedules 26 (Payment Mechanism) and 27 (Performance Framework) shall apply to the extent set out therein.

## 52. **RECYCLING, COMPOSTING AND WASTE MINIMISATION**

- 52.1. As part of the Services the Contractor shall:
  - 52.1.1. subject to the provisions of Clause 58 (Review of Recyclable Materials), Recycle Recyclable Material; and
  - 52.1.2. from the Initial Services Commencement Date, but:
    - 52.1.2.1. subject to the provisions of Schedule 22 (Facility Input Specifications) and Method Statement 6 (Contingency and Emergency Plan); and/or
    - 52.1.2.2. save as reasonably required by the Contractor to enable the Contractor to carry out MBT Commissioning and to achieve Acceptance or in order to comply with its obligations in Schedule 24 in relation to the MBT Input Review Period; and/or
    - 52.1.2.3. (without limiting Clause 54) save as required

in order to ensure (if required at the Contractor's discretion) that during the period of three years from Full Service Commencement Date that the MBT Organic Fraction is not below the Minimum Organic Fraction,

Compost IVC Acceptable Waste provided always that (without prejudice to any express remedy under the Payment Mechanism) a breach by the Contractor of this Clause 52.1.2 (Obligations to Compost IVC Acceptable Waste) shall not by itself be capable of giving rise to a Contractor Default under limb (a) or (b) of that definition.

- 52.2. The Contractor shall participate in waste education and waste minimisation programmes in accordance with Service Output 2 of Schedule 2 (Specification) and Method Statement 10 (Waste Minimisation and Promotions) in the Contractor's Service Proposals.

### 53. **COMPOSITION CHANGES**

If there is any Composition Change:

- 53.1. the provision of Clause 55 (Composition Risk) will apply; and
- 53.2. the Authority Change provisions under Clause 107 will be applied in accordance with Clauses 53.3 to 53.8 below to:

- 53.2.1. fairly and reasonably revise any or all of the following mechanisms:

- 53.2.1.1. the HWRC Recycling and Composting Range having regard inter alia to any variance in the volumes or type of Recyclable Material attributable to a Composition Change;
- 53.2.1.2. the Prohibited Landfill List;
- 53.2.1.3. the Contract Targets to reflect inter alia the impact of any Composition Change on the volume, nature or composition of Contract Waste or any particular type of Waste falling within Contract Waste (e.g. household, commercial, industrial, street sweepings etc or sub-types thereof reviewed as a whole and/or separately) Received by the Contractor;

to reflect in each case any adverse impact of the Composition Change upon the Contractor's ability to comply with or exceed the Recycling and Composting Range and/or the Prohibited Landfill List and/or the Contract Targets; and/or

- 53.2.2. revise the Services or take other measures to enable the Contractor to achieve the HWRC Recycling and Composting Range or the Contract Targets or to comply with the Prohibited Landfill List despite the Composition Change; and/or
- 53.2.3. to compensate the Contractor for any Estimated Change in Project Costs in accordance with Schedule 39 (Unitary Charge Adjustment Protocol) including for the avoidance of doubt but without limitation any loss of actual or anticipated payments of the Tonnage Based Element under the Payment Mechanism and any reduction in Third Party Income arising as a result of the Composition Change (on the basis set out in the Appendix to Schedule 39 (Compensation for lost Third Party Income)).

Always taking into account the extent to which the Contractor has been relieved by virtue of the application of Clauses 55 (Composition Risk) and 70 (Excusing Causes)

#### **Authority Change Notice**

- 53.3. Subject to Clause 53.4 in the event that either or both of the Contractor or the Authority identify that a Composition Change has occurred (whether material or not) either in the preceding Contract Year or any earlier Contract Year in respect of which the mechanisms set out in Clauses 53.4 to 53.9 have not previously been applied, then within 60 Business Days of the end of any Contract Year, at the Contractor's request or, if not so requested, at the Authority's discretion, the Authority shall issue an Authority Change Notice in accordance with Clause 107 (Authority Change) and the procedure in Clauses 107.2 to 107.13 shall apply except that:
  - 53.3.1. the Authority shall not be entitled to withdraw the Authority Notice of Change and nor shall it be deemed withdrawn except by agreement;
  - 53.3.2. the Parties shall agree or it shall be determined pursuant to the Dispute Resolution Procedure the date on which the Composition Change took effect and if necessary (but always taking into account the extent to which the Contractor was relieved by virtue of the application of Clauses 55 (Composition Risk) and 70 (Excusing causes) any adjustment in the Annual Unitary Charge and other consequential adjustments shall be applied retrospectively to the date on which the Composition Change is determined or agreed to have taken effect;
  - 53.3.3. the Authority may include in the Authority Notice of Change (or may issue a second Notice of Change following the Contractor's Estimate) setting out changes in the Services

required to mitigate the effect of the Composition Change;

- 53.3.4. the Parties shall use their reasonable endeavours to work together in good faith (and liaise with the WCAs as appropriate) to mitigate and reduce any adverse impact of the Composition Change.

**WCA Change Notice – annual notice or in the event of a material Composition Change**

- 53.4. Notwithstanding the annual mechanism set out in Clause 53.3 above, if at any time:

- 53.4.1. the WCA Baseline set out in Schedule 23 is updated by the Authority in accordance with paragraph 2 of that Schedule; or

- 53.4.2. it otherwise becomes known to the Contractor at any time that there is or has been a material Composition Change or that a Composition Change is likely

and unless the Authority has already issued an Authority Notice of Change in respect of such matters, the Contractor shall issue a notice to the Authority (a WCA Change Notice) setting out details of the Composition Change and providing reasonable evidence in support.

- 53.5. The Authority shall respond within one month of receipt of a WCA Change Notice by either:

- 53.5.1. Issuing an Authority Notice of Change relating to the matter in which case the provisions of Clauses 53.3.1 to 53.3.4 shall apply mutatis mutandis; or

- 53.5.2. Notifying the Contractor in writing that it disputes the fact that there is a Composition Change in and referring the matter to the Dispute Resolution Procedure.

- 53.6. If the Authority does not respond in accordance with either of Clauses 53.5.1 or 53.5.2 above the Composition Change shall be treated as a Compensation Event and the provisions of Clause 36 (Compensation Events) and Clause 46 (Service Delay) shall apply.

- 53.7. The Parties shall refer to the Disputes Resolution Procedure any dispute as to whether there is a Composition Change and if so its practical or financial effect.

- 53.8. The Authority will at all times act in good faith in relation to the reporting and identification of changes in the WCA Baseline and will use all reasonable endeavours to provide such information in relation thereto as the Contractor shall reasonably require.

- 53.9. For the avoidance of doubt:

- 53.9.1. save in relation to any breach of Clause 44 (Volume of Contract Waste and Exclusivity) and Clause 53.6 above Composition Changes shall not be deemed either an Authority Default nor Compensation Event;
- 53.9.2. the mechanism set out in this Clause 53 shall protect the Contractor inter alia against changes in composition or the balance of commodities of Waste in the Contract Waste arising in the Authority's Administrative Area. They are not intended nor shall they be deemed to protect the Contractor from increases or decreases in the volume of Contract Waste (i.e. when the balance between commodities within the stream remain the same) which arise from general population and/or societal behaviour, Changes in Law (other than Qualifying Changes in Law) or Contractor acts (save where such increases or decreases arise from a Composition Change) because such increases or decreases are calibrated and catered for within the Tonnage Based Element of the Annual Unitary Charge as described in the Payment Mechanism.

#### **54. MBT INPUT COMPOSITION**

- 54.1. The MBT Organic Fraction shall be measured and recorded in accordance with the provisions of Schedule 25 (Organic Fraction Measurement Protocol). Such measurement will be carried out as provided in Part 1 (Monitoring the MBT Organic Fraction) of Schedule 25 within the MBT Reception Hall on a fortnightly basis. An average MBT Organic Fraction for each six month period (Average half yearly MBT Organic Fraction) shall be derived from such fortnightly measurements. These bi-annual results will be assessed on an annual basis as provided in Clause 54.2 and any six month period in which the Average half yearly MBT Organic Fraction is below the Minimum Organic Fraction will be taken into account. Any six month period in which the Average half yearly MBT Organic Fraction is above the Minimum Organic Fraction shall be disregarded for these purposes.
- 54.2. From the end of the Contract Year in which the Full Service Commencement Date occurs, and at the end of each Contract Year thereafter the Contractor shall notify the Authority in writing of the results of the measurements carried out pursuant to Clause 54.1 during that Contract Year and if for that Contract Year the MBT Organic Fraction is below the Minimum Organic Fraction Percentage in respect of any six month period or six month periods (a 'Shortfall') then the following provisions shall apply:
  - 54.2.1. the provision of Clause 55 (Composition Risk) will apply retrospectively if appropriate to the relevant Contract Year; and
  - 54.2.2. from the end of the MBT Input Review Period (and for the

avoidance of doubt not in respect of any part of the MBT Input Review Period) the Authority Change provisions will (at either Party's request) be applied in accordance with Clauses 54.3 to 54.8 below to:

54.2.2.1. fairly and reasonably revise any or all of the following mechanisms:

a) the Prohibited Landfill List;

b) the Contract Targets to reflect inter alia the impact of any Shortfall on the performance of the MBT Facility,

to reflect in each case any adverse impact of the Shortfall on the Contractor's ability to comply with or exceed the Prohibited Landfill List and/or the Contract Targets; and/or

54.2.2.2. Revise the Services or take other measures to enable the Contractor to achieve the Contract Targets and comply with the Prohibited Landfill List despite the Shortfall; and/or

54.2.2.3. To compensate the Contractor for any Estimated Changes in Project Costs in accordance with Schedule 39 (Unitary Charge Adjustment Protocol) including for the avoidance of doubt but without limitation reduction in Third Party Income arising as a result of the Shortfall (on the basis set out in the Appendix to Schedule 39 (Compensation for Lost Third Party Income)); and/or

54.2.2.4. To compensate the Contractor for any loss of payment of the Tonnage Based Element under Schedule 26 (Payment Mechanism) (on the basis set out in paragraph 9 of Schedule 39 (Unitary Charge Adjustment Protocol)).

Always taking into account the extent to which the Contractor has been relieved by virtue of the application of Clauses 55 (Composition Risk) and 70 (Excusing Causes)

54.3. In the event that a Shortfall arises or has arisen then the Contractor shall be entitled to issue a Notice to the Authority (an MBT Input Change Notice) providing reasonable evidence in support. The Authority shall respond within one month of receipt of a MBT Input Change Notice by either:

54.3.1. Issuing an irrevocable Authority Notice of Change relating to

the matter as provided under Clause 54.6; or

- 54.3.2. Notifying the Contractor in writing that it disputes the fact that there is a Shortfall and referring the matter to the Dispute Resolution Procedure.
- 54.4. If the Authority does not respond in accordance with either of Clauses 54.3.1 or 54.3.2 above the Shortfall shall be treated as a Compensation Event and the provisions of Clause 46 (Service Delay) shall apply.
- 54.5. The Parties shall refer to the Dispute Resolution Procedure any dispute as to whether there has been a Shortfall and, if so, its practical or financial effect.
- 54.6. The Authority shall issue an Authority Change Notice in accordance with Clause 107 (Authority Change) and the procedure in Clauses 107.2 to 107.13 shall apply except that:
  - 54.6.1. the Authority shall not be entitled to withdraw the Authority Notice of Change and nor shall it be deemed withdrawn except by agreement;
  - 54.6.2. the Parties shall agree or it shall be determined pursuant to the Dispute Resolution Procedure the relevant Quarter on which the Shortfall occurred and if necessary (but always taking into account the extent to which the Contractor was relieved by virtue of the application of Clauses 55 (Composition Risk) and 70 (Excusing Causes) any adjustment in the Annual Unitary Charge and other consequential adjustments shall be applied retrospectively to the date on which the six month period is determined or agreed to have occurred;
  - 54.6.3. the Authority may include in the Authority Notice of Change (or may issue a second Notice of Change following the Contractor's Estimate) setting out changes in the Services required to mitigate the effect of the Shortfall;
  - 54.6.4. the Parties shall use their reasonable endeavours to work together in good faith to mitigate and reduce any adverse impact of the Shortfall.
- 54.7. For the avoidance of doubt:
  - 54.7.1. save in relation to any breach of Clause 44 (Volume of Contract Waste and Exclusivity) and Clause 54.4 above a Shortfall shall not be deemed either an Authority Default nor Compensation Event;
  - 54.7.2. the mechanism set out in this Clause 54 shall protect the Contractor inter alia against changes in composition or the



balance of commodities of Waste in the Contract Waste. They are not intended nor shall they be deemed to protect the Contractor from increases or decreases in the volume of Contract Waste (i.e. when the balance between commodities within the stream remain the same) which arise from general population and/or societal behaviour, Changes in Law (other than Qualifying Changes in Law) or Contractor acts because such increases or decreases are calibrated and catered for within (inter alia) Clause 53 and in the Tonnage Based Element of the Annual Unitary Charge as described in the Payment Mechanism.

## **55. COMPOSITION RISK**

- 55.1. If at the end of any Contract Year there is both a Composition Change and a Shortfall there shall be no double counting of relief or Estimated Change in Project Costs but the Parties shall, as far as is possible, take into account the combined effect and the extent to which the Shortfall was caused by the Composition Change. If the Parties choose not to apply or require the application of the Authority Change mechanisms to a Composition Change or Shortfall, the cumulative effect of the Composition Change or Shortfall may nevertheless be taken into account if there is a Composition Change or Shortfall in the future.
- 55.2. Following the application of the Authority Change following a Composition Change or Shortfall, the definition of WCA Baseline or Minimum Organic Fraction Percentage shall (if appropriate) be deemed amended to reflect the nature of the adjustments arising from the Authority Change and the provisions of this Clause 53 and 54 shall apply to any future Changes.
- 55.3. Without limiting the application of Clause 70 (Excusing Causes) in relation to any other Excusing Cause, in the event that a Composition Excusing Cause occurs, the provisions of Clause 70 (Excusing Causes) shall apply.
- 55.4. In the case of a Composition Excusing Cause relief from the applicable element of the Payment Mechanism shall continue to apply until the earlier of:
  - 55.4.1. the Shortfall or the Composition Change (as is relevant) being no longer applicable; or
  - 55.4.2. the Authority Change consequential on such Composition Excusing Cause pursuant to Clauses 53 and 54 being agreed or determined and implemented.

## **56. OWNERSHIP OF WASTE**

- 56.1. As between the Contractor and the Authority, all Contract Waste and

any Non-Contract Waste received by or in the possession of the Contractor or any of its Sub-Contractors (or their sub-contractors) shall thereupon become and be deemed to be acquired by and in the ownership and at the risk of the Contractor who shall take full responsibility for it.

**57. DUTY OF CARE**

57.1. Without prejudice to the Contractor's general obligation to comply with all Legislation applicable to it the Contractor shall at all times comply with its duty of care under section 34 of the EPA and with any Guidance issued pursuant to it by the Government or Relevant Authority which is binding upon it. Such compliance shall include without limitation making and retaining suitable and sufficient records, transfer notes and weighbridge records.

57.2. The Contractor shall have a duty to warn the Authority if any person for whom the Authority is responsible, any WCA or any third party may in the reasonable opinion of or to the knowledge of the Contractor be in breach of the duty of care under section 34 of the EPA and/or is acting in breach or contrary to any Consent or Third Party Consent. For the avoidance of doubt this duty to warn applies to assist the Authority in managing environmental considerations within the Administrative Area and not to transfer risk in the Facilities and the Sites from the Contractor to the Authority where such risk falls pursuant to the provisions of this Contract upon the Contractor.

**58. REVIEW OF RECYCLABLE MATERIALS**

58.1. In the event that the Contractor from time to time considers that any component of Contract Waste which was previously included on the list in paragraph (b) of the definition of Recyclable Materials contained in the definition of Recyclable Materials (the "List") is no longer Economically Recyclable the Contractor may on or before the end of any Contract Year propose to the Authority that such item should be removed from the List with effect from the beginning of the immediately following Contract Year and the Prohibited Landfill List shall be deemed to be adjusted accordingly. Within 10 Business Days of the submission of the Contractor's proposal, the Authority shall indicate in writing whether it agrees with the Contractor's proposal. In the event that the Authority does not agree with the Contractor's proposal either Party may refer the matter to the Dispute Resolution Procedure.

**59. [NOT USED]**

**60. PROTESTER ACTION**

60.1. The Contractor shall use all reasonable endeavours to prevent Protester Action causing delay to the Works and/or Services, disruption at and/or damage to the Facilities and to prevent Protester Action leading to Unavailability of the Facilities including for the avoidance of

doubt providing appropriate security and security fencing, appropriately manned weighbridges and providing reasonable additional security measures in the event that and for so long as there are reasonable grounds for believing that a higher risk of Protester Action persists.

60.2. Notwithstanding the provisions of Clause 60.1 above, in the event Protester Action arises at or around any Site or on the access road to any Site the Contractor shall take such actions as are reasonable, proportionate and lawful to deal with Protester Action and where necessary shall co-operate with the emergency services.

60.3. Subject to Clause 60.4, the Contractor shall be responsible for the consequences of any Unavailability, delays or disruption at and/or damage to the Facilities consequent upon any Protester Action.

60.4. **Relief Event in relation to MBT Facility**

Subject to compliance with the provisions of Clauses 60.1 to 60.2 above, in the event that Protester Action arises at the MBT Facility the Contractor is entitled to apply for relief in accordance with the provisions of Clause 104 (Relief Events).

61. **ENVIRONMENTAL PROVISIONS**

61.1. Schedule 48 (Environmental Provisions) applies in relation to Contamination.

62. **HEALTH AND SAFETY**

62.1. The Contractor shall at all times retain a person to be responsible for the health and safety matters as required by the Health and Safety at Work Act 1974 and notify full details of such person to the Authority. Whilst on Authority owned premises (not being the Sites) the Contractor shall require its staff, licensees and visitors to comply with the lawful requirements of the Authority's Safety Adviser. The Contractor shall provide and maintain, at all its premises and the Sites, an accident book which shall be open to inspection by the Authority's Representative or his representative.

62.2. The Contractor shall have regard to the Authority's health and safety policy when preparing its own statement, a copy of which shall be supplied to the Contractor prior to the Contract Commencement Date.

62.3. The Contractor shall supply a copy of its general statement of safety policy to the Authority, for approval no later than 60 Business Days following the Contract Commencement Date, and shall review its policy and safe working procedures whenever necessary in the light of changing Legislation, working practices, accidents or similar events and shall inform the Authority's Representative of any consequent revisions.

62.4. The Contractor shall provide, in response to a written request from the

Authority, information and all reasonable assistance at no less than twelve monthly intervals from the start of the Second Contract Year to the Authority's Representative to enable a health and safety audit to be completed by the Authority.

**63. QUALITY ASSURANCE AND QUALITY MANAGEMENT SYSTEMS**

63.1. The Contractor shall procure that all aspects of the Services are carried out in accordance with Integrated Management Systems.

63.2. The Integrated Management Systems shall be reflected in appropriate Quality Manuals and shall comply with:-

63.2.1. BS EN ISO 9000/2000 or such other quality standard as may replace or supersede the same or, in the absence of a replacement or a superseding quality standard, such other quality standard as the Parties may agree; and

63.2.2. Good Industry Practice.

63.3. The Contractor shall prepare, implement and comply with the Quality Manuals.

**63.4. Additional Information**

Notwithstanding any other provision of this Clause 63, the Contractor shall provide, in response to a written request from the Authority to the Authority such information as they may reasonably require to demonstrate compliance with this Clause 63.

**64. AUTHORITY POLICIES**

64.1. The Contractor shall comply with the Authority Policies provided that (notwithstanding any other provision of this Contract) the Contractor shall only be obliged to comply with any amendment to any Authority Policy or additional Authority Policy pursuant to an Authority Change.

**65. PERFORMANCE MONITORING**

**Contractor Responsibility**

65.1. The Contractor acknowledges and agrees that, notwithstanding any provision of this Contract which contemplates that the Authority will or may from time to time:-

65.1.1. inspect any part of the Works or the Facilities or the Sites;

65.1.2. check compliance by the Contractor with its obligations;

65.1.3. confirm or indicate approval of or non objection to proposals made by the Contractor;

- 65.1.4. request the Contractor to make a change to the Works or Services; or
- 65.1.5. otherwise seek to influence the manner in which the Project is conducted by the Contractor,

it will always be fully the responsibility of the Contractor, and not the responsibility of the Authority, to ensure that the Project is conducted in all respects in accordance with the Contractor's obligations under this Contract, and subject to Clause 36 (Compensation Events) and Clause 46 (Service Delay) and any other express provisions of the Contract to the contrary or which have a contrary effect no such action by or on behalf of the Authority will in any way limit or affect such obligations.

### **Authority Monitoring**

- 65.2. The Authority may elect to undertake its own performance monitoring exercise at any stage during the Contract Period for any purpose including in order to ensure that the Facilities, Sites and Services are being provided in accordance with this Contract. In that respect the Authority shall have the right acting reasonably to audit the Contractor's Quality Management Systems including examining and inspecting Works or Services on or off Site to establish the adequacy of the Quality Management System documentation.

### **Cost of Performance Monitoring**

- 65.3. Each Party shall bear its own cost of performance monitoring.

## **66. EMPLOYEES**

- 66.1. Whilst engaged at the HWRC Sites the Contractor shall have regard to the Authority Policies relating to the conduct of staff and security arrangements of which it has been notified in writing by the Authority prior to the Contract Commencement Date and shall ensure that its staff do likewise. In the event that the Authority wishes to impose any further or amended Authority Policies from time to time any such imposition shall be notified in writing to the Contractor in advance and provided that any additional policies and amendments are reasonably introduced in relation to Contractor staff or otherwise shall be introduced by the Authority as an Authority Notice of Change in accordance with Clause 107.1 (Authority Change).
- 66.2. During the 12 months preceding the Expiry Date or once notice terminating this Contract for whatever reason has been given the Contractor shall enable and assist the Authority and such other persons as the Authority may determine to communicate with and meet the Relevant Employees and their trade unions or other employee representatives save that this shall not require the Contractor to provide access which might disrupt the Contractor's provision of the Services or be in any way detrimental to the Contractor's relationship

with its employees or their representatives.

- 66.3. Both before and after termination of this Contract, the Contractor shall give reasonable assistance and comply with all reasonable requirements that the Authority may (acting reasonably) specify with a view to ensuring that an orderly and efficient handover to the Authority or to any successor contractor is achieved.

67. **TUPE**

- 67.1. The provisions of Schedule 47 (TUPE and Pensions) shall apply in relation to employment matters as set out therein.

68. **SURVEYS**

For the avoidance of doubt, this Clause 68 (Surveys) shall apply to the Facilities and Equipment rather than to the Sites and Contamination and ground conditions on the Sites.

- 68.1. **If the Authority reasonably believes that the Contractor is in breach of its obligations under Clause 49.1 (Planned Maintenance) then it may carry out (or procure) a survey of the Facilities and/or Equipment to assess whether such Facilities and/or Equipment have been and are being maintained by the Contractor in accordance with its obligations under Clause 49.1 (Planned Maintenance). This right may not be exercised more often than once every 2 years.** The Authority shall procure that any survey of the Facilities and/or Equipment is undertaken by a suitably qualified surveyor.
- 68.2. **The Authority shall notify the Contractor in writing a minimum of 14 Days in advance of the date on which it wishes to carry out the survey. The Authority shall consider in good faith any reasonable request by the Contractor for the survey to be carried out on a different date if such request is made at least 7 Days prior to the notified date and the Contractor (acting reasonably) is able to demonstrate that carrying out the survey on the notified date would materially prejudice the Contractor's ability to provide the Services.**
- 68.3. **When carrying out any survey, the Authority shall use reasonable endeavours to minimise any disruption caused to the provision of the Services by the Contractor. The cost of the survey shall, except where Clause 68.4 below applies, be borne by the Authority. The Contractor shall give the Authority (free of charge) any reasonable assistance required by the Authority during the carrying out of any survey.**
- 68.4. **If the survey shows that the Contractor has not complied or is not complying with its obligations under Clause 49.1 (Planned Maintenance), the Authority shall:**

- 68.4.1. **notify the Contractor of the standard that the condition of the relevant Facilities and/or Equipment should be in to comply with its obligations under Clause 49.1 (Planned Maintenance);**
- 68.4.2. **specify a reasonable period within which the Contractor shall carry out any necessary rectification and/or maintenance work; and**
- 68.4.3. **be entitled to be reimbursed by the Contractor for the cost of the survey** referable to the relevant Facilities and/or Equipment in question.
- 68.5. **The Contractor shall carry out such rectification and/or maintenance work within the period specified and any costs it incurs in carrying out such rectification and/or maintenance work shall be at its own expense.**

**69. TRANSFER OF ASSETS AT EXPIRY**

- 69.1. **On or before a date falling no later than 12 months prior to the Expiry Date, the Authority shall notify the Contractor in writing whether it wishes:-**
  - 69.1.1. **to retender the provision of the Service; or**
  - 69.1.2. **the Contractor to transfer all of its rights, title and interest in and to the Assets to the Authority;**
- 69.2. **If the Authority wishes to retender the provision of the Service then:-**
  - 69.2.1. **the retendering shall be carried out on the basis that the Authority will contract with a successor contractor to provide the new service on and from the Expiry Date; and**
  - 69.2.2. **the Contractor shall do all necessary acts (including entering into any contracts) to ensure that the successor contractor obtains all of its rights, title and interest in and to the Assets with effect on and from the Expiry Date; and**
  - 69.2.3. **the Authority will bear all costs of any retendering of the Contract on expiry.**
- 69.3. **On or before a date falling no later than 24 months prior to the Expiry Date the Authority shall notify the Contractor in writing whether or not it wishes to exercise its option under Clause 11 of the Contractor Site Lease in respect of the MBT Site as required under the terms of that Contractor Site Lease. For the avoidance of doubt, in the event that the Authority shall exercise such option, the MBT Continuing Lease**

shall be granted as a new lease on the Expiry Date and the MBT Facility shall form one of the Handback Facilities.

## **70. EXCUSING CAUSE**

### **70.1. Relief from Deductions and other Payment Mechanism provisions**

If an Excusing Cause interferes adversely with, or directly causes a failure of, the performance of the Services and provided that the effect of such Excusing Cause is claimed in writing within twenty (20) Business Days of the date on which the Contractor becomes aware (or ought reasonably to have become so aware) of the occurrence of the Excusing Cause, then to the extent such failure or adverse interference arises as a direct result of such Excusing Cause:-

70.1.1. failure by the Contractor to perform, and any poor performance of, any affected Service (including without limitation any failure to achieve the Contract Targets) any failure to achieve shall not constitute a breach of the provisions of this Contract by the Contractor and shall not be taken into account in assessing whether any Contractor Default has occurred;

70.1.2. to the extent only provided in Appendix 4 of the Payment Mechanism (Application of Excusing Causes) such interference shall be taken account of in measuring the performance of the Services in accordance with Clause 65 (Performance Monitoring) and in calculating the Annual Unitary Charge (and any Deductions therefrom) under Schedule 26 (Payment Mechanism).

so that (without in anyway double counting the protection granted to the Contractor under this Contract under this Clause 70 (Excusing Causes) and any other mechanism) the Contractor shall be entitled to payment under this Contract as if there had been no such interference with the performance of the Services. PROVIDED THAT the Contractor shall not be entitled to the protection which would otherwise be granted by this Clause 70 to the extent that failure or adverse interference in respect of which such protection is sought arises as a result of the Contractor failing to use reasonable endeavours to mitigate the consequences of the Excusing Cause in question.

70.2. Excusing Causes are only those events set out in Appendix 4 of the Payment Mechanism (Application of Excusing Causes).

70.3. This Clause 70 shall be subject to the provisions of Clause 116.6 (Requirement to recover under insurance).

## **71. PERFORMANCE DEFAULTS**

71.1. Subject to Clause 116 (Exclusive Remedies), if the Contractor fails to



make the Facilities Available and/or defaults in providing the Services to the Performance Standards (together known as "Performance Default") the Authority may without prejudice to other express rights and remedies hereunder make deductions in accordance with and where provided for in Schedule 26 (Payment Mechanism).

## **72. INCREASED MONITORING**

- 72.1. Without prejudice to the Authority's rights under Part 5 (Termination) and any other express rights under this Contract, if at any time the Contractor has accrued more than 2500 Performance Points in any rolling six Month period then the Authority may give written notice (an "Increased Monitoring Notice") to the Contractor setting out the matter or matters giving rise to such notice and containing a reminder to the Contractor of the implications of such notice. Any such notice shall state on its face that it is an "Increased Monitoring Notice".
- 72.2. Without prejudice to the Authority's rights under Part 5 (Termination) and to any other express rights under this Contract, if the Contractor receives one or more Increased Monitoring Notice in any rolling twelve Month period, the Authority may by notice to the Contractor increase the level of its monitoring of the Contractor, or (at the Authority's option) of the Contractor's monitoring of its own performance of its obligations under this Contract, in respect of the relevant Service, until such time as the Contractor shall have demonstrated to the reasonable satisfaction of the Authority that it will perform (and is capable of performing) its obligations under this Contract, in which case, the following provisions shall apply:
- 72.2.1. any such notice to the Contractor shall specify in reasonable detail the additional measures to be taken by the Authority or by the Contractor (as the case may be) in monitoring the performance of the Contractor;
- 72.2.2. if the Contractor (acting reasonably) objects to any of the specified measures on the grounds that they are excessive, it shall notify the Authority in writing within five (5) Business Days of the receipt of the notice of the measures objected to (and of any changes necessary in order to prevent prejudice to the Contractor's performance of its obligations under this Contract);
- 72.2.3. the measures to be taken by the Authority and the Contractor (as the case may be) shall be agreed between the parties or, in the absence of agreement, within three (3) Business Days of the Authority's receipt of the Contractor's objection, determined pursuant to Clause 113 (Dispute Resolution); and
- 72.2.4. the Contractor shall bear its own costs and indemnify and keep indemnified the Authority at all times from and against

all reasonable costs and expenses (if any) incurred by or on behalf of the Authority in relation to such increased level of monitoring (including an appropriate sum in respect of general staff costs and overheads).

## **PART 4: PAYMENT PROVISIONS**

### **73. INVOICING AND PAYMENT**

- 73.1. The Authority shall pay the Contractor the Annual Unitary Charge in respect of each Payment Period calculated in accordance with the provisions of Schedule 26 (Payment Mechanism).
- 73.2. The Annual Unitary Charge shall be invoiced and become payable in accordance with the provisions of Schedule 26 (Payment Mechanism).

#### **Disputes**

- 73.3. If either Party (acting in good faith) disputes all or any part of the Annual Unitary Charge payable (or any Deductions from the Annual Unitary Charge) pursuant to Schedule 26, the undisputed amount of the Annual Unitary Charge shall be paid by the Authority in accordance with Schedule 26 (Payment Mechanism) and the provisions of these Clauses 73.3 to 73.7 shall apply. The Parties shall use all reasonable endeavours to resolve the dispute in question within ten (10) Business Days of the dispute arising. If they fail so to resolve it, either Party may refer the matter to be determined in accordance with Clause 113 (Dispute Resolution). The Authority shall be deemed to be acting in good faith if the evidence required by Section 12, Table 10 (where required pursuant to paragraph 12.4.1 of the Payment Mechanism), is not provided or made available by the Contractor in support of an invoice.
- 73.4. If a sum is disputed and is subsequently determined by the Dispute Resolution Procedure (or is agreed) to be due, interest shall accrue in accordance with Clause 75 (Late Payments).
- 73.5. Any sum disputed and subsequently agreed or determined by the Dispute Resolution Procedure to be due shall be paid (together with interest from the due date until the date of payment in accordance with Clause 75 (Late Payments)) within the period of 5 Business Days from the date of such agreement or determination.
- 73.6. Subject as provided in Clauses 73.3 to 73.5 above the Authority may withhold payment of any disputed amount pending agreement or determination of the Contractor's entitlement in relation to the disputed amount.
- 73.7. The Contractor shall not invoice the Authority for the final Payment Period in the Service Period until all material information on Deductions relating to the last Payment Period in the Service Period is available.

### **74. SET-OFF**

- 74.1. Subject to Clause 100 (Set Off on Termination), **the Contractor shall not be entitled to retain or set off any amount due to the Authority**

by it, but the Authority may retain or set off any amount owed to it by the Contractor under this Contract which has fallen due and payable against any amount due to the Contractor under this Contract.

- 74.2. If the payment or deduction of any amount referred to in Clause 74.1 above is disputed then any undisputed element shall be paid and the disputed element shall be dealt with in accordance with Clause 113 (Dispute Resolution).

**75. LATE PAYMENTS**

- 75.1. Save where otherwise provided the Parties will pay interest on any amount payable under this Contract not paid on the due date for the period from that date to the date of payment at a rate equal to the Prescribed Rate.
- 75.2. For the purposes of Clause 75.1, the due date for payment shall be the dates specified for the relevant payment in Section 12 of Schedule 26 (Payment Mechanism).

**76. VALUE ADDED TAX**

- 76.1. All amounts due under this Contract are exclusive of VAT.
- 76.2. If any supply made or referred to in this Contract is or becomes chargeable to VAT then the person receiving the supply (the "Recipient") shall in addition pay the person making the supply (the "Supplier") the amount of that VAT against receipt by the Recipient from the Supplier of a proper VAT invoice in respect of that supply.
- 76.3. Where under this Contract any amount is calculated is calculated by reference to any sum which has or may be incurred by any person, the amount shall include any VAT in respect of that amount only to the extent that such VAT is not recoverable as input tax by that person (or a member of the same VAT group), whether by set-off or repayment.
- 76.4. The Contractor shall provide the Authority with any information reasonably requested by the Authority in relation to the amount of VAT chargeable in accordance with the Contract and payable by the Authority to the Contractor.

**77. LANDFILL TAX**

- 77.1. The Contractor shall be responsible for paying the Landfill Tax at the then applicable rate on Contract Waste disposed to Landfill under and in accordance with this Contract to the extent provided for in Schedule 26 (Payment Mechanism).
- 77.2. The Authority shall reimburse the Contractor for the payment of Landfill

Tax in accordance with and to the extent set out in Schedule 26 (Payment Mechanism).

**78. UTILITIES**

- 78.1. Subject to the provisions of Clause 79 (NNDR), the Contractor shall be responsible for paying all utility costs and charges in respect of all Facilities and Sites incurred in providing the Services and making the Facilities Available.

**79. NNDR**

- 79.1. The Contractor shall pay and Authority shall reimburse the cost of any NNDR payable on the Facilities and Landfill Site and other relevant areas in accordance with Section 9 (Pass Through Element) of Schedule 26 (Payment Mechanism).

**80. THIRD PARTY INCOME**

- 80.1. Save as expressly provided for in Section 11 (Third Party Income Share) of Schedule 26 (Payment Mechanism) or otherwise in this Contract the generation of Third Party Income shall be at the entire risk of the Contractor.
- 80.2. In the event that pursuant to any provision of this Contract the Authority is required to compensate the Contractor for lost Third Party Income, the level of compensation payable shall be assessed on the basis set out in the Appendix to Schedule 39 (Unitary Charge Adjustment Protocol).

**81. FEES, COSTS AND EXPENSES**

- 81.1. Each party shall be responsible for paying its own costs and expenses incurred in connection with the negotiation, preparation and execution of this Contract.

**82. EURO CONTINUITY OF CONTRACT**

- 82.1. For the avoidance of doubt all amounts referred to in this Contract are expressed in Sterling and shall be payable in Sterling in accordance with the provisions of Clause 73 (Invoicing and Payment).
- 82.2. In the event that at any time during the Contract Period the United Kingdom adopts the Euro (or any other currency) as its lawful currency in substitution for Sterling ("Euro Effective Date") such adoption will not have the effect of altering any term of, or discharging or excusing performance under this Contract or any transaction, or give a Party the right unilaterally to alter or terminate this Contract or any transaction.
- 82.3. From the Euro Effective Date:
- 82.3.1. to the extent relevant all amounts in this Contract calculated

in Sterling shall be converted from Sterling to Euros (or any other currency) in accordance with the fixed conversion rate provided for by law; and

- 82.3.2. no payments falling due shall be made in Sterling or national currency units.

### 83. **BEST VALUE AND CONTINUOUS IMPROVEMENT**

#### **Authority's Best Value Duty**

- 83.1. The Contractor acknowledges that:

83.1.1. the Authority is subject to the Best Value Duty; and

83.1.2. the provisions of this Clause 83 are intended to assist the Authority in discharging its Best Value Duty in relation to the Services.

- 83.2. The Contractor shall, throughout the Contract Period, but only to the extent of its obligations in Clause 83.3 to 83.34, make arrangements to secure continuous improvement in the way in which the Services are provided, having regard to a combination of economy, efficiency and effectiveness.

- 83.3. In so far as not inconsistent with the Contractor's obligation to provide the Services as set out in the Specification, the Contractor shall undertake or refrain from undertaking such actions as the Authority shall reasonably request to enable the Authority to comply with Part 1 of the 1999 Act, including:

83.3.1. supporting and assisting the Authority in preparing Best Value Performance Plans and conducting Best Value Reviews in relation to waste management of which the Services forms part;

83.3.2. complying with reasonable requests for information, data or other assistance made by the Authority in pursuant of its Best Value Duty to:

83.3.2.1. enable the Authority to prepare a Best Value Performance Plan;

83.3.2.2. enable the Authority to conduct a Best Value Review;

83.3.2.3. facilitate the audit of the Authority's Best Value Performance Plan by the Authority's auditor pursuant to section 7 of the 1999 Act;

83.3.2.4. facilitate the Authority preparing any statement, in response to the Authority's

- auditor's report, pursuant to section 9 of the 1999 Act;
- 83.3.2.5. facilitate any inspection undertaken by any Relevant Authority in connection with the Best Value Duty in respect of the Services, including any inspection undertaken with a view to verifying the Authority's compliance with its Best Value Duty pursuant to sections 10 and 11 of the 1999 Act;
  - 83.3.2.6. assist the Authority in relation to any action taken by the Secretary of State under section 15 of the 1999 Act; and
  - 83.3.2.7. enable the Authority to comply with the Publication of Information Direction 1999 (England);
- 83.3.3. provided any assistance reasonably requested by the Authority in carrying out any Stakeholder Satisfaction Surveys.
- 83.3.4. complying with all requests by the Authority to procure the attendance of specific officers or employees of the Contractor or the Operating Sub-Contractor (or using reasonable endeavours to procure attendance of any of its or their sub-contractors) at any meetings of the Authority which the Services are to be discussed (but not, otherwise than in exceptional circumstances, more than four times in any one Contract Year);
- 83.3.5. permitting any Best Value Inspector, in connection with the exercise of his statutory powers and duties, at all reasonable times and upon reasonable notice, access to:
- 83.3.5.1. the Sites and any Facility; and
  - 83.3.5.2. any document or data relating to the Services;
  - 83.3.5.3. any Sub Contractor, agent or employee of the Contractor.

### **Annual Service Report**

- 83.4. Without prejudice to any other provision in this Contract the Contractor shall, no later than the Annual Service Report Date at its own cost, provide to the Authority a written report (the "Annual Service Report") which shall contain the information set out in the Specification.
- 83.5. The Contractor shall upon a written request from the Authority promptly provide such written evidence or other supporting information as the

Authority may reasonably require to verify and audit the information and other material contained in the Annual Service Report.

- 83.6. If, in the Authority's reasonable opinion, the provision, performance or delivery of the Services (or any part) may be more effective, efficient and economic having regard to the Annual Service Report, and the Best Value Duty, then the Authority may serve a written notice upon the Contractor (a "Best Value Service Change Notice") stating the nature and timing of the changes to the provision, performance or delivery of the Services (or the relevant part) which the Authority desires.
- 83.7. The Contractor shall, within 28 Business Days of the date of a Best Value Service Change Notice, provide the Authority at its own cost with a written statement (the "Annual Service Plan") containing the Contractor's proposals to achieve the change to the Services (or the relevant part) in accordance with the Best Value Service Change Notice.
- 83.8. As soon as practicable after the Authority receives the Annual Service Plan the Parties shall discuss and endeavour to agree the issues set out in the Annual Service Plan. In such discussions the Authority may modify the Best Value Service Change Notice, in which case the Contractor shall, as soon as practicable, and in any event not more than 21 Business Days after the receipt of such modification, notify the Authority of any consequential changes to the Annual Service Plan.
- 83.9. If the Parties cannot agree on the contents of the Annual Service Plan then the dispute will be determined in accordance with the Dispute Resolution Procedure.
- 83.10. As soon as practicable after the content of the Annual Service Plan has been agreed or otherwise determined pursuant to the Dispute Resolution Procedure the Authority shall:
- 83.10.1. confirm in writing the Annual Service Plan; or
- 83.10.2. withdraw the Best Value Service Change Notice.
- 83.11. If the Authority does not confirm the Annual Service Plan within 14 Business Days of the Annual Service Plan having been agreed or otherwise determined pursuant to the Dispute Resolution Procedure then the Annual Service Plan shall be deemed to have been withdrawn.
- 83.12. If the Authority confirms the Annual Service Plan the Authority shall propose a change in the Service in accordance with Clause 107 (Authority and Contractor Changes).
- 83.13. To the extent that the implementation of the proposals in the Annual Service Plan will result in a decrease in the costs of the Contractor, the



Annual Unitary Charge shall be adjusted downwards, in accordance with Clause 110 (Financial Adjustments) and subject to the Unitary Charge Adjustment Protocol, to reflect a sharing in the decrease in costs 50:50 as to the Authority and Contractor respectively.

- 83.14. To the extent that the implementation of the proposals in the Annual Service Plan will result in an increase in the costs of the Contractor, the Annual Unitary Charge shall be adjusted upwards, in accordance with Clause 110 (Financial Adjustments) and subject to the Unitary Charge Adjustment Protocol.
- 83.15. The Contractor and the Authority shall both take all reasonable steps to mitigate the costs arising as a consequence of a Best Value Service Change Notice and a Authority Notice served pursuant to sub Clause 83.11.

### **Best Value Reviews**

- 83.16. On or before each Best Value Review Date the Authority may instigate a Best Value Review in relation to such of its services or functions of which the Services form part and thereafter the following provisions of this Clause 83.21 shall apply.
- 83.17. The Parties agree that any such Best Value Review shall be carried out in accordance with the applicable Legislation.
- 83.18. The Authority shall carry out the Best Value Review at its own cost.
- 83.19. In carrying out the Best Value Review, the Authority may take into account the results of any:
- 83.19.1. Annual Service Reports; and/or
  - 83.19.2. Stakeholder Satisfaction Survey
- and shall consult with the Contractor on any proposals to change the Services to enable the Authority to comply with its Best Value Duty.
- 83.20. If in the Authority's reasonable opinion the results of the Best Value Review disclose that the provision, performance or delivery of the Services (or any part) may be more efficient, effective or economic having regard to the Best Value Duty then the Authority may serve a Best Value Service Change Notice on the Contractor stating the nature and timing of the changes to the provision, performance or delivery of the Services (or the relevant part) which the Authority desires.
- 83.21. The Contractor shall, within 20 Business Days of the date of receipt of a Best Value Service Change Notice, at its own cost provide the Authority with a written statement (the "Best Value Review Plan") containing the Contractor's proposals to achieve the change to the Services (or the relevant part) in accordance with the Best Value Service Change Notice.

- 83.22. As soon as practicable after the Authority receives the Best Value Review Plan the Parties shall discuss and endeavour to agree the issues set out in the Best Value Review Plan. In such discussions the Authority may modify the Best Value Service Change Notice, in which case the Contractor shall, as soon as practicable, and in any event not more than 15 Business Days after the receipt of such modification, notify the Authority of any consequential changes to the Best Value Review Plan.
- 83.23. If the Parties cannot agree on the contents of the Best Value Review Plan then the dispute shall be determined in accordance with Clause 113 (Dispute Resolution).
- 83.24. As soon as practicable after the content of the Best Value Review Plan has been agreed or otherwise determined pursuant to the Dispute Resolution Procedure the Authority shall:
- 83.24.1. confirm in writing the Best Value Review Plan; or
  - 83.24.2. withdraw the Best Value Service Change Notice.
- 83.25. If the Authority does not confirm the Best Value Review Plan within 20 Business Days of the Best Value Review Plan having been agreed or determined in accordance with the Dispute Resolution Procedure then the Best Value Service Change Notice shall be deemed to have been withdrawn.
- 83.26. If the Authority confirms the Best Value Review Plan the Authority shall propose a change in the Service in accordance with Clause 107 (Authority and Contractor Changes).
- 83.27. To the extent that the implementation of the proposals contained in the Best Value Review Plan will result in a decrease in the costs of the Contractor, the Annual Unitary Charge shall thereafter be adjusted downwards in accordance with Clause 110 (Financial Adjustments) and subject to the Unitary Charge Adjustment Protocol to reflect the sharing in the decrease in costs 50:50 as to the Authority and Contractor respectively.
- 83.28. To the extent that the implementation of the proposals contained in the Best Value Review Plan will result in an increase in the costs of the Contractor, the Annual Unitary Charge shall thereafter be adjusted upwards, in accordance with Clause 110 (Financial Adjustments) and subject to the Unitary Charge Adjustment Protocol.
- 83.29. The Contractor and the Authority shall both take all reasonable steps to mitigate any costs arising as a consequence of a Best Value Service Change Notice and a Authority Notice of Change served pursuant this Clause 83.
- 83.30. In the event the implementation of the Annual Service Plan proposals

under Clauses 83.18 or 83.19 or Best Value Review Plan proposals under Clauses 83.32 or 83.33 shall effect Third Party Income generated by the Contractor then any such impact shall be taken into account to adjust the Annual Unitary Charge pursuant to Clause 110 (Financial Adjustments) and the Appendix to Schedule 39 (Unitary Charge Adjustment Protocol).

## **PART 5: TERMINATION**

The provisions set out in this Part 5 (Termination) of the Contract are subject to the Direct Agreement.

### **84. TERMINATION ON CONTRACTOR DEFAULT**

84.1. The Authority shall be entitled to terminate this Contract by notice in writing to the Contractor (subject to complying with the requirements of this Clause 84) if the Contractor commits a Contractor Default. The Authority agrees that prior to determining whether to exercise any right of termination in respect of limb (a) of the definition of "Contractor Default" it shall, acting reasonably and in good faith by reference to the nature and gravity of the breach, give all due consideration to taking action other than termination of this Contract (including exercising their other contractual rights and remedies under this Contract (having regard to the nature of such rights and remedies) to deal with the breach or circumstances giving rise to the breach).

#### **84.2. Termination Notice and Opportunity to Remedy**

**If a Contractor Default has occurred and the Authority wishes to terminate the Contract, it must serve a termination notice on the Contractor.**

#### **84.3. The termination notice referred to in Clause 84.2 must specify:**

84.3.1. **the type and nature of Contractor Default that has occurred giving reasonable details; and**

84.3.2. **that in the case of any Contractor default falling into limbs (a); (b); (g); (h); (i); (m); and (r) of the definition of Contractor Default this Contract will terminate on the day falling 120 Business Days after the date the Contractor received the termination notice unless:**

84.3.2.1. **in the case of a breach under limb (a) or (b) of the definition of Contractor Default the Contractor puts forward an acceptable rectification programme ("Rectification Programme") within 60 Business Days (such rectification plan to be approved by the Authority (such approval not to be unreasonably withheld or delayed) after the date the Contractor receives the termination notice (and implements such Rectification Programme in accordance with its terms and rectifies the Contractor Default in accordance with the Rectification Programme) or**

- the Authority may give notice stating that the Contract will, subject to the terms of the Direct Agreement, terminate on the date falling seven Days after the date of receipt of such notice.**

any such notice nor otherwise seek termination for Contractor Default in relation to such performance, non-performance, breach or default where the Contractor can demonstrate that it is using reasonable endeavours to procure the provision of the Service from a substitute Operating Sub-Contractor.

**85. VOLUNTARY TERMINATION BY AUTHORITY**

- 85.1. The Authority may terminate the Contract at any time on or before the Expiry Date by complying with its obligations under Clauses 85.2 to 85.4 below.**
- 85.2. If the Authority wishes to terminate this Contract under this Clause 85 it must give notice to the Contractor stating:**
  - 85.2.1. that the Authority is terminating the Contract under this Clause 85 (Voluntary Termination by Authority);**
  - 85.2.2. that the Contract will terminate on the date specified in the notice, which must be a minimum of 30 Business Days after the date of receipt of the notice; and**
  - 85.2.3. whether the Authority has chosen to exercise its option under Clause 85.3 below.**
- 85.3. On termination under Clause 85 (Voluntary Termination by Authority) the Authority shall have the option to require the Contractor to transfer its rights, title and interest in and to the Assets to the Authority or as directed by the Authority in accordance with and subject to the provisions of Clause 97 (Transfer of Assets on Termination).**
- 85.4. The Contract will terminate on the date specified in the notice referred to in Clause 85.2 above.**

**86. TERMINATION ON AUTHORITY DEFAULT**

- 86.1. If an Authority Default has occurred and the Contractor wishes to terminate the Contract it must serve a termination notice on the Authority within 45 Business Days of becoming aware of the Authority Default.**
- 86.2. The termination notice must specify the type of Authority Default which has occurred entitling the Contractor to terminate.**
- 86.3. The Contract will terminate on the day falling 45 days after the date the Authority receives the termination notice, unless the Authority rectifies the Authority Default within 30 days of receipt of the termination notice.**

**87. TERMINATION BY AUTHORITY FOR REFINANCING BREACH**

- 87.1. **If the Contractor wilfully breaches Clause 112 (Refinancing) then the Authority may terminate this Contract at any time on or before the Expiry Date by complying with its obligations under Clause 87.2 to 87.4 below.**
- 87.2. **If the Authority wishes to terminate the Contract under this Clause, it must give notice to the Contractor stating:**
- 87.2.1. **that the Authority is terminating the Contract under this Clause 87 (Termination by Authority for Refinancing Breach);**
- 87.2.2. **that the Contract will terminate on the date falling 30 days after the date of receipt of the notice; and**
- 87.2.3. **whether the Authority has chosen to exercise its option under Clause 87.3.**
- 87.3. **On termination the Authority shall have the option to require the Contractor to transfer to the Authority all of its right, title and interest in and to the Assets in accordance with and subject to the provisions of Clause 97 (Transfer of Assets on Termination).**
- 87.4. **This Contract will terminate on the date falling 30 Days after the date of receipt of the notice referred to in Clause 87.2 above.**
88. **TERMINATION FOR PERSISTENT BREACH**
- 88.1. **If a particular breach, other than any breach for which Deductions could have been awarded and/or an HWRC Recycling and Composting Deductions could have been made pursuant to Section 6 (HWRC Recycling and Composting Element) of the Payment Mechanism and/or a negative adjustment could have been made to the Annual Unitary Charge by way of L(2) pursuant to Section 7 (Landfill Element) of the Payment Mechanism in accordance with Schedule 26 (Payment Mechanism), occurred more than six times in any twelve month period then the Authority may serve a notice on the Contractor:**
- 88.1.1. **specifying it is a formal warning notice;**
- 88.1.2. **giving reasonable details of the breach; and**
- 88.1.3. **stating that such breach is a breach which, if it recurs frequently or continues, may result in a termination of this Contract.**
- 88.2. **If, following service of such a warning notice under Clause 88.1 ("Warning Notice") the breach specified has continued beyond 30 Days or recurred in five or more months within the six month period after the date of service of the Warning Notice, then the Authority may serve another notice on the Contractor:**

- 88.2.1. specifying that it is a final Warning Notice;
  - 88.2.2. stating that the breach specified has been the subject of a Warning Notice served within the six month period prior to the date of service of the final Warning Notice; and
  - 88.2.3. stating that if such breach continues for more than 120 Days or recurs in five or more months within the six month period after the date of service of the final Warning Notice, this Contract may be terminated for Contractor Default.
- 88.3. A Warning Notice may not be served in respect of any breach which has previously been counted in the making of a separate Warning Notice.

**89. TERMINATION ON FORCE MAJEURE**

- 89.1. No party shall be entitled to bring a claim for a breach of obligations under this Contract by the other party or incur any liability to the other party for any losses or damages incurred by that other party to the extent that a Force Majeure Event occurs and it is prevented from carrying out obligations by that Force Majeure Event. For the avoidance of doubt (but without prejudice to Clauses 89.5 or 89.7 below), the Authority shall not be entitled to terminate this Contract for a Contractor Default if a Contractor Default arises from a Force Majeure Event.
- 89.2. Nothing in Clause 89.1 above shall affect any entitlement to make Deductions or any deductions made as a result of Schedule 26 (Payment Mechanism) in the period during which the Force Majeure Event is subsisting.
- 89.3. On the occurrence of a Force Majeure Event, the Affected Party shall notify the other Party as soon as practicable. The notification shall include details of the Force Majeure Event, including evidence of its effect on the obligations of the Affected Party and any action proposed to mitigate its effect.
- 89.4. As soon as practicable following such notification, the Parties shall consult with each other in good faith and use all reasonable endeavours to agree appropriate terms to mitigate the effects of the Force Majeure Event and facilitate the continued performance of this Contract.
- 89.5. If no such terms are agreed on or before the date falling 120 Days after the date of the commencement of the Force Majeure Event and such Force Majeure Event is continuing or its consequence remains such that the Affected Party is unable to comply with its obligations under this Contract for a period of more than 180



**Days, then, subject to Clause 89.7 below, either Party may terminate this Contract by giving 30 Days' written notice to the other party.**

- 89.6. If this Contract is terminated under Clause 89.5 above or Clause 89.7 below**
- 89.6.1. compensation shall be payable by the Authority in accordance with Clause 96 (Compensation on Termination for Force Majeure); and**
- 89.6.2. the Authority may require the Contractor to transfer its title, interest and rights in and to any Assets to the Authority in accordance with and subject to the provisions of Clause 97 (Transfer of Assets on Termination).**
- 89.7. If the Contractor gives notice to the Authority under Clause 89.5 above that it wishes to terminate this Contract, then the Authority has the option either to accept such notice or to respond in writing on or before the date falling 10 Business Days after the date of its receipt stating that it requires this Contract to continue. If the Authority gives the Contractor such notice, then:**
- 89.7.1. the Authority shall pay to the Contractor the Annual Unitary Charge (the Tonnage Based Element to be assessed on the basis set out in paragraph 9 of Schedule 39) and Third Party Income forecast to be made during the relevant period calculated in accordance with the Appendix to Schedule 39 (Unitary Charge Adjustment Protocol), from the day after the date on which the Contract would have terminated under Clause 89.5 as if the Services were being fully provided; and**
- 89.7.2. the Contract will not terminate until expiry of written notice (of at least 30 Days) from the Authority to the Contractor that it wishes the Contract to terminate.**
- 89.8. The Parties shall at all times following the occurrence of a Force Majeure Event use all reasonable endeavours to prevent and mitigate the effects of any delay and the Contractor shall at all times during which a Force Majeure Event is subsisting take all steps in accordance with industry good practice to overcome or minimise the consequences of the Force Majeure Event.**
- 89.9. The Affected Party shall notify the other party as soon as practicable after the Force Majeure Event ceases or no longer causes the Affected Party to be unable to comply with its obligations under this Contract. Following such notification the Contract shall continue to be performed on the terms existing**

**immediately prior to the occurrence of the Force Majeure Event.**

**90. TERMINATION FOR CORRUPT GIFTS AND FRAUD**

- 90.1. The Contractor warrants that in entering the Contract it has not committed any Prohibited Act.**
- 90.2. If the Contractor or any Sub-Contractor (or anyone employed by or acting on behalf of any of them) or any of its or their agents or shareholders commits any Prohibited Act, then the Authority shall be entitled to act in accordance with Clauses 90.3 to 90.8 below.**
- 90.3. If a Prohibited Act is committed by the Contractor or by an employee not acting independently of the Contractor, then the Authority may terminate the Contract by giving notice to the Contractor.**
- 90.4. If the Prohibited Act is committed by an employee of the Contractor acting independently of the Contractor, then the Authority may give notice to the Contractor of termination and the Contract will terminate, unless within 30 Days of receipt of such notice the Contractor terminates the employee's employment and (if necessary) procures the performance of such part of the Works and/or Service by another person.**
- 90.5. If the Prohibited Act is committed by a Sub-Contractor or by an employee of that Sub-Contractor not acting independently of that Sub-Contractor, then the Authority may give notice to the Contractor of termination and the Contract will terminate, unless within 30 Days of receipt of such notice the Contractor terminates the relevant Project Document and procures the performance of such part of the Works and/or Services by another person.**
- 90.6. If the Prohibited Act is committed by an employee of a Sub-Contractor acting independently of that Sub-Contractor, then the Authority may give notice to the Contractor of termination and the Contract will terminate, unless within 30 Days of receipt of such notice the Sub-Contractor terminates the employee's employment and (if necessary) procures the performance of such part of the Works and/or Services by another person.**
- 90.7. If the Prohibited Act is committed by any other person not specified in Clauses 90.3 to 90.6 above, then the Authority may give notice to the Contractor of termination and the Contract will terminate unless within 30 Days of receipt of such notice, the Contractor procures the termination of such person's employment and of the appointment of their employer (where not employed by the Contractor or the Sub-Contractors) and (if necessary) procures the performance of such part of the Works and/or Services by another person.**

**90.8. Any notice of termination under this Clause 90 shall specify:**

- 90.8.1. the nature of the Prohibited Act;
- 90.8.2. the identity of the party whom the Authority believes has committed the Prohibited Act;
- 90.8.3. the date on which the Contract will terminate, in accordance with the applicable provision of this Clause; and
- 90.8.4. the Authority's chosen option under Clause 95 (Compensation on Termination for Corrupt Gifts and Fraud).

**91. CONSEQUENCES OF TERMINATION AND EXIT PROVISIONS**

**91.1. If this Contract is terminated pursuant to:**

- 91.1.1. Clause 84 (Termination on Contractor Default), the provisions of Clause 92 (Compensation on Termination for Contractor Default) shall apply;
- 91.1.2. Clause 85 (Voluntary Termination by Authority), the provisions of Clause 93 (Compensation on Voluntary Termination) shall apply;
- 91.1.3. Clause 86 (Termination on Authority Default), the provisions of Clause 94 (Compensation on Termination for Authority Default) shall apply;
- 91.1.4. Clauses 87 (Termination by Authority for Refinancing Breach) and 90 (Termination for Corrupt Gifts and Fraud), the provisions of Clause 95 (Compensation on Termination for Corrupt Gifts and Fraud and Refinancing) shall apply; and
- 91.1.5. Clause 89 (Termination on Force Majeure), the provisions of Clause 96 (Compensation on Termination for Force Majeure) shall apply.

**92. COMPENSATION ON TERMINATION FOR CONTRACTOR DEFAULT**

**Retendering Election**

**92.1. Subject to Clause 92.2, the Authority shall be entitled either to:-**

- 92.1.1. retender the provision of the Project in accordance with Clause 92.3 (Retendering Procedure); or
- 92.1.2. require an expert determination in accordance with Clause 92.4 (No Retendering Procedure).

**92.2. The Authority shall be entitled to retender the provision of the Project in accordance with Clause 92.3 (Retendering Procedure) if:**

**92.2.1. the Authority notifies the Contractor on or before the date falling 20 Business Days after the Termination Date that it intends to retender; and**

**92.2.2. there is a Liquid Market; and either:-**

**92.2.2.1. the Senior Lenders have not exercised their rights to step-in under Clause 5 of the Direct Agreement; or**

**92.2.2.2. the Contractor or Senior Lenders have not procured the transfer of the Contractor's rights and liabilities under this Contract to a Suitable Substitute Contractor and have failed to use all reasonable efforts to do so;**

**but otherwise the Authority shall not be entitled to retender the provision of the Services and Clause 92.4 (No Retendering) shall apply.**

#### **Retendering Procedure**

**92.3. If the Authority elects to retender the provision of the Project under Clause 92.3 (Retendering Procedure), then the following provisions shall apply:**

**92.3.1. The objective of the retendering procedure shall be to establish and pay to the Contractor the Highest Compliant Tender Price, as a result of the Tender Process.**

**92.3.2. The Authority shall (subject to any legal requirements preventing it from doing so) use its reasonable endeavours to complete the Tender Process as soon as practicable.**

**92.3.3. The Authority shall notify the Contractor of the Qualification Criteria and the other requirements and terms of the Tender Process, including the timing of the Tender Process, but shall act reasonably in setting such requirements and terms.**

**92.3.4. The Contractor authorises the release of any information by the Authority under the Tender Process which would otherwise be prevented under Clause 121 (Freedom of Information and Confidentiality) that is reasonably required as part of the Tender Process.**

- 92.3.5. The Contractor may, at its own cost, appoint a person (the “Tender Process Monitor”) to monitor the Tender Process for the purpose of monitoring and reporting to the Contractor and the Senior Lenders on the Authority’s compliance with the Tender Process and making representations to the Authority. The Tender Process Monitor will not disclose any confidential information to the Contractor or any other person (and shall provide an undertaking to the Authority to such effect as a condition of its appointment) but shall be entitled to advise the Contractor and the Senior Lenders as to whether it considers that the Authority has acted in accordance with the Tender Process, and correctly determined the Adjusted Highest Compliant Tender Price.
- 92.3.6. The Tender Process Monitor shall enter into a confidentiality agreement with the Authority in a form acceptable to the Authority and shall be entitled to attend all meetings relating to the Tender Process, inspect copies of the tender documentation and bids and shall be required to make written representations to the Authority regarding compliance with the Tender Process. All representations shall be made by the Tender Process Monitor in a timely manner as the Tender Process proceeds. The Authority shall not be bound to consider or act upon such representations but acknowledges that such representations may be referred to by the Contractor in the event that the Contractor refers a dispute relating to the Adjusted Highest Compliant Tender Price to the Dispute Resolution Procedure in accordance with Clause 113 (Dispute Resolution).
- 92.3.7. For all or any part of a month, falling within the period from the Termination Date to the Compensation Date, the Authority shall pay to the Contractor:
- 92.3.7.1. the Post Termination Service Amount for that month, on or before the date falling 10 Business Days after the end of that month; and
- 92.3.7.2. the Post Termination Service Amount for the period ending on the Compensation Date, on or before the date falling 20 Business Days after the Compensation Date.
- 92.3.8. If any Post Termination Service Amount is less than zero, then it shall be carried forward and shall be set off

**against any future positive Post Termination Service Amounts. If any such Post Termination Service Amount has not been set off on or before the Compensation Date then it shall be taken into account in the calculation of the Adjusted Highest Compliant Tender Price.**

**92.3.9. The Authority shall require bidders to bid on the basis that they will receive the benefit of any outstanding claims under material damage insurance policies and amounts (if any) standing to the credit of the Joint Insurance Account on the date that the New Contract is entered into.**

**92.3.10. As soon as practicable after tenders have been received, the Authority shall (acting reasonably) determine the Compliant Tenders and shall either:**

**92.3.10.1. notify the Contractor of the Adjusted Highest Compliant Tender Price; or**

**92.3.10.2. where the Authority has received no Compliant Tenders within the time stipulated for the return of such tenders (or having received one or more Compliant Tenders within such stipulated time periods such Compliant Tenders are subsequently withdrawn) then the following provisions of this Clause 92.3 shall not apply to that termination and the provisions of Clause 92.4 (No Retendering Procedure) shall apply.**

**92.3.11. If the Contractor refers a dispute relating to the Adjusted Highest Compliant Tender Price to the Dispute Resolution Procedure in accordance with Clause 113 (Dispute Resolution) the Authority shall be entitled to enter into a New Contract. The Authority shall pay to the Contractor the Adjusted Highest Compliant Tender Price on or before the date falling 20 Business Days after it has been determined under Clause 113 (Dispute Resolution) and the Authority shall pay interest to the Contractor at the Senior Debt Rate on any amount of Adjusted Highest Compliant Tender Price which had been withheld from the date specified in Clause 92.3.12 below until the date specified in this Clause 92.3.11. For the avoidance of doubt, where there is an agreed amount and a disputed amount in respect of the Adjusted Highest Compliant Tender Price the Authority shall (where it is agreed that the Adjusted Highest Compliant Tender Price is a positive number) pay to the Contractor the agreed amount no later than the date**

**specified in Clause 92.3.12 below, with the disputed amount being dealt with in accordance with this Clause 92.3.11.**

- 92.3.12. Subject to Clauses 92.3.11 and 92.3.15 the Authority shall pay to the Contractor an amount equal to the Adjusted Highest Compliant Tender Price no later than the date falling 20 Business Days after the date of the New Contract.**
- 92.3.13. The discharge by the Authority of its payment obligation in Clauses 92.3.11 and/or 92.3.12 above shall be in full and final settlement of all the Contractor's claims and rights against the Authority for breaches and/or termination of this Contract and the Project Documents whether under contract, tort, restitution or otherwise, save for any liability of the Authority which arose prior to the Termination Date that has not already been taken into account in the Adjusted Highest Compliant Tender Price.**
- 92.3.14. Subject to Clauses 92.3.15 and 92.3.18 below, if the Authority has not paid an amount equal to the Adjusted Highest Compliant Tender Price to the Contractor on or before the date falling two years after the Termination Date then the following provisions of this Clause shall not apply to that termination and the provisions of Clause 92.4 (No Retendering Procedure) shall apply instead.**
- 92.3.15. If the Adjusted Highest Compliant Tender Price is zero or a negative number then the Authority shall have no obligation to make any payment to the Contractor and with effect from the time that the Authority gives notice of that event to the Contractor, the Authority shall be released from all liability to the Contractor for breaches and/or termination of this Contract and any other Project Document whether under contract, tort, restitution or otherwise save for any antecedent liability of the Authority which arose prior to the Termination Date (but not from the termination itself) that has not already been taken into account in determining the Adjusted Highest Compliant Tender Price.**
- 92.3.16. If the Adjusted Highest Compliant Tender Price is less than zero then an amount equal to the Adjusted Highest Compliant Tender Price shall be due and payable by the Contractor to the Authority on the date of the New Contract.**
- 92.3.17. The Authority may elect at any time prior to the receipt**

**of a Compliant Tender to follow the no retendering procedure under Clause 92.4 (No Retendering Procedure) by notifying the Contractor that this election has been made.**

- 92.3.18. If the Authority has received all bids from bidders under the Tender Process and has received a Compliant Tender but decides not to complete the Tender Process, it shall notify the Contractor of this decision and pay to the Contractor an amount equal to the Adjusted Highest Compliant Tender Price within 20 Business Days of such notification.**

#### **No Retendering Procedure**

- 92.4. If either the Authority is not entitled to retender the provision of the Project under Clause 92.2 (Retendering Election), or the Authority elects to require an expert determination in accordance with this Clause 92.4 (No Retendering Procedure), then the following procedure shall apply:**

- 92.4.1. Subject to Clause 92.4.2 below, the Contractor shall not be entitled to receive any Post Termination Service Amount.**

- 92.4.2. If the Authority elects to require an expert determination in accordance with this Clause 92.4 (No Retendering Procedure) after it has elected to follow the procedure under Clause 92.3 (Retendering Procedure) or no Compliant Tenders have been received and Clause 92.3.10 applies then the Authority shall continue to pay to the Contractor each Post Termination Service Amount until the Compensation Date, in accordance with Clause 92.3 (Retendering Procedure).**

- 92.4.3. In agreeing or determining the Estimated Fair Value of this Contract, the Parties shall be obliged to follow the principles set out below:**

- 92.4.3.1. all forecast amounts (including Third Party Income calculated on the basis set out in the Appendix to Schedule 39 (Unitary Charge Adjustment Protocol)) should be calculated in nominal terms at current prices, recognising the adjustment for indexation in respect of forecast inflation between the date of calculation and the forecast payment date(s) as set out in the Contract;**

- 92.4.3.2. the total of all future payments of the full**



**Annual Unitary Charge (without deductions) forecast to be made and Third Party Income calculated on the basis set out in the Appendix to Schedule 39 (Unitary Charge Adjustment Protocol) forecast to be received shall be calculated and discounted to the Termination Date at the Termination Date Discount Rate;**

**92.4.3.3. the total of all costs forecast to be incurred by the Authority as a result of termination shall be calculated and discounted at the Termination Date Discount Rate and deducted from the payment calculated pursuant to Clause 92.4.3.2 above, such costs to include (without double counting):**

- a) a reasonable risk assessment of any cost overruns that will arise, whether or not forecast in the relevant base case;**
- b) the costs of the Services forecast to be incurred by the Authority in providing the Project to the standard required; and**
- c) any Rectification Costs required to deliver the Project to the standard required (including any costs forecast to be incurred by the Authority to complete construction or development work and additional operating costs required to restore operating services standards),**

**in each case such costs to be forecast at a level that will deliver the full Annual Unitary Charge and Third Party Income referred to in Clause 92.4.3.2 above.**

**92.4.4. If the Parties cannot agree on the Adjusted Estimated Fair Value of the Contract on or before the date falling 30 Days after the date on which the Authority elected to require an expert determination in accordance with this Clause 92.4 (No Retendering Procedure) then the Adjusted Estimated Fair Value of this Contract shall be determined in accordance with Clause 113 (Dispute**

**Resolution).**

- 92.4.5. For the avoidance of doubt, where there is an agreed amount and a disputed amount in respect of the Adjusted Highest Compliant Tender Price the Authority shall (where it is agreed that the Adjusted Highest Compliant Tender Price is a positive number) pay to the Contractor the agreed amount no later than the date specified in Clause 92.4.6 below, with the disputed amount being dealt with in accordance with Clause 92.4.4.
- 92.4.6. The Authority shall pay to the Contractor an amount equal to the Adjusted Estimated Fair Value of the Contract on the date falling 40 Days after the date on which the Adjusted Estimated Fair Value of the Contract has been agreed or determined in accordance with this Clause 92.4 (No Retendering Procedure).
- 92.4.7. The discharge by the Authority of its obligation in Clause 94.2.6 is in full and final settlement of all the Contractor's claims and rights against the Authority for breaches and/or termination of this Contract or other Project Document whether in contract, tort, restitution or otherwise save for any liability that arose prior to the Termination Date (but not from the termination itself) that has not been taken into account in determining the Adjusted Estimated Fair Value of the Contract.
- 92.4.8. To the extent that the Adjusted Estimated Fair Value of the Contract is less than zero, then an amount equal to the Adjusted Estimated Fair Value of this Contract shall be due and payable by the Contractor to the Authority on the Compensation Date.

**92.5. Transfer of Assets on Contractor Default**

On termination under Clause 84 (Contractor Default) the Authority shall have the option to require the Contractor to transfer to the Authority all of its rights, title and interest in and to the Assets in accordance with and subject to the provisions of Clause 97 (Transfer of Assets on Termination).

**93. COMPENSATION ON VOLUNTARY TERMINATION**

- 93.1. On termination under Clause 85 above, the Authority shall pay the Contractor an amount equal to the amount payable under Clause 94 (Compensation on Termination for Authority Default) in accordance with Clauses 99 to 101 on the Termination Date.

**94. COMPENSATION ON TERMINATION FOR AUTHORITY DEFAULT**

**94.1. On termination of this Contract pursuant to Clauses 86 (Voluntary Termination by Authority) or 85 (Termination on Authority Default) or as provided for in Schedule 5 (Relevant Discharge Terms), the Authority shall pay the Contractor the Authority Default Termination Sum (in accordance with Clauses 99 to 101) on the Termination Date. Subject to Clause 94.2 to 94.4 below the Authority Default Termination Sum shall be an amount equal to the aggregate of:**

**94.1.1. the Base Senior Debt Termination Amount; and**

**94.1.2. redundancy payments for employees of the Contractor that have been or will be reasonably incurred as a direct result of termination of this Contract and any Sub-Contractor Breakage Costs; and**

**94.1.3. the aggregate amount for which the share capital of the Contractor and the amounts outstanding under the Subordinated Financing Agreements could have been sold on an open market basis based on the Relevant Assumptions.**

**94.2. On payment of the amount referred to in Clause 94.1 above, the Authority shall have the option to require the Contractor to transfer its rights, title and interest in and to the Assets to the Authority or as directed by the Authority in accordance with and subject to the provisions of Clause 97 (Transfer of Assets on Termination).**

**94.3. If the aggregate of the amounts referred to in Clause 94.1.1 and 94.1.3 is less than the Revised Senior Debt Termination Amount, then the Authority Default Termination Sum shall be increased so that it is equal to the aggregate of the Revised Senior Debt Termination Amount and the amount referred to in Clause 94.1.2 provided always that:-**

**94.3.1. the amount referred to in Clause 94.1.2 shall only be paid to the extent that the Contractor has demonstrated to the reasonable satisfaction of the Authority that the amount will not be paid in payment (in whole or in part) of any Distribution; and**

**94.3.2. if, at the time of termination, there are any Additional Permitted Borrowings outstanding, no Sub-Contractor Breakage Costs shall be paid in respect of any Sub-Contract in circumstances where there is an event of default under such Sub-Contract which would entitle the Contractor to terminate such Sub-Contract.**

- 94.4. If a Distribution is made whilst any Additional Permitted Borrowing is outstanding and the Contractor has wilfully, or through gross negligence, failed to comply with its obligations under Clause 11.6(d)(i) of the Direct Agreement then in addition to the deduction of the Distribution referred to in paragraph (v) of the definition of Revised Senior Debt Termination Amount, the Authority shall be entitled to set off the value of that Distribution a second time against the Authority Default Termination Sum, provided that the amount of the Authority Default Termination Sum will never be less than the Revised Senior Debt Termination Amount.
- 94.5. If the Contractor has wilfully or through gross negligence failed to comply with its obligations under Clause 11.6(d)(ii) of the Direct Agreement and there has been an overstatement of the cash balances by the Contractor as at that date which has caused the Authority to reasonably believe that it would be required to pay a lesser sum at the Termination Date that it actually is required to pay under the terms of this Clause 94, then the Authority Default Termination Sum, shall be reduced by the amount of such overstatement (to the extent such overstatement is still applicable at the Termination Date), provided that the amount of the Authority Default Termination Sum will never be less than the Revised Senior Debt Termination Amount.
95. **COMPENSATION ON TERMINATION FOR CORRUPT GIFTS AND FRAUD AND REFINANCING**
- 95.1. On termination of this Contract in accordance with Clause 90 (Termination on Corrupt Gifts) or Clause 87 (Refinancing Breach) the Authority shall pay the Contractor an amount equal to the Revised Senior Debt Termination Amount.
- 95.2. Such amount shall be determined and paid in accordance with Clauses 99 to 101.
- 95.3. If termination occurs then the Authority may require the Contractor to transfer its rights, title and interest in and to the Assets to the Authority in accordance with and subject to the provisions of Clause 97 (Transfer of Assets on Termination).
96. **COMPENSATION ON TERMINATION FOR FORCE MAJEURE**
- 96.1. On termination of the Contract under Clause 89 (Termination on Force Majeure) the Authority shall pay to the Contractor the "Force Majeure Termination Sum" in accordance with this Clause 96.
- 96.2. Subject to Clauses 96.3 to 96.6 below the Force Majeure Termination Sum shall be the amount equal to the aggregate of:

- 96.2.1. the Base Senior Debt Termination Amount;
  - 96.2.2. the Junior Debt less an amount equal to the aggregate of payments of interest made by the Contractor under the Subordinated Financing Agreements;
  - 96.2.3. all amounts paid to the Contractor by way of subscription for shares in the capital of the Contractor less dividends and other distributions paid to the shareholders of the Contractor (save to the extent deducted under Clause 96.2.2 above); and
  - 96.2.4. redundancy payments for employees of the Contractor that have been or will be reasonably incurred by the Contractor as a direct result of termination of the Contract and any Sub-Contractor Breakage Costs.
- 96.3. If the amounts referred to in Clause 96.2.2 and/or 96.2.3 are less than zero, then, for the purposes of the calculation in Clause 96.2 they shall be deemed to be zero.
- 96.4. If the aggregate of the amounts referred to in Clause 96.2.1, 96.2.2 and 96.2.3 is less than the Revised Senior Debt Termination Amount, then the Force Majeure Termination Sum shall be increased so that it is equal to the aggregate of the Revised Senior Debt Termination Amount and the amount referred to in Clause 96.2.4 provided always that:
- 96.4.1. the amount referred to in Clause 96.2.4 shall only be paid to the extent that the Contractor has demonstrated to the reasonable satisfaction of the Authority that the amount will not be paid in payment (in whole or in part) of any Distribution; and
  - 96.4.2. if, at the time of termination, there are any Additional Permitted Borrowings outstanding, no Sub-Contractor Breakage Costs shall be paid in respect of any Sub-Contract in circumstances where there is an event of default under such Sub-contract which would entitle the Contractor to terminate such Sub-Contract.
- 96.5. If a Distribution is made whilst any Additional Permitted Borrowing is outstanding and the Contractor has wilfully, or through gross negligence, failed to comply with its obligations under Clause 11.6(d)(i) of the Direct Agreement then in addition to the deduction of the Distribution referred to in paragraph (v) of the definition of Revised Senior Debt Termination Amount, the Authority shall be entitled to set off the value of that Distribution a second time against the Force Majeure Termination Sum, provided that the amount of the Force Majeure Termination Sum will never be less than the Revised Senior Debt Termination

**Amount.**

- 96.6. **If the Contractor has wilfully or through gross negligence failed to comply with its obligations under Clause 11.6(d)(ii) of the Direct Agreement and there has been an overstatement of the cash balances by the Contractor as at that date which has caused the Authority to reasonably believe that it would be required to pay a lesser sum at the Termination Date than it actually is required to pay under the terms of this Clause 96, then the Force Majeure Termination Sum, shall be reduced by the amount of such overstatement (to the extent such overstatement is still applicable at the Termination Date), provided that the amount of the Force Majeure Termination Sum will never be less than the Revised Senior Debt Termination Amount.**
- 96.7. **Such amount shall be determined and paid in accordance with Clauses 99 to 101.**
- 96.8. **On termination, the Authority shall have the option to require the Contractor to transfer to the Authority all of its rights, title and interest in and to the Assets in accordance with and subject to the provisions of Clause 97 (Transfer of Assets on Termination).**

**97. TRANSFER OF ASSETS ON TERMINATION**

**97.1. Transfer of Assets**

97.1.1. On the earlier of:

97.1.1.1. the Termination Date; or

97.1.1.2. the Expiry Date

the Contractor shall take all due and necessary steps that are within its lawful power to transfer the Assets to the Authority or to a new contractor as the case may be and as directed by the Authority for consideration of £1 receipt of which shall be deemed. Such steps shall include (without limitation) and at nil cost to the Authority:

97.1.1.3. to the extent that it is able in accordance with the terms of such agreements and contracts, novating or assigning relevant and current supply, disposal and transport agreements and Off Take Contracts;

97.1.1.4. transferring to the extent that it is able in accordance with the terms of such arrangements those contractual rights and revenues referred to in limb (e) of the definition of Assets;

- 97.1.1.5. procuring the transfer of Intellectual Property Rights in accordance with the provisions of Clause 124 (Intellectual Property Rights and IT Systems Licences);
- 97.1.1.6. vacating the Contractor Sites in accordance with the provisions of the Contractor Site Sub-Leases.
- 97.1.1.7. vacating the Authority Sites in accordance with the provisions of the applicable Leases and Underleases;
- 97.1.1.8. transferring ownership, title and all beneficial rights in the Equipment which is listed in the Final Equipment List (prepared pursuant to Clause 50 (Equipment)) which are owned by the Contractor to the Authority and entering into such instruments as are necessary to effect such transfer;
- 97.1.1.9. in respect of any Equipment which is listed in the Final Equipment List which is leased from any third party or which have been taken on hire purchase or other similar arrangement, subject to and where provided for under the terms of the relevant lease hire purchase or other arrangement assigning or novating such arrangements;
- 97.1.1.10. in respect of any Equipment which is listed in the Final Equipment List, procuring the transfer of the benefit of any manufacturers guarantees, warranties, licences and service records in respect of the Equipment; and
- 97.1.2. On or before the Expiry Date or the Termination Date, the Authority may require the Contractor to take out Run Off Cover for EIL as an Authority Change pursuant to the provisions of Clause 107 (Authority Change) and Clause 120.13 (Authority Variation).
- 97.1.3. For the avoidance of doubt the provisions of Clause 115 (Indemnities) may apply in accordance with the terms of that Clause to any liability incurred by the Contractor or any of its Sub-Contractors relating to the Assets prior to Expiry or Termination.
- 97.1.4. Each of the Contractor and the Authority shall use all reasonable endeavours to transfer (to the extent that it can lawfully do so) any Waste Management Licences and/or

PPC Permits held by the Contractor (or held by the Operating Sub-Contractor or other Sub-Contractor on its behalf) which are relevant to the Handback Facilities (and on early termination only any Waste Management Licences relating to the IVC Facility and/or Alconbury WTS) to the Authority or its nominated contractors. The Authority may direct that a Waste Management Licence held by the Contractor (or held by the Operating Sub-Contractor or other Sub-Contractor on its behalf) in respect of any Handback Facility (or on early termination only any Waste Management Licences relating to the IVC Facility and/or Alconbury WTS) is not required to be transferred whereupon the Contractor (or the Operating Sub-Contractor or other Sub-Contractor as applicable) shall surrender the relevant Waste Management Licence.

## **97.2. Provision of information**

97.2.1. On or before the Expiry Date or Termination Date, except to the extent that the Authority directs otherwise, the Contractor shall provide to the Authority in hard copy and (where practicable) electronically in a commonly used format:

97.2.1.1. Information required in accordance with Clause 122.6 (Contractor's Records). Such records shall be organised, indexed and filed in a manner which will enable a competent person to access and understand them without undue difficulty;

97.2.1.2. Transfer notes in relation to all Contract Waste in situ at the Facilities;

97.2.1.3. Copies of all operating and maintenance manuals relating to Assets and any associated Equipment or components within them; and

97.2.1.4. Workforce information in accordance with Schedule 47 (TUPE),

in each case as applicable at the Termination Date or Expiry Date.

## **Handback Condition**

97.3. On the Expiry Date the March WTS (assuming that the March Trigger Date has arisen) and (provided that the Authority shall have exercised its option referred to in Clause 69.3 in respect of the MBT Site) the MBT Facility, shall be in such serviceable condition and state of repair (allowing for fair wear and tear) as to enable their efficient operation for



a period of five years following such date in the case of the Expiry Date assuming:

97.3.1. the March WTS and the MBT Facility would be used to provide services similar in all material respects to the Services; and

97.3.2. that the maintenance regime detailed in the Maintenance Programme continued to apply throughout such period to no less a standard that is required under this Contract.

97.4. For the avoidance of doubt, the condition and state of repair of the March WTS and MBT Facility shall for the purposes of Clause 97.3 be assessed under Clause 102 (Surveys on Termination and Retention Fund) and such assessment shall be final and the Authority shall not be able to and shall waive any right to claim that the March WTS and/or MBT Facility was not in such a condition by reason of any event or circumstances or evidence arising after termination or expiry of this Contract.

97.5. On the Expiry Date the HWRC Sites shall be in no worse condition and state of repair (subject to Clause 49 (Planned Maintenance) but allowing for fair wear and tear) as evidenced by the Phase 2 Schedules of Condition.

#### **98. CONTRACTOR'S ACCOUNTS**

The accounts of the Contractor shall be maintained as foreseen in the Financial Model.

#### **99. GROSS UP OF TERMINATION PAYMENTS**

99.1. If any amount of compensation payable by the Authority under Clauses 94 (Compensation on Termination for Authority Default), 96 (Compensation on Termination for Force Majeure), 95 (Compensation on Termination for Corrupt Gifts and Fraud and Refinancing), 93 (Compensation on Voluntary Termination) is subject to Tax payable to a Relevant Authority in the United Kingdom, then the Authority shall pay to the Contractor such additional amount as will put the Contractor in the same after Tax position as it would have been in had the payment not been subject to Tax taking account of any relief, allowances deduction, setting off or credit in respect of Tax (whether available by choice or not) which may be available to the Contractor to reduce the Tax to which the payment is subject.

#### **100. SET OFF ON TERMINATION**

100.1. Except where expressly stated otherwise, the Authority is not entitled to set off any amount against any payment of termination compensation (whether payable as a lump sum or in instalments)

under Clause 94 (Compensation on Termination for Authority Default), Clause 96 (Compensation on Termination for Force Majeure) Clause 95 (Compensation on Termination for Corrupt Gifts and Fraud), Clause 93 (Compensation on Voluntary Termination) save to the extent that after such an amount has been set off, the termination payment made would be in an amount greater than or equal to the Base Senior Debt Termination Amount or the Revised Senior Debt Termination Amount as the case may be, at that time.

#### **101. METHOD OF PAYMENT**

101.1. The Authority shall pay to the Contractor the Termination Sum, together with interest on any Base Senior Debt Termination Sum or Revised Senior Debt Termination Amount element of the Termination Sum at the Senior Debt Rate on or before the date falling 60 Days after the Notice Date provided that it may elect to pay the Adjusted Estimated Fair Value of the Contract or the Base Senior Debt Termination Amount or the Revised Senior Debt Termination Amount (as relevant) element of the Termination Sum in accordance with Clause 101.2 below.

101.2. The Authority may, other than on an Authority Default, elect to pay the Adjusted Estimated Fair Value of the Contract or the Base Senior Debt Termination Amount or the Revised Senior Debt Termination Amount (as relevant) element of the Termination Sum:

101.2.1. in instalments as follows:

101.2.1.1. where the Base Senior Debt Termination Amount or the Revised Senior Debt Termination Amount or the Adjusted Estimated Fair Value of the Contract (as relevant) is greater than or equal to the Outstanding Principal

a) in respect of that element of the Base Senior Debt Termination Amount or the Revised Senior Debt Termination Amount or the Adjusted Estimated Fair Value of the Contract (as relevant) representing the Outstanding Principal on the dates (the "Instalment Dates") and in the amounts that the Contractor would have been required to pay principal to the Senior Lenders under the terms of the

**Senior Financing Agreement had the Termination Date not occurred; and**

b) **in respect of the sum (if any) remaining after deducting the Outstanding Principal from the Base Senior Debt Termination Amount or the Revised Senior Debt Termination Amount or the Adjusted Estimated Fair Value of the Contract (as relevant) shall be paid in equal instalments on the Instalment Dates;**

c) **where the Base Senior Debt Termination Amount or the Revised Senior Debt Termination Amount or the Adjusted Estimated Fair Value of the Contract (as relevant) is less than the Outstanding Principal, on the Instalment Dates pro rata to the amounts that the Contractor would have been required to pay as principal to the Senior Lenders on each Instalment Date under the terms of the Senior Financial Agreement had the Termination Date not occurred; or**

**101.2.2. as the Parties may otherwise agree.**

**101.3. Interest**

**From the Notice Date until the date of payment, interest shall accrue on any unpaid element of the Termination Sum at the Senior Debt Rate and be payable on the next occurring Instalment Date.**

**101.4. Payment of Outstanding Element**

**If the Authority has elected to pay in accordance with Clause 101.2 (Instalments) above, it may (on 28 Days' prior written notice to the Contractor) elect to pay the outstanding part of the Adjusted Estimated Fair Value of the Contract or the Base Senior Debt Termination Amount or the Revised Senior Debt Termination Amount (as relevant) element of the Termination Sums in full on**

**any Instalment Date.**

**Authority Default in Payment**

**101.5. If the Authority:**

- 101.5.1. fails to make a payment to the Contractor in accordance with Clauses 101.1 and/or 101.2 and/or 101.3 above; or**
- 101.5.2. breaches Clause 131 (Assignment and Sub-Contracting),**

**the Contractor may issue a notice to the Authority declaring any unpaid and outstanding element of (as applicable) the Adjusted Estimated Fair Value of the Contract, the Base Senior Debt Termination Amount or the Revised Senior Debt Termination Amount (as relevant) element of the Termination Sum and any accrued but unpaid interest to be immediately due and payable.**

**Exclusivity of Remedy**

- 101.6. Any payment of compensation shall be in full satisfaction of any claim which can be made against the Authority by the Contractor in relation to termination of this Contract or any Project Document. The compensation payable under Clauses 94 (Compensation on Authority Default), 96 (Compensation on Termination for Force Majeure) and 95 (Compensation for Corrupt Gifts and Fraud and Refinancing) and 93 (Compensation on Voluntary Termination by the Authority) shall be the sole remedy of the Contractor against the Authority in respect of termination of the Contract.**

**Agent's Certificate is conclusive**

- 101.7. The Authority shall be entitled to rely on the certificate of the Agent as conclusive as to the amount of the Base Senior Debt Termination Amount or the Revised Senior Debt Termination Amount outstanding at the relevant time. The receipt by the Agent of the Base Senior Debt Termination Amount or the Revised Senior Debt Termination Amount (or elements thereof as relevant) shall discharge the Authority's obligations to pay such sums to the Contractor.**

**102. SURVEYS ON TERMINATION AND RETENTION FUND**

For the avoidance of doubt, the provisions of this Clause 102 shall apply in respect of the Handback Facilities and shall not apply to the Site Conditions or any Contamination. The provisions of Clause 31 (Site Matters) shall apply to Site Conditions and the provisions of Schedule 48 (Environmental Provisions) shall apply in respect of Contamination.

**Final Survey on Termination**

- 102.1. **18 months prior to the Expiry Date, the Authority shall be entitled to carry out a final survey of the Handback Facilities to assess whether they have been and are being maintained by the Contractor in accordance with its obligations under Clause 49.1 (Planned Maintenance).**
- 102.2. **The Authority shall notify the Contractor in writing a minimum of 20 Business Days in advance of the date it wishes to carry out the final survey. The Authority shall consider in good faith any reasonable request by the Contractor for the final survey to be carried out on a different date if such request is made at least 2 Days prior to the notified date and the Contractor (acting reasonably) is able to demonstrate that carrying out the final survey on the notified date would materially prejudice the Contractor's ability to provide the Service.**

#### **Minimisation of Disruption**

- 102.3. **When carrying out the final survey, the Authority shall appoint a suitably qualified and experienced independent surveyor and shall procure that such independent surveyor uses reasonable endeavours to minimise any disruption caused to the provision of the Services by the Contractor. The Contractor shall afford the Authority and such independent surveyor, once appointed (free of charge) any reasonable assistance required by the Authority and the independent surveyor during the carrying out of the final survey. The cost of the final survey shall be borne by the Authority.**

#### **Results of Survey**

- 102.4. **If the final survey shows that the Contractor has not complied with or is not complying with its obligations under Clause 49.1 (Planned Maintenance), the Authority shall:**
  - 102.4.1. **notify the Contractor of the rectification and/or maintenance work which is required to bring the condition of the relevant Handback Facilities to the standard they would have been in if the Contractor had complied or was complying with its obligations under Clause 49.1 (Planned Maintenance);**
  - 102.4.2. **specify a reasonable period within which the Contractor must carry out such work; and**
  - 102.4.3. **recover the cost of the survey to the extent relating to that Handback Facility from the Contractor by means of a deduction from the next instalment of Annual Unitary Charge.**

#### **Retention Fund**

- 102.5. If the Contractor has been notified under Clause 102.4.1 (Results of Survey) that rectification and/or maintenance work is required, 12 months prior to the Expiry Date the Authority shall deduct (to the extent that such works have not been carried out by the Contractor in the interim) the costs of that work as quantified by that survey from the next following instalment (or, if the amount of such instalment is insufficient, the next instalments as necessary) of Annual Unitary Charge and pay such amount into an interest bearing account (the "Retention Fund Account").

#### **Maintenance Work**

- 102.6. The Contractor shall carry out such rectification and/or maintenance work to the Authority's reasonable satisfaction within the period specified and any costs it incurs in carrying out such rectification and/or maintenance work shall be at its own expense.

#### **Costs**

- 102.7. If and to the extent that the Contractor carries out the necessary rectification and/or maintenance work to Authority's reasonable satisfaction within the specified period, the Authority shall reimburse the Contractor's costs of so doing by withdrawing amounts from the Retention Fund Account. If the amount in the Retention Fund Account is insufficient to cover the Contractor's costs the Contractor shall bear the balance of its costs itself.

#### **Failure to carry out Work**

- 102.8. If and to the extent that the Contractor fails to carry out the necessary rectification and/or maintenance work to the Authority's reasonable satisfaction within the specified period, the Authority shall be entitled to carry out itself, or procure, such rectification and/or maintenance work at the Contractor's expense and shall make withdrawals from the Retention Fund Account to pay for such work or, where there is insufficient funds in the Retention Fund Account, make deductions from the Annual Unitary Charge to pay for such work.

#### **Balance of Fund**

- 102.9. If:
- 102.9.1. all the rectification and/or maintenance work identified by the independent surveyor has been carried out to the Authority's reasonable satisfaction;
  - 102.9.2. all such work has been paid for by the Contractor; and
  - 102.9.3. no termination notice given in accordance with this Contract is outstanding,

**then the Authority shall pay any credit balance on the Retention Fund Account to the Contractor as soon as practicable.**

## **PART 6: GENERAL**

### **103. OPEN BOOK**

103.1. The Parties shall (subject to any restrictions imposed by law or in relation to Commercially Sensitive Information) use their reasonable endeavours to operate on an open book basis in respect of their obligations under this Contract (including but not limited to the Contractor's obligation pursuant to Section 11 of the Payment Mechanism (Third Party Income Share)) and shall (unless prevented by statute, court order, injunction or similar process) provide access to such information as is required to fulfil these obligations and nothing in this Clause 103 shall prejudice or otherwise qualify the Authority's position as a local authority or imply a fetter on the Authority's statutory financial or audit responsibilities.

103.2. Nothing in this Clause 103 shall:

- 103.2.1. oblige any party acting in accordance with Good Industry Practice to incur any additional material cost or expense;
- 103.2.2. relieve any party of any obligation to pay any sum due and payable under this Contract; or
- 103.2.3. oblige the Contractor or any Contractor Related Party to release any Commercially Sensitive Information.

### **104. RELIEF EVENTS**

104.1. **If and to the extent that a Relief Event:-**

- 104.1.1. **is the direct cause of a delay in achieving the Planned Works Commencement Date and/or Initial Acceptance Date and/or Full **Service Commencement** Date in respect of the MBT Facility or in achieving any other Service Commencement Date; and/or**
- 104.1.2. **adversely affects the ability of the Contractor to perform any of its obligations under this Contract,**

**then the Contractor is entitled to apply for relief from any rights of the Authority arising under Clause 84 (Termination on Contractor Default)**

104.2. **To obtain relief, the Contractor must:-**

- 104.2.1. **as soon as is practicable, and in any event within 14 Days after it became aware that the Relief Event has caused or is likely to cause delay and/or adversely affect the ability of the Contractor to perform its other obligations give to the Authority a notice of its claim for**



- relief from its obligations under the Contract, including full details of the nature of the Relief Event, the date of occurrence and its likely duration;**
- 104.2.2. **within 14 Days of receipt by the Authority of the notice referred to in Clause 104.2.1 above, give full details of the relief claimed; and**
- 104.2.3. **demonstrate to the reasonable satisfaction of the Authority that:-**
- 104.2.3.1. **the Contractor and its Sub-Contractors could not have avoided such occurrence or its consequences by steps which they might reasonably be expected to have taken, without incurring material expenditure;**
- 104.2.3.2. **the Relief Event directly caused the delay to the Planned Works Commencement Date, Initial Acceptance Date and/or Full Service Commencement Date or following the Planned Initial Acceptance Date delay in achieving the Initial Acceptance Date by the Initial Acceptance Longstop Date or following the Planned Full Service Commencement Date delay in achieving the Full Service Commencement Date by the Full Service Commencement Longstop Date in each case in respect of the MBT Facility or otherwise directly caused the delay in achieving any other Service Commencement Date; and/or**
- 104.2.3.3. **the time lost and/or relief from the obligations under the Contract claimed could not reasonably be expected to be mitigated or recovered by the Contractor acting in accordance with Good Industry Practice, without incurring material expenditure; and**
- 104.2.3.4. **the Contractor is using reasonable endeavours to perform its obligations under the Contract.**
- 104.3. **In the event that the Contractor has complied with its obligations under Clause 104.2 above, then:-**
- 104.3.1. **the Planned Works Commencement Date, Planned Initial Acceptance Date (or following the Planned Initial Acceptance Date the Initial Acceptance Longstop Date) and**

**the Planned Full Service Commencement Date (or following the Planned Full Service Commencement Date, the Full Service Commencement Longstop Date) or the relevant Service Commencement Date shall be postponed by such time as shall be reasonable for such a Relief Event, taking into account the likely effect of delay; and/or**

- 104.3.2. **the Authority shall not be entitled to exercise its rights to terminate the Contract under Clause 84.2 (Termination on Contractor Default).**
- 104.4. **Nothing in Clause 104.3 above shall affect any entitlement to make Deductions under Schedule 26 (Payment Mechanism) during the period in which the Relief Event is subsisting.**
- 104.5. **In the event that information required by Clause 104.2 above is provided after the dates referred to in that Clause, then the Contractor shall not be entitled to any relief during the period for which the information is delayed.**
- 104.6. **The Contractor shall notify the Authority if at any time it receives or becomes aware of any further information relating to the Relief Event, giving details of that information to the extent that such information is new or renders information previously submitted materially inaccurate or misleading.**
- 104.7. **If the Parties cannot agree the extent of the relief required, or the Authority disagrees that a Relief Event has occurred or that the Contractor is entitled to any extension of the Planned Works Commencement Date, Planned Initial Acceptance Date and/or Initial Acceptance Longstop Date and/or Planned Full Service Commencement Date and/or Full Service Longstop Date or other Service Commencement Date the Parties shall resolve the matter in accordance with Clause 113 (Dispute Resolution).**
- 104.8. **For the avoidance of doubt, nothing in this Clause 104 (Relief Events) shall vary any Planning Longstop Date.**
- 105. CHANGE IN LAW**
- 105.1. **If a Qualifying Change in Law occurs or is shortly to occur, then either Party may write to the other to express an opinion on its likely effects, giving details of its opinion of:**
- 105.1.1. **any necessary change in the Works, the Facilities, the Equipment and/or the Services;**
- 105.1.2. **whether any changes are required to the terms of this Contract to deal with the Qualifying Change in Law;**
- 105.1.3. **whether relief from compliance with obligations is**

**required, including the obligation of the Contractor to achieve the Planned Works Commencement Date, Planned Initial Acceptance Date and/or Initial Acceptance Longstop Date and/or Planned Full Service Commencement Date and/or Full Service Longstop Date and/or meet the Payment Mechanism and Performance Framework during the implementation of any relevant Qualifying Change in Law;**

105.1.4. **any loss of revenue** (including Third Party Income on the basis provided for in the Appendix to Schedule 39 (Unitary Charge Adjustment Protocol) **that will result from the relevant Qualifying Change in Law;**

105.1.5. **any Estimated Change in Project Costs that directly result from the Qualifying Change in Law; and**

105.1.6. **any Capital Expenditure that is required or no longer required as a result of a Qualifying Change in Law taking effect during the Contract Period,**

**in each case giving in full detail the procedure for implementing the change in the Facilities, Site, Works, Equipment and/or the Services.**

105.2. **Responsibility for the costs of implementation (and any resulting variation to the Annual Unitary Charge) shall be dealt with in accordance with Clauses 105.3 to 105.7 below.**

105.3. **As soon as practicable after receipt of any notice from either Party under Clause 105.1, the Parties shall discuss and agree the issues referred to in Clause 105.1 and any ways in which the Contractor can mitigate the effect of the Qualifying Change in Law; including:-**

105.3.1. **providing evidence that the Contractor has used reasonable endeavours (including (where practicable) the use of competitive quotes) to oblige its Sub-Contractors to minimise any increase in costs and maximise any reduction in costs;**

105.3.2. **demonstrating how any Capital Expenditure to be incurred or avoided is being measured in a cost effective manner including showing that when such expenditure is incurred or would have been incurred foreseeable Changes in Law at that time have been taken into account by the Contractor;**

105.3.3. **giving evidence as to how the Qualifying Change in Law has affected prices charged by any similar businesses to the Project, including similar businesses in which the**

**Shareholders or their Affiliates carry on business; and**

- 105.3.4. **demonstrating that any expenditure that has been avoided, which was anticipated to be incurred to replace or maintain assets that have been affected by the Qualifying Change in Law concerned, has been taken into account in the amount which in its opinion has resulted or is required under Clause 105.1.**
- 105.4. **If the Parties agree or it is determined under Clause 113 (Dispute Resolution) that the Contractor is required to incur additional Capital Expenditure due to a Qualifying Change in Law (excluding the Contractor's Share of any Capital Expenditure agreed or determined to be required as a result of a General Change in Law under this Clause), then the Contractor shall use its reasonable endeavours to obtain funding for such Capital Expenditure on terms reasonably satisfactory to it and the Senior Lenders.**
- 105.5. **The Contractor's Share shall be solely for the account of the Contractor.**
- 105.6. **If the Contractor has used reasonable endeavours to obtain funding for the Capital Expenditure referred to in Clause 105.4, but has been unable to do so within 60 Days of the date that the agreement or determination referred to in Clause 105.4 occurred, then the Authority shall pay to the Contractor an amount equal to that Capital Expenditure on or before the date falling 30 Days after the Capital Expenditure has been incurred.**
- 105.7. **Any compensation payable under this Clause by means of an adjustment to or reduction in the Annual Unitary Charge shall be calculated in accordance with Clause 110 (Financial Adjustments).**

**EA Guidance 2005**

- 105.8. **For the avoidance of doubt, any changes in or replacement to the EA Guidance 2005 or its application or interpretation or any changes to the testing to be carried out pursuant to the EA Guidance 2005 with which the Contractor is bound to comply under this Contract shall be treated and assessed as a Specific Change in Law. Save as required by any Change of Law with which the Contractor is bound to comply, the Authority shall not be bound to accept (nor shall there be deemed) amendments to Schedule 25 (Organic Fraction Measurement Protocol) (so as to realign the testing regime and measurements for Contract Target purposes with those required for LATS purposes) but it is acknowledged that if the Authority requires such realignment, it shall do so through the Authority Change Mechanism pursuant to Clause 107.**

**106. PAYMENT OF IRRECOVERABLE VAT**

- 106.1. **The Authority shall pay to the Contractor from time to time as the**

**same is incurred by the Contractor sums equal to any irrecoverable VAT but only to the extent that it arises as a result of a Change in Law. Any such payment shall be made within 28 Days of the delivery by the Contractor to the Authority of written details of the amount involved accompanied by details as to the grounds for and computation of the amount claimed. For the purposes of this Clause 106, "Irrecoverable VAT" means input VAT incurred by the Contractor on any supply which is made to it which is used or to be used exclusively in performing the Works or the Services or any of the obligations or provisions under the Contract (together with input VAT incurred as part of its overhead in relation to such activities) to the extent that the Contractor is not entitled to repayment or credit from HMRC in respect of such VAT.**

## **107. AUTHORITY AND CONTRACTOR CHANGES**

### **Authority Changes**

**107.1. The Authority has the right to propose changes to the Works and/or the Services in accordance with this Clause 107. Notwithstanding any other provision of this Clause 107 (Authority and Contractor Changes) and the proviso below, the Authority shall not propose a change which:**

- 107.1.1. requires the Works and/or the Services to be performed in a way that infringes Legislation or is inconsistent with Good Industry Practice;
- 107.1.2. would cause any existing Consent to be revoked (or would require a new or revised Consent to be obtained to implement the relevant change in the Works and/or the Services which, after using reasonable efforts, the Contractor has been unable to obtain);
- 107.1.3. would materially and adversely affect the Contractor's ability to perform the Works and/or Services or to comply with the Contract Targets in a manner not compensated pursuant to this Clause 107;
- 107.1.4. would materially and adversely affect the health and safety of any person;
- 107.1.5. subject to the proviso to this Clause 107.1, would increase the Contractor's capital costs by more than ten percent (10%) (in aggregate);
- 107.1.6. would, if implemented, materially and adversely change the nature of the Project (including its risk profile); or
- 107.1.7. the Authority does not have the legal power or capacity to require implementation of such Authority Change.

PROVIDED ALWAYS that the restriction contained in Clause 107.1.5 above shall not prevent the Authority from requiring the following changes:

- 107.1.8. a change to the Contract Targets;
- 107.1.9. a change to the Minimum Organic Fraction Percentage and/or the measure of reduction in the biodegradability of Waste in the Composting Hall of the MBT Facility in paragraph 7 of Schedule 24 (MBT Input Composition) of 75% over seven weeks;
- 107.1.10. the method of dealing with the Facility Residues to include but not be limited to a requirement on the part of the Contractor to send (or to cease sending as appropriate) the Facility Residues for quarry restoration.

Subject at all times to the provisions of Schedule 39 (Unitary Charge Adjustment Protocol) including (without limitation) paragraph 5 (Establishing the Estimated Revised Project Costs) of Schedule 39.

**If the Authority requires a change to the Works and/or the Services, it must serve a notice (a “Authority Notice of Change”) on the Contractor in accordance with Clause 107.2.**

**107.2. The Authority Notice of Change shall:**

- 107.2.1. **set out the change in the Works or Services required in sufficient detail to enable the Contractor to calculate and provide the Estimated Change in Project Costs in accordance with Clause 107.3 (the “Estimate”);**
- 107.2.2. **in the event that the Authority Change will require Capital Expenditure, state whether the Authority intends to pay the Contractor the costs involved in implementing the Authority Change or whether the Authority requires the Contractor to use its reasonable efforts to obtain funding in accordance with the Clause 107.9; and**
- 107.2.3. **require the Contractor to provide** the Authority with the Estimate within such reasonable period as the Authority shall specify in the Authority Notice of Change and in setting such period the Authority shall pay due regard to the nature of the proposed Authority Change. If the Contractor believes that it is reasonable to incur third party costs in connection with preparing the relevant Estimate, the Contractor shall notify the Authority within ten (10) Business Days of receiving **the Authority Notice of Change** and the time period for submitting the Estimate shall not commence until the Parties have agreed or it is determined under

Clause 113 (Dispute Resolution) the matters referred to in Clauses 107.8.2 and 107.8.3.

### **Contractor's Estimate**

**107.3. As soon as practicable and in any event before the expiry of the period referred to in Clause 107.2.3 after having received the Authority Notice of Change, the Contractor shall deliver to the Authority the Estimate. The Estimate shall include the opinion of the Contractor on:**

- 107.3.1. whether relief from compliance with obligations is required, including the obligations of the Contractor to achieve the Planned Works Commencement Date, Planned Initial Acceptance Date, Initial Acceptance Longstop Date, Planned Full Service Commencement Date or Full Service Longstop Date or any other Planned Service Commencement Date and meet the requirements set out in the Specification during the implementation of the Authority Change;**
- 107.3.2. any impact on the provision of the Works and/or the Services;**
- 107.3.3. any amendment required to this Contract and/or any Project Document or Ancillary Document or Financing Agreement as a result of the Authority Change;**
- 107.3.4. any Estimated Change in Project Costs that results from the Authority Change;**
- 107.3.5. any loss of revenue (including Third Party Income on the basis set out in The Appendix to Schedule 39 (Unitary Charge Adjustment Protocol)) that results from the Authority Change;**
- 107.3.6. any Capital Expenditure that is required or no longer required as a result of the Authority Change;**
- 107.3.7. any regulatory approvals which are required; and**
- 107.3.8. the proposed method of certification of any construction or operational aspects of the Works or the Services required by the proposed Authority Change if not covered by the procedures specified in Clause 37 (Completion of MBT Facility).**

### **Discussion**

**107.4. As soon as practicable after the Authority receives the Estimate, the Parties shall discuss and agree the issues set out in the Estimate, including:**

- 107.4.1. **providing evidence that the Contractor has used reasonable endeavours (including (where practicable) the use of competitive quotes) to oblige its Sub-Contractors to minimise any increase in costs and maximise any reduction in costs;**
- 107.4.2. **demonstrating how any Capital Expenditure to be incurred or avoided is being measured in a cost effective manner, including showing that when such expenditure is incurred, foreseeable Changes in Law at that time have been taken into account by the Contractor; and**
- 107.4.3. **demonstrating that any expenditure that has been avoided, which was anticipated to be incurred to replace or maintain assets that have been affected by the Authority Change concerned, has been taken into account in the amount which in its opinion has resulted or is required under Clause 107.2.1 and/or 107.2.2 and/or 107.2.3.**

**In such discussions the Authority may modify the Authority Notice of Change, and (if the estimated increase in Capital Expenditure in respect of the Authority Change is expected to exceed £200,000 (Indexed) and it is practical for the Contractor to do so) the Authority may require the Contractor to seek and evaluate competitive tenders for the relevant capital works. In each case the Contractor shall, as soon as practicable, and in any event not more than 14 Days after receipt of such modification, notify the Authority of any consequential changes to the Estimate.**

#### **Value for Money**

- 107.5. **If the Contractor does not intend to use its own resources to implement an Authority Change it shall comply with Good Industry Practice with the objective of ensuring that it obtains best value for money (taking into account all relevant circumstances including, in particular, the requirements that the Contractor should not be worse off as a result of the implementation of the Authority Change) when procuring any work, services, supplies, materials or equipment required in relation to the Authority Change.**

#### **Disputes**

- 107.6. **If the Parties cannot agree on the contents of the Estimate then the dispute will be determined in accordance with the Dispute Resolution Procedure.**

#### **Confirmation or withdrawal of Authority Notice**



**107.7. As soon as practicable after the contents of the Estimate have been agreed or otherwise determined pursuant to the Dispute Resolution Procedure, the Authority shall:**

**107.7.1. confirm in writing the Estimate (as modified if applicable); or**

**107.7.2. withdraw the Authority Notice of Change.**

**Failure to confirm Authority Change**

**107.8. If the Authority does not confirm in writing the Estimate (as modified) within 30 Days of the contents of the Estimate having been agreed in accordance with Clause 107.3 or determined pursuant to Clause 107.6 then the Authority Notice of Change shall be deemed to have been withdrawn. Where there is such a withdrawal (either pursuant to this Clause 107.8 or Clause 107.7 or Clause 107.10 above), the Authority shall pay to the Contractor the reasonable additional third party costs incurred by the Contractor in preparing such Estimate provided that:-**

**107.8.1. the Contractor has used all reasonable endeavours to submit a reasonably priced Estimate;**

**107.8.2. the Contractor has made available to the Authority a cost breakdown of the Estimate including an estimate of third party costs to be incurred by the Authority if the Authority Notice of Change is withdrawn or deemed to be withdrawn;**

**107.8.3. the Authority has:-**

**107.8.3.1. approved the estimate of third party costs referred to in Clause 107.8.2 above and the type of third party prior to any third party costs being incurred; and**

**107.8.3.2. agreed that, given the nature of the proposed Change, it is reasonable to expect the relevant third party to incur costs in preparing the Estimate on the basis of the extent of the proposed change to the Services or the Works and the work required in submitting an accurate Estimate in compliance with this Clause 107.8; and**

**107.8.4. the Contractor has provided the Authority with such evidence as it may reasonably require in order to verify the additional third party costs incurred by the Contractor.**

## **Funding for Capital Expenditure**

- 107.9. In the event that the Estimate (as modified) involves estimated Capital Expenditure then (unless the Authority has elected to fund such costs in accordance with Clause 107.2.2) the Contractor shall use its reasonable endeavours to obtain funding for the whole of the estimated Capital Expenditure, on terms reasonably satisfactory to it and the Senior Lenders.

## **Failure to Obtain Funding for Capital Expenditure**

- 107.10. If the Contractor has used its reasonable endeavours to obtain funding for the whole of the estimated Capital Expenditure, but has been unable to do so within 60 Days of the date that the Authority confirmed the Estimate, then the Contractor shall have no obligation to carry out the Authority Change, unless the Authority agrees within 20 Days of the end of such period to pay the costs for which funding is not available on the basis provided for in Clause 107.13 below.

## **Authority Contribution to Funding**

- 107.11. The Authority may, at any time following the date on which the Estimate is confirmed, agree to meet all or, to the extent the Contractor has obtained funding for part of the Capital Expenditure, the remaining part of the estimated Capital Expenditure.

## **107.12. Adjustment to Annual Unitary Charge**

In the event that the Estimate has been confirmed by the Authority, then the adjustment to the Annual Unitary Charge shall be calculated in accordance with Clause 110 (Financial Adjustments).

## **Method of payment of Authority contribution**

- 107.13. Where the Authority agrees to pay the costs for which funding is not available pursuant to Clause 107.10 above:

107.13.1. the Authority and the Contractor shall agree:

107.13.1.1. a payment schedule in respect of the payment of such sum reflecting the amount and timing of the costs to be incurred by the Contractor in carrying out the Authority Change to the extent borne by the Authority; and

107.13.1.2. where payment for part of a change in Service or Works reflects the carrying out of, or specific progress towards, an

**element within the Authority Change, an objective means of providing evidence confirming that the part of the Authority Change corresponding to each occasion when payment is due under the payment Schedule appears to have been duly carried out,**

**(such payment and evidence to be determined in accordance with the Dispute Resolution Procedure in the event of the Authority and the Contractor failing to agree as to its terms);**

**107.13.2. The Authority shall make a payment to the Contractor within 15 Days of receipt by the Authority of invoices presented to the Authority (complete in all material respects) in accordance with the agreed payment schedule (as the case may be, varied by agreement from time to time) accompanied by the relevant evidence (where applicable) that the relevant part of the Authority Change has been carried out; and**

**107.13.3. if payment is not made in accordance with Clause 107.13.2, the Authority shall pay interest to the Contractor on the amount unpaid from the date 15 Days after receipt of the relevant invoice until paid at the Prescribed Rate.**

#### **Contractor Changes in Service**

**107.14. If the Contractor wishes to introduce a change in the Works or Services or the Contractor's Service Proposals relating to the Services (a "Contractor Change"), it must serve a notice ("Contractor Notice of Change") on the Authority.**

**107.15. The Contractor Notice of Change must:**

**107.15.1. set out the proposed change to the Works or Services in sufficient detail to enable the Authority to evaluate it in full;**

**107.15.2. specify the Contractor's reasons for proposing the change to the Works or Services;**

**107.15.3. request the Authority to consult with the Contractor with a view to deciding whether to agree to the change to the Works or Services and, if so, what consequential changes the Authority requires as a result;**

**107.15.4. indicate any implications of the change to the Works or Services;**

- 107.15.5. **indicate, in particular, whether a variation to the Annual Unitary Charge is proposed (and, if so, give a detailed cost estimate of such proposed change); and**
- 107.15.6. **indicate if there are any dates by which a decision by the Authority is critical.**
- 107.16. **The Authority shall evaluate the Contractor's proposed change to the Works or Services in good faith, taking into account all relevant issues, including whether:**
  - 107.16.1. **a change in the Annual Unitary Charge will occur;**
  - 107.16.2. **the change affects the quality of the Works or Services or the likelihood of successful delivery of the Services;**
  - 107.16.3. **the change will interfere with the relationship of the Authority with third parties;**
  - 107.16.4. **the financial strength of the Contractor is sufficient to perform the changed Works or Services; or**
  - 107.16.5. **the residual value of the Assets is reduced; or**
  - 107.16.6. **the change materially affects the risk or costs to which the Authority is exposed.**
- 107.17. **As soon as practicable after receiving the Contractor Notice of Change the Parties shall meet and discuss the matter referred to in it. During their discussions the Authority may propose modifications or accept or reject the Contractor Notice of Change.**
- 107.18. **If the Authority accepts the Contractor Notice of Change (with or without modification), the relevant change to the Services shall be implemented within 20 Business Days of the Authority's acceptance. Within this period, the Parties shall consult and agree the remaining details as soon as practicable and shall enter into any documents to amend this Contract or any relevant Project Document or Ancillary Document which are necessary to give effect to the change to the Works and/or Services.**
- 107.19. **If the Authority rejects the Contractor Notice of Change, it shall be not obliged to give its reasons for such a rejection.**
- 107.20. **Unless the Authority's acceptance specifically agrees to an increase in the Annual Unitary Charge, there shall be no increase in the Annual Unitary Charge as a result of a change to the Works or Services proposed by the Contractor.**
- 107.21. **If the change to the Works or Services proposed by the Contractor causes or will cause the Contractor's costs or those of a Sub-Contractor to decrease, there shall be a decrease in the Annual**

**Unitary Charge** in accordance with Clause 110 (Financial Adjustments) such that any savings are shared 50:50 between the Authority and the Contractor.

**107.22. The Authority cannot reject a change to the Services which is required in order to conform to a Change in Law. The cost of introducing a change to the Works or Services resulting from a Change in Law (including any resulting variation in the Annual Unitary Charge) shall be dealt with in accordance with Clause 105 (Change in Law) and to the extent not dealt with shall be borne by the Contractor.**

**107.22A Method Statements and Authority Policies**

1. For the avoidance of doubt (without prejudice to the Contractor's ability to propose any other Contractor Notice of Change including without limitation in respect of the Contractor's Service Proposals), the Contractor may at any time from the Contract Commencement Date submit a Contractor Notice of Change to vary any of the Method Statements in a way which departs from the Authority Policies. The Authority shall not be permitted to reject such notice unless it has acted reasonably, in good faith and without delay in determining to reject such notice and shall have consulted the Contractor and provided details of the rejection. Both Parties acknowledge that any such rejection shall be subject to the outcome of the Dispute Resolution Procedure.
2. Any Contractor Change to the Contractor's Service Proposals and the procedures set out in Clauses 107.14 to 107.22 shall be subject to the Review Procedure.

**Contractor Anticipated Changes**

**107.23.** It is acknowledged by the Parties that subject always to the provisions of Schedule 14 (Review Procedure) the Contractor has reserved the right to carry out all or any of the Contractor Anticipated Changes in the Contractor's Service Proposals at any time during the Contract Period and that:

- 107.23.1. pursuant to Schedule 14 (Review Procedure) the Contractor shall notify the Authority in the event that it wishes to implement the Contractor Anticipated Changes and the Authority shall have the opportunity to comment on the proposed implementation and raise objections as provided in Schedule 14; and
- 107.23.2. the Contractor has not included any monies in the Base Case in respect of the Contractor Anticipated Changes and as such (subject to Clause 107.23.3 below) will implement any Contractor Anticipated Changes which it determines to

implement entirely at its own cost and risk; and

- 107.23.3. for the avoidance of doubt, in the event that the Authority requires the implementation of measures the same or similar to any Contractor Anticipated Changes then such requirement shall be introduced by means of an Authority Notice of Change and Clauses 107.1 to 107.13 shall apply and in the event that the Authority requires by means of an Authority Change the implementation measures the same or similar to the Contractor Anticipated Changes the Contractor shall accordingly be entitled to account fully for the Estimated Revised Project Costs in respect thereof in assessing any Authority Notice of Change and shall not be deemed to have included any such costs in its Base Case.

### **Anticipated Changes**

- 107.24. Anticipated Changes are other Changes which reflect matters which were referred to as part of the Contractor's tender and discussed in negotiations between the Parties prior to the Contract Commencement Date but which the Parties subject to Clause 107.23 have agreed will not form part of the Contract at the Contract Commencement Date because their need or effect is insufficiently certain. Neither Party shall accept any obligations in respect of Anticipated Changes save as set out in this Clause 107 (Authority and Contractor Changes).
- 107.25. The Parties have agreed that, should the need for the Anticipated Changes be established through future discussion, circumstance or Authority requirement, the Anticipated Changes may be incorporated into the Contract in accordance with and subject to the provisions of Clause 107.1 (Authority Change).
- 107.26. The Anticipated Changes are all or any of the following:
- 107.26.1. the WEEE Authority Change as provided for in Clause 107.29 (WEEE Authority Change);
  - 107.26.2. the March Anticipated Change pursuant to Schedule 7 (March Anticipated Change);
  - 107.26.3. the operation of any New HWRC;
  - 107.26.4. the construction of any New HWRC;
  - 107.26.5. the construction of a "dutch barn" (additional "maturation" capacity) linked to the MBT Facility;
  - 107.26.6. the design, build, finance and operation of a treatment plant for RDF; and
  - 107.26.7. provision for rendering the MBT Facility capable of producing ABPR Compliant Facility Residues.

107.27. The value of any Anticipated Change shall not be taken into account in calculating the aggregate value of any Authority Changes for the purposes of the provisions of Clause 107.1.5.

**107.28. Exclusivity in relation to Anticipated Changes**

107.28.1. Subject to Clause 17 the Contractor shall be both obliged and entitled to carry out the operation of any New HWRCs and the Authority shall not engage any third party to do so.

107.28.2. For the avoidance of doubt (but without prejudice and subject at all times to Clause 44.1), the Authority is not bound to engage the Contractor through this Contract or otherwise to carry out the Anticipated Changes referred to in Clause 107.26.4, and 107.26.6 and shall be entitled to carry out such services, construction or operations itself or through others.

**107.29. WEEE Authority Change**

The Parties have agreed that (notwithstanding that the WEEE Regulations are in force as at the Contract Commencement Date) it has not been practical to assess the impact of the WEEE Regulations or the manner of the implementation of the WEEE Regulations on the Project (including the Authority's requirements for such implementation), the performance of the Works and or Services and on the Base Case (including without limitation the cost and TPI projections of the Contractor) as at the Contract Commencement Date. Accordingly, they have agreed to manage this issue in the following manner:

107.29.1. No later than 31<sup>st</sup> March 2008 the Authority and the Contractor shall commence dialogue in good faith in order to seek to establish the nature and detail of the WEEE Authority Change to be implemented as set out in this Clause 107.29 and shall meet as reasonably necessary to achieve that objective;

107.29.2. The Parties shall use all reasonable endeavours to agree the nature and detail of the WEEE Authority Change on or before 31<sup>st</sup> March 2009 in which case (subject as provided below) the Authority shall confirm the agreed WEEE Authority Change in writing within 10 Business Days of such agreement and the provisions of Clause 107.1 to 107.13 shall apply;

107.29.3. In the event of disagreement as to the nature and scope of the WEEE Authority Change either Party shall be entitled to refer the matter for resolution to the Disputes Resolution Procedure and in the event of failure to agree the WEEE Authority Change by 31<sup>st</sup> March 2009 the matter shall be

referred for resolution to the Disputes Resolution Procedure within 10 Business Days thereafter;

107.29.4. Without limiting the generality of Clauses 107.1 to 107.13 (Authority and Contractor Changes), the WEEE Authority Change shall set out the impact of WEEE Regulations (including the manner of their implementation as proposed by the Authority) upon the Project assuming that the WEEE Baseline Assumptions applied prior to such implementation including:

- 107.29.4.1. the impact upon the Contractor's Base Case (including costs included therein) including any assumptions as to the projected impact;
- 107.29.4.2. the impact on receipt of Tonnage Based Element including any assumptions as to the projected impact;
- 107.29.4.3. any requirement upon the Contractor to segregate and/or separately store WEEE at any Facility;
- 107.29.4.4. any requirement on the Contractor to operate any Facility as a Designated Collection Facility;
- 107.29.4.5. any requirement on the Contractor to upgrade any Facility so that it can be designated as a Designated Collection Facility (including any amendment to the relevant Waste Management Licence);
- 107.29.4.6. any requirement for the Contractor to enter into any contractual arrangement with any Operator of a Scheme;
- 107.29.4.7. any impact on actual and projected TPI generation by the Contractor including reviewing whether the Bands for Recyclates TPI as set out in Table 9 to the Payment Mechanism (including for the avoidance of doubt Band 1) should be adjusted on the basis that the Contractor should (as provided in Schedule 39 (Unitary Charge Adjustment Protocol) be in 'no better, no worse' position as a result of the WEEE Authority Changes;
- 107.29.4.8. any assumptions and projections as to the future operational impact of the WEEE Regulations (and their implementations)



supporting the WEEE Authority Changes.

The Parties agree that within 20 Business Days of 1<sup>st</sup> October 2010 they shall jointly conduct a review of any divergence between the assumptions and projections contained in the WEEE Authority Change referred to in Clause 107.29.4.8 above and the operational performance of the Project in the period between the HWRC Date and 1st October 2010 in relation to those matters. If there is any divergence the Authority (unless the Parties agree otherwise) shall serve a further WEEE Authority Change in respect of such divergence within 10 Business Days from the review date and the provisions of Clause 107.1 to 107.13 shall apply and in the event of any dispute as to the outcome of such review either Party shall be entitled to refer the matter to the Disputes Resolution Procedure.

## **108. AUTHORITY STEP-IN**

### **Right to Step-In**

**108.1. If the Authority reasonably believes that it needs to take action in connection with the Services:**

**108.1.1. because a serious risk exists to the health or safety of persons or property or to the environment; and/or**

**108.1.2. to discharge a statutory duty,**

**then the Authority shall be entitled to take action in accordance with Clauses 108.2 to 108.5 below.**

**108.2. If Clause 108.1 applies and the Authority wishes to take action, the Authority shall notify the Contractor in writing of the following:**

**108.2.1. the action it wishes to take;**

**108.2.2. the reason for such action;**

**108.2.3. the date it wishes to commence such action;**

**108.2.4. the time period which it believes will be necessary for such action; and**

**108.2.5. to the extent practicable, the effect on the Contractor and its obligation to carry out the Works and/or provide the Services during the period such action is being taken.**

### **Action by Authority**

**108.3. Following service of such notice, the Authority shall take such action as notified under Clause 108.2 and any consequential**

**additional action as it reasonably believes is necessary (together, the “Required Action”) and the Contractor shall give all reasonable assistance to the Authority while it is taking the Required Action.**

#### **Step-In without Contractor Breach**

**108.4. If the Contractor is not in breach of its obligations under this Contract, then for so long as and to the extent that the Required Action is taken, and this prevents the Contractor from providing any part of the Services:**

**108.4.1. the Contractor shall be relieved from its obligations to carry out the Works and/or provide such part of the Services; and**

**108.4.2. in respect of the period in which the Authority is taking the Required Action and provided that the Contractor provides the Authority with reasonable assistance (such assistance to be at the expense of the Authority to the extent that incremental costs are incurred), the Annual Unitary Charge due from the Authority to the Contractor shall equal the amount the Contractor would receive if it were satisfying all its obligations and providing the Services affected by the Required Action in full over that period.**

#### **Step-In on Contractor Breach**

**108.5. If the Required Action is taken as a result of a breach of the obligations of the Contractor under this Contract, then for so long as and to the extent that the Required Action is taken, and this prevents the Contractor from providing any part of the Services:**

**108.5.1. the Contractor shall be relieved of its obligations to provide such part of the Services; and**

**108.5.2. in respect of the period in which the Authority is taking the Required Action, the Annual Unitary Charge due from the Authority to the Contractor shall equal the amount the Contractor would receive if it were satisfying all its obligations and providing the Service affected by the Required Action in full over that period, less an amount equal to all the Authority’s costs of operation in taking the Required Action. Paragraph 6.2 of the Appendix to Schedule 39 (Unitary Charge Adjustment Protocol) shall apply in respect of Third Party Income where Required Action is taken pursuant to this Clause 108.5.**

#### **Performance by the Authority and Third Party Income**

108.6. If the Required Action has been taken as a result of the Contractor not being in breach of its obligations under this Contract, the Authority:

108.6.1. shall ensure that it acts in accordance with Good Industry Practice in carrying out or procuring the carrying out of the Required Action; and

108.6.2. will indemnify the Contractor against any Direct Losses suffered or incurred by the Contractor including any loss of Third Party Income (on the basis set out in the Appendix to Schedule 39 (Unitary Charge Adjustment Protocol) arising as a direct result of any Required Action or any breach by the Authority of this Clause 108.

## **109. RIGHTS OF ACCESS**

This Clause 109 shall be subject to the provisions of Clause 14 (General Obligations of the Authority).

109.1. **The Authority or a representative of the Authority may enter upon any property used by the Contractor to perform the Service, to inspect the construction, operation and maintenance of the Project and to monitor compliance by the Contractor with its obligations.**

109.2. [not used]

109.3. **The Contractor shall procure that satisfactory facilities are made available to the Authority and any representative of the Authority and that reasonable assistance is given for the purposes of Clause 109.1 above, subject to the Contractors and Sub-Contractors construction or operational requirements not being adversely affected, and to reimbursement of any reasonable costs or expenses of the Contractor.**

109.4. **If the Authority is or becomes aware of a breach by the Contractor of its obligations under Clause 68.5 then the Authority may exercise its right of access and remedy such breach and shall be entitled to recover any costs or expenses incurred from the Contractor as a debt (or set off in accordance with Clause 74 (Set Off)).**

109.5. **The Authority and its representative shall at all times comply with any health and safety requirements when exercising its rights under this Clause.**

109.6. **If the Authority or its representative causes material damage to any asset in exercising any right under this Clause, then the Authority shall be liable to the Contractor for the reasonable costs directly caused by such damage.**

## **110. FINANCIAL ADJUSTMENTS AND CUSTODY OF FINANCIAL MODEL**

110.1. Schedule 39 (Unitary Charge Adjustment Protocol) shall apply in relation to:

110.1.1. arrangements for Custody and amendment of the Base Case; and

110.1.2. (save where otherwise provided in this Contract or where the Parties agree otherwise) whenever a Relevant Event occurs to determine the financial consequences and (if applicable) to determine any adjustment to and the Annual Unitary Charge.

110.1.3. to establish the basis upon which the Contractor will (in the circumstances provided for in this Contract) be compensated for lost Third Party Income

#### **111. AUDIT ACCESS AND OMBUDSMAN CO-OPERATION**

111.1. Notwithstanding the provisions of Clause 121 (Freedom of Information and Confidentiality) the Contractor shall co-operate fully and in a timely manner with any reasonable request from time to time of any auditor (whether internal or external) of the Authority.

111.2. Where reasonably requested by the auditor referred to under Clause 111.1, at the expense of the Contractor, the Contractor shall provide documents, or to procure the provision of documents, relating to the Project, and to provide, or to procure the provision of, any oral or written explanation relating to the same.

111.3. The Contractor shall co-operate fully with the Local Ombudsman as defined in the Local Government Act 1974 and with the Authority in the investigation of a complaint against the Authority which relates to the defective or non-performance of this Contract by the Contractor.

#### **112. REFINANCING**

112.1. **The Contractor shall obtain the Authority's prior written consent to any Qualifying Refinancing and both the Authority and the Contractor shall at all times act in good faith with respect to any Refinancing.**

112.2. **The Authority shall be entitled to receive a 50 per cent share of any Refinancing Gain arising from a Qualifying Refinancing.**

112.3. **The Authority shall not withhold or delay its consent to a Qualifying Refinancing to obtain a greater than 50 per cent share of the Refinancing Gain.**

112.4. **The Contractor shall promptly provide the Authority with full details of any proposed Qualifying Refinancing including a copy of the proposed financial model relating to it (if any) and the basis for the assumptions used in the proposed financial model. The**

**Authority shall (before, during and at any time after any Refinancing) have unrestricted rights of audit over any financial model and documentation (including any aspect of the calculation of the Refinancing Gain) used in connection with that Refinancing whether the Refinancing is a Qualifying Refinancing or not).**

**112.5. The Authority shall have the right to elect to receive its share of any Refinancing Gain as:**

**112.5.1. a single payment in an amount less than or equal to any Distribution made on or about the date of the Refinancing;**

**112.5.2. a reduction in the Annual Unitary Charge over the remainder of the Contract Period; or**

**112.5.3. a combination of any of the above,**

**112.6. The Authority and the Contractor will negotiate in good faith to agree the basis and method of calculation of the Refinancing Gain any payment of the Authority's share of the Refinancing Gain (taking into account how the Authority has elected to receive its share of the Refinancing Gain under Clause 112.5 (Receipt of Gain)). If the Parties fail to agree the basis and method of calculation of the Refinancing Gain or the payment of the Authority's share, the dispute shall be determined in accordance with Clause 113 (Dispute Resolution).**

**112.7. The Refinancing Gain shall be calculated after taking into account the reasonable and proper professional costs that each Party directly incurs in relation to the Qualifying Refinancing and on the basis that all reasonable and proper professional costs incurred by the Authority will be paid to the Authority by the Contractor within 28 Business Days of any Qualifying Refinancing.**

### **113. DISPUTE RESOLUTION**

#### **113.1. Disputes**

**113.1.1. Any dispute arising in relation to any aspect of this Contract shall be resolved in accordance with this Clause 113.**

#### **113.2. Consultation**

**113.2.1. If a dispute arises in relation to any aspect of this Contract, the Contractor and the Authority shall consult in good faith in an attempt to come to an agreement in relation to the disputed matter.**

#### **113.3. Adjudication**

**113.3.1. Without prejudice to Clause 113.2, either Party may give the**

other notice at any time of its intention to refer the dispute to adjudication (the "Notice of Adjudication"). The Notice of Adjudication shall include a brief statement of the issue to be referred and the redress sought. The party giving the Notice of Adjudication (the "Referring Party") shall on the same day and by the same means of communication send a copy of the Notice of Adjudication to an adjudicator selected in accordance with Clause 113.4 (Identity of Adjudicator).

#### **113.4. Identity of Adjudicator**

113.4.1. The Adjudicator nominated to consider a dispute referred to him shall be selected on a strictly rotational basis from the relevant panel of experts selected in accordance with the following:

- 113.4.1.1. there shall be three (3) panels of experts, one (1) in respect of construction matters (the "Construction Panel"), one (1) in respect of operational and maintenance matters (the "Operational Panel") and one (1) in respect of environmental matters (the "Environmental Panel"). All the experts on each panel shall be wholly independent of the Contractor, the Authority, the relevant Sub-Contractor and any of the major competitors of the Contractor or relevant Sub-Contractor;
- 113.4.1.2. the Construction Panel shall be comprised of three (3) experts who shall be selected jointly by the Contractor and the Authority. Such appointments shall take place within 60 Days of the Contract Commencement Date;
- 113.4.1.3. the Operational Panel shall be comprised of three (3) experts who shall be selected jointly by the Contractor and the Authority. Such appointments shall take place within 60 Days of the Contract Commencement Date;
- 113.4.1.4. the Environmental Panel shall be comprised of three (3) experts who shall be selected jointly by the Contractor and the Authority within sixty (60) Days of the Contract Commencement Date;
- 113.4.1.5. if any member of a panel resigns or dies during the Contract Period, a replacement expert shall be selected by the Contractor and the Authority as soon as practicable;

- 113.4.1.6. in the event that the nominated Adjudicator is unable or unwilling to confirm acceptance of his appointment as Adjudicator within two (2) Business Days of receipt of the Notice of Adjudication, or if the Parties disagree as to the relevant panel of experts to be used, the Referring Party may apply to the President for the time being of TeCSA who shall within 3 Business Days of any such application nominate an Adjudicator to determine the issue set out in the Notice of Adjudication.
- 113.4.1.7. if the Authority and the Contractor are unable to agree on the identity of the experts to be selected to the panels, the President for the time being of the TeCSA shall appoint such expert(s) within thirty (30) Days of any application for such appointment by either party.

#### **113.5. Referral of the Dispute**

- 113.5.1. Within five (5) Business Days of the service of the Notice of Adjudication, or as soon thereafter as the Adjudicator is appointed, the Referring Party shall serve its statement of case (the "Referral Notice") on the Adjudicator and the other party (the "Responding Party").
- 113.5.2. The Referral Notice shall include a copy of this Contract, details of the circumstances giving rise to the dispute as set out in the Notice of Adjudication, the reasons why the Referring Party is entitled to the redress sought, and the evidence upon which it relies.

#### **113.6. Response to the Referral**

The Responding Party shall serve its statement of case (the "Response") on the Adjudicator and the Referring Party (within a period of time to be directed by the Adjudicator). The Response shall include any arguments in response to the Referral Notice of the dispute set out in the Notice of Adjudication and any additional evidence on which the Responding Party relies.

#### **113.7. Procedure**

Subject to Clause 113.11, the Adjudicator shall have absolute discretion as to how to conduct the adjudication, including whether a meeting is necessary. He shall establish the procedure and timetable subject to any limitation within this Contract. The Parties shall comply with any request or direction of the Adjudicator in relation to the adjudication.

### **113.8. Adjudicator's Decision**

- 113.8.1. In any event, the Adjudicator shall provide to both Parties his written decision on the dispute, within twenty eight (28) Days after the date of receipt of the Referral Notice (or such other period as the Parties may agree after the dispute has been referred). The Adjudicator shall be entitled to extend the said period of twenty eight (28) Days by up to 14 Days with the consent of the Referring Party.
- 113.8.2. The Adjudicator shall state any reasons for his decision.
- 113.8.3. Unless and until opened up, revised, cancelled or varied by the English courts, the Adjudicator's decision shall be binding on both parties who shall forthwith give effect to the decision.

### **113.9. Adjudicator's Costs**

- 113.9.1. Subject to Clause 113.19 (Costs):-
  - 113.9.1.1. the Adjudicator's costs of any referral shall be borne as the Adjudicator shall specify or, in default, equally by the Parties;
  - 113.9.1.2. each Party shall bear its own costs arising out of the referral, including legal costs and the costs and expenses of any witnesses.

### **113.10. Adjudicator as Expert**

The Adjudicator shall be deemed not to be an arbitrator but shall render his decision as an expert, and the provisions of the Arbitration Act 1996 and the law relating to arbitration shall not apply to the Adjudicator or his determination or the procedure by which he reached his determination.

### **113.11. Adjudicator's Powers**

The Adjudicator shall act fairly and impartially and may take the initiative in ascertaining the facts and the law. The Adjudicator shall have the power to open up, review and revise any opinion, certificate, instruction, determination or decision of whatever nature given or made under this Contract.

### **113.12. Confidentiality**

All information, data or documentation disclosed or delivered by a party to the Adjudicator in consequence of or in connection with his appointment as Adjudicator shall be treated as confidential. The Adjudicator shall not, save as permitted by Clause 121 (Freedom of Information and Confidentiality), disclose to any person or company



any such information, data or documentation and all such information, data or documentation shall remain the property of the party disclosing or delivering the same and all copies shall be returned to such party on completion of the Adjudicator's work.

#### **113.13. Liability of Adjudicator**

The Adjudicator is not liable for anything done or omitted in the discharge or purported discharge of his functions as Adjudicator unless the act or omission is in bad faith. Any employee or agent of the Adjudicator is similarly protected from liability.

#### **113.14. Reference to the Courts**

If:

113.14.1. there is any dispute in respect of matters referred to in Part 5 (Termination), Clause 105 (Change in Law), Clause 107 (Authority and Contractor Changes), Clause 110 (Financial Adjustment) and the Unitary Charge Adjustment Protocol; or

113.14.2. either Party is dissatisfied with or otherwise wishes to challenge the Adjudicator's decision made in accordance with Clause 113.8 (Adjudicator's Decision); or

113.14.3. both Parties agree,

then either Party may (if applicable within ninety (90) Days of receipt of the Adjudicator's decision or where the Adjudicator fails to give a decision pursuant to Clause 113.8) give notice to the other Party of its intention to refer the dispute to the courts of England and Wales for final determination.

#### **113.15. Parties' Obligations**

The Parties shall continue to comply with, observe and perform all their obligations hereunder regardless of the nature of the dispute and notwithstanding the referral of the dispute for resolution under this Clause and shall give effect forthwith to every decision of the Adjudicator and the courts delivered under this Clause 113.

#### **113.16. Similar Disputes**

113.16.1. If any dispute arising under this Contract raises issues which relate to:

113.16.1.1. any dispute between the Contractor and the Construction Sub-Contractor and/or the New Facilities Construction Sub-Contractor arising under the Construction Contract or the New Facility Construction Contract or otherwise affects the relationship or rights of the

Contractor and/or the or under the Construction Contract or the New Facility Construction Contract (the "Construction Contract Dispute"); or

- 113.16.1.2. any dispute between the Contractor and the Operating Sub-Contractor arising under the Operating Contract or otherwise affects the relationship or rights of the Contractor and/or the Operating Sub-Contractor under the Operating Contract (the "Operating Contract Dispute"),

then the Contractor may include as part of its submissions made to the Adjudicator or to the court submissions made by the Construction Sub-Contractor and/or the New Facilities Construction Sub-Contractor or by the Operating Sub-Contractor as appropriate.

#### **113.17. Jurisdiction over Sub-Contractors**

The Adjudicator shall not have jurisdiction to determine the Construction Contract Dispute or the Operating Contract Dispute but the decision of the Adjudicator and/or the courts shall, subject to Clause 113.14 (Reference to the Courts), be binding on the Contractor and the Construction Sub-Contractor and/or the New Facilities Construction Sub-Contractor insofar as it determines the issues relating to the Construction Contract Dispute and on the Contractor and the Operating Sub-Contractor insofar as it determines the issues relating to the Operating Contract Dispute.

#### **113.18. Sub-Contractors' Submissions**

- 113.18.1. Any submissions made by the Construction Sub-Contractor and/or the New Facilities Construction Sub-Contractor or the Operating Sub-Contractor shall:

- 113.18.1.1. be made within the time limits applicable to the delivery of submissions by the Contractor; and
- 113.18.1.2. concern only those matters which relate to the dispute between the Authority and the Contractor under this Contract.

#### **113.19. Costs**

- 113.19.1. Where the Construction Sub-Contractor and/or the New Facilities Construction Sub-Contractor or the Operating Sub-Contractor makes submissions in any reference before:

- 113.19.1.1. the Adjudicator:

- a) the Adjudicator's costs of such reference shall be borne as the Adjudicator shall specify, or in default, one-third by the Authority and two-thirds (2/3) by the Contractor;
- b) the costs of the Adjudication shall be in the discretion of the Adjudicator;

113.19.1.2. the courts, the costs of the litigation shall be in the discretion of the court.

#### **113.20. Authority's Liability**

The Authority shall have no liability to the New Facilities Construction Sub-Contractor or the Operating Sub-Contractor arising out of or in connection with any decision of the Adjudicator or courts or in respect of the costs of the Construction Contract or the Operating Contract in participating in the resolution of any dispute under this Contract.

#### **113.21. Access to Documents**

113.21.1. The Contractor shall not allow the Construction Sub-Contractor and/or the New Facilities Construction Sub-Contractor or the Operating Sub-Contractor access to any document relevant to issues in dispute between the Authority and the Contractor save where:

113.21.1.1. the document is relevant also to the issues relating to the Construction Contract Dispute or the Operating Contract Dispute as the case may be; and

113.21.1.2. the Contractor has first delivered to the Authority a written undertaking from the Construction Sub-Contractor and/or the New Facilities Construction Sub-Contractor or the Operating Sub-Contractor (as appropriate) addressed to the Authority that they shall not use any such document otherwise than for the purpose of the Dispute Resolution Procedure under this Contract and that they shall not disclose such documents or any information contained therein to any third party other than the Adjudicator or the courts or any professional adviser engaged by the Construction Sub-Contractor and/or the New Facilities Construction Sub-Contractor or the Operating Sub-Contractor (as appropriate) to advise in connection with the dispute.

#### **114. MITIGATION**

- 114.1. Each of the Authority and the Contractor shall at all times take all reasonable steps to minimise and mitigate any loss for which the relevant Party is entitled to bring a claim against the other Party pursuant to this Contract.

#### **115. INDEMNITIES**

- 115.1. **The Contractor shall subject to Clause 115.2 (including 115.2A) to 115.5 be responsible for, and shall release and indemnify the Authority, its employees, agents and contractors on demand from and against all liability for:**

- 115.1.1. **death or personal injury;**
- 115.1.2. **loss of or damage to property (including property belonging to the Authority or for which it is responsible ("Authority Property")) (but excluding the Works or the Facilities);**
- 115.1.3. **(subject to Clause 115.4.3) breach of statutory duty; and**
- 115.1.4. **third party actions, claims, demands and any costs, charges and expenses (including legal expenses on an indemnity basis) arising out of and/or associated with such third party actions, claims or demands;**

**which may arise out of or in consequence of:**

- a) **in the case of Clauses 115.1.1, 115.1.2, 115.1.4, the design, construction, operation or maintenance of the Assets provided by the Contractor or the performance or non-performance by the Contractor of its obligations under this Contract or the presence on the Authority property of the Contractor, a sub-contractor of the Contractor (of any tier), their employees or agents;**
  - b) **in the case of Clause 115.1.3 (breach of statutory duty) which may arise out of the failure by the Contractor to comply with its express obligations under this Contract;**
- 115.2. **The Contractor shall not be responsible or be obliged to indemnify the Authority for:**
- 115.2.1. **any of the matters referred to in Clause 115.1 above which arises as a direct result of the Contractor acting on the instruction of the Authority;**
  - 115.2.2. **any injury, loss, damage, cost and expense caused by the negligence or wilful misconduct of the Authority, its**

**employees, agents or contractors or by the breach by the Authority of its obligations under this Contract;**

- 115.2.3. Indirect Losses except to the extent that such Indirect Losses are covered under the Required Insurance;
  - 115.2.4. Losses arising from a Force Majeure Event (except to the extent that such Loss is covered under a Required Insurance) which shall be borne by the Contractor and the Authority each as to its own losses;
  - 115.2.5. Tradeable Landfill Allowances (or any fines imposed under the Waste Emissions and Trading Act 2003 and associated regulations (or any other legislation from time to time) in respect of the Landfilling of Contract Waste without possessing any required Tradeable Landfill Allowances) or any actual or deemed loss of income in connection with the trading of Tradeable Landfill Allowances;
  - 115.2.6. Income derived from the sale of or transfer of an interest in the ownership of Waste;
  - 115.2.7. WCA Claims;
  - 115.2.8. Tipping Away Payments (which for the avoidance of doubt shall be dealt with in accordance with Schedule 26 (Payment Mechanism)).
  - 115.2.9. Liability for breach of statutory duty or duties which relate to the diversion of Waste from Landfill (whether by Recycling, Composting or howsoever otherwise).
- 115.2A Clause 115.1 (Indemnities) shall not apply in relation to Contamination or claims relating to Contamination which are intended by the Parties to be dealt with in Schedule 48 (Environmental Matters). Accordingly this Clause 115.2A is without prejudice to the provisions of Schedule 48 (Environmental Matters) (including without limitation any indemnities therein).
- 115.3. **An indemnity by either Party under any provision of this Contract shall be without limitation to any indemnity by that Party under any other provision of this Contract.**
- 115.4. **Limit on indemnities**
- 115.4.1. Subject to Clause 115.4.3, the maximum aggregate amount for which the Contractor shall be liable to indemnify in respect of all claims (taken together) under Clause 115.1 in respect of Losses against which the Contractor is not required to maintain insurance pursuant to Clause 118 (Insurance) (excluding for the avoidance of doubt any excesses or deductibles relating to the Required

Insurances) shall be [REDACTED]  
[REDACTED] in aggregate in respect of all such Losses.

115.4.2. In respect of Losses other than those referred to in Clause 115.4.1 the maximum aggregate amount for which the Contractor shall be liable to indemnify the Authority under the indemnities contained in Clause 115.1 shall be the greater of:

115.4.2.1. the amount that is required to be covered under the terms of Clause 118 (Insurance) and Schedule 36 (Required Insurances) in respect of such Losses; or

115.4.2.2. the amount which would have been recovered if the Required Insurance had been maintained as required under Clause 118 (Insurance) and Schedule 36 (Required Insurances).

115.4.3. Without limiting Clause 115.4.1 (so that the monetary cap referred to in this Clause 115.4.3 shall be within (and not in addition to) the cap on liability specified in Clause 115.4.1) the Contractor's liability under Clause 115.1.3 in respect of breach of statutory duty shall not exceed [REDACTED]  
[REDACTED] in aggregate in any Contract Year and for the avoidance of doubt, the Authority shall not be entitled to carry forward a claim (or any part of any claim) arising in one Contract Year pursuant to Clause 115.1.3 to any subsequent Contract Year or Contract Years.

115.5. The Authority shall subject to Clause 115.6 be responsible for, and shall release and indemnify the Contractor, its employees and agents on demand from and against all liability for:

115.5.1. death or personal injury;

115.5.2. third party actions, claims, demands and any costs, charges and expenses (including legal expenses on an indemnity basis) associated with such third party actions, claims or demands

which may arise out of, or in consequence of the default or negligence or wilful act of the Authority or a breach by the Authority of its obligations under this Contract.

115.6. The Authority shall not be responsible or be obliged to indemnify the Contractor under Clause 115.5 for:

115.6.1. any injury, loss, damage, cost and expense caused by the negligence or wilful misconduct of the Contractor or any Contractor Related Party or by the breach by the Contractor

of its obligations under this Contract;

115.6.2. any Indirect Losses;

115.6.3. losses arising from a Force Majeure Event which shall be borne by the Authority and the Contractor each as to its own losses.

115.6A Clause 115.5 shall not apply in relation to Contamination or claims relating to Contamination which are intended by the Parties to be dealt with in Schedule 48 (Environmental Matters). Accordingly this Clause 115.6A is without prejudice to the provisions of Schedule 48 (Environmental Matters) including without limitation any indemnities therein.

#### **115.7. Conduct of Claims**

This Clause 115.7 shall apply to the conduct, by a Party from whom an indemnity is sought under this Contract, of claims made by a third person against a Party having (or claiming to have) the benefit of the indemnity. The Party having, or claiming to have, the benefit of the indemnity is referred to as the "Beneficiary" and the party giving the indemnity is referred to as the "Indemnifier" and shall be subject at all times to the requirements of the relevant insurer. Accordingly:

115.7.1. if the Beneficiary receives any notice, demand, letter or other document concerning any claim for which it appears that the Beneficiary is, or may become entitled to, indemnification under this Contract, the Beneficiary shall give notice in writing to the Indemnifier as soon as reasonably practicable and in any event within twenty (20) days of receipt of the same;

115.7.2. subject to Clauses 115.7.3, 115.7.4 and 115.7.5 and on the giving of a notice by the Beneficiary pursuant to Clause 115.7.1 where it appears that the Beneficiary is or may be entitled to indemnification from the Indemnifier in respect of all (but not part only) of the liability arising out of the claim, the Indemnifier shall (subject to providing the Beneficiary with a secured indemnity to its reasonable satisfaction against all costs and expenses that it may incur by reason of such action) be entitled to dispute the claim in the name of the Beneficiary at the Indemnifier's own expense and take conduct of any defence, dispute, compromise, or appeal of the claim and of any incidental negotiations. The Beneficiary shall give the Indemnifier all reasonable co-operation, access and assistance for the purposes of considering and resisting such claim;

115.7.3. with respect to any claim conducted by the Indemnifier pursuant to Clause 115.7.2:



- 115.7.3.1. the Indemnifier shall keep the Beneficiary fully informed and consult with it about material elements of the conduct of the claim;
- 115.7.3.2. the Indemnifier shall not bring the name of the Beneficiary into disrepute; and
- 115.7.3.3. the Indemnifier shall not pay or settle such claims without the prior consent of the Beneficiary, such consent not to be unreasonably withheld or delayed;
- 115.7.4. The Beneficiary shall be free to pay or settle any claim on such terms as it thinks fit and without prejudice to its rights and remedies under this Contract if:
  - 115.7.4.1. the Indemnifier is not entitled to take conduct of the claim in accordance with Clause 115.7.2; or
  - 115.7.4.2. the Indemnifier fails to notify the Beneficiary of its intention to take conduct of the relevant claim within twenty (20) Business Days of the notice from the Beneficiary under Clause 115.7.1 or notifies the Beneficiary that it does not intend to take conduct of the claim; or
  - 115.7.4.3. the Indemnifier fails to comply in any material respect with the provisions of Clause 115.7.3;
- 115.7.5. The Beneficiary shall be free at any time to give notice to the Indemnifier that it is retaining or taking over (as the case may be) the conduct of any defence, dispute, compromise or appeal of any claim (or of any incidental negotiations) to which Clause 115.7.2 applies. On receipt of such notice the Indemnifier shall promptly take all steps necessary to transfer the conduct of such claim to the Beneficiary, and shall provide to the Beneficiary all reasonable co-operation, access and assistance for the purposes of considering and resisting such claim. If the Beneficiary gives any notice pursuant to this Clause 115.7.5, then the Indemnifier shall be released from any liability under its indemnity under Clause 115.1 or Clause 115.3 (as the case may be) and, without prejudice to any accrued liabilities, any liability under its indemnity given pursuant to Clause 115.7.2 in respect of such claim;
- 115.7.6. If the Indemnifier pays to the Beneficiary an amount in respect of an indemnity and the Beneficiary subsequently recovers (whether by payment, discount, credit, saving, relief or other benefit or otherwise) a sum which is directly



referable to the fact, matter, event or circumstances giving rise to the claim under the indemnity, the Beneficiary shall forthwith repay to the Indemnifier whichever is the lesser of:

- 115.7.6.1. an amount equal to the sum recovered (or the value of the saving or benefit obtained) less any out-of-pocket costs and expenses properly incurred by the Beneficiary in recovering the same; and
- 115.7.6.2. the amount paid to the Beneficiary by the Indemnifier in respect of the claim under the relevant indemnity,

provided that there shall be no obligation on the Beneficiary to pursue such recovery and that the Indemnifier is repaid only to the extent that the amount of such recovery aggregated with any sum recovered from the Indemnifier exceeds any loss sustained by the Beneficiary (including for this purpose indirect or consequential losses or claims for loss of profits which are excluded by this Contract from being recovered from the Indemnifier); and

- 115.7.7. any person taking any of the steps contemplated by Clauses 115.7.1 to 115.7.6 shall comply with the requirements of any insurer who may have an obligation to provide an indemnity in respect of any liability arising under this Contract.

115.8. This Clause 115 is concerned with the provision of indemnities and financial limits to such indemnities and is subject to Clause 118 (Insurance).

## **116. EXCLUSIVE REMEDIES AND ACCRUED RIGHTS**

### **116.1. Payment Mechanism: No double remedy**

#### **Subject to:-**

- 116.1.1. any other express right of the Authority pursuant to this Contract; and
- 116.1.2. the Authority's right to claim, on or after termination of this Contract, the amount of its reasonable costs, losses, damages and expenses suffered or incurred by it as a result of rectifying or mitigating the effects of any breach of this Contract by the Contractor, save to the extent that the same has already been recovered by the Authority pursuant to this Contract or has been taken into account to calculate any compensation payable by the Authority pursuant to Clauses 96 (Compensation on Termination for Force Majeure), 92 (Compensation on

**Termination for Contractor Default), 93 (Compensation on Voluntary Termination), 94 (Compensation on Termination for Authority Default) or 95 (Compensation on Corrupt Gifts, Fraud and Refinancing Breaches),**

**the sole remedy of the Authority in respect of a failure to provide the Services and/or for Unavailability at any stage after the relevant Service Commencement Date in accordance with the Contract shall be the operation of Clause 73 (Invoicing and Payment) and Schedule 26 (Payment Mechanism).**

**116.2. Termination rights and Compensation on Termination**

116.2.1. Any payment of compensation shall be in full satisfaction of any claim which can be made against the Authority by the Contractor in relation to termination of this Contract or any Project Document. The compensation payable under Clause 94 (Compensation on Authority Default), Clause 96 (Compensation for Force Majeure) Clause 94 (Voluntary Termination), Clause 95 (Compensation for breach of Refinancing provisions and Corrupt Gifts and Fraud) shall be the sole remedy of the Contractor against the Authority in respect of termination of the Contract but without prejudice to any liability of the Authority arising prior to the Termination Date (but not from termination itself) that has not been taken into account in determining the amount of Termination compensation payable.

116.2.2. The Authority shall have no right to terminate this Contract following any breach of Contract by the Contractor (whether in common law, equity or otherwise) except in the manner set out in Clause 84 (Termination on Contractor Default) pursuant to a Contractor Default.

116.2.3. For the avoidance of doubt, (without prejudice to any express remedy under the Payment Mechanism) a breach by the Contractor of Clause 23 (Principal Obligations):

116.2.3.1. shall not entitle the Authority to claim liquidated damages or general damages; and

116.2.3.2. shall not by itself be capable of giving rise to a Contractor Default under limb (a) or (b) of that definition.

**116.3. Accrued Rights**

Save as provided in this Clause 116.3, the termination of this Contract howsoever arising shall be without prejudice to the rights, duties and liabilities of either Party accrued prior to the Termination Date that has

not been taken into account in determining the amount of compensation payable.

#### **116.4. Compensation Events**

Subject to (and without limitation to) any other express right or remedy (including (without limiting the generality of the foregoing) under any indemnity or Termination in respect of an Authority Default)) of the Contractor pursuant to this Contract the sole remedy of the Contractor in respect of a breach of this Contract by the Authority which is a Compensation Event under:

116.4.1. (without limitation to Clause 116.4.2) Clause 36 (Compensation Events) shall be to claim the compensation and other reliefs, extensions of time and rights available to it pursuant to Clause 36 (Compensation Events); and

116.4.2. (without limitation to Clause 116.4.1) Clause 46 (Service Delay) shall be to claim the compensation and other reliefs, extensions of time and rights available to it pursuant to Clause 46 (Service Delay)

PROVIDED THAT for the avoidance of doubt (and notwithstanding the foregoing):

- a) this Clause shall not operate as a waiver by the Contractor of or otherwise reduce or prejudice in any way the rights of the Contractor in respect of a breach by the Authority of its obligations whether arising under this Contract, in common law, statute in equity (including tort) or howsoever otherwise which breach is not a Compensation Event under Clause 36 (Compensation Event) and/or Clause 46 (Service Delay) respectively;
- b) where a breach of Contract is a Compensation Event under Clause 36 (Compensation Events) but is not also a Service Period Compensation Event under Clause 46 (Service Delay) this Clause 116.4 shall not (save to the extent that such breach is a Compensation Event under Clause 36) exclude or operate as a waiver or otherwise reduce or prejudice the rights of the Contractor in respect of that breach by the Authority whether arising under this Contract, in common law, statute in equity (including tort) or howsoever otherwise.

#### **116.5. Equitable relief**

**Nothing in this Clause 116 shall prevent or restrict the right of either Party to seek injunctive relief or a decree of specific performance or other discretionary remedies of the Court.**

#### **116.6. Requirement to recover under insurance**

Where any event giving rise to a claim (including for the avoidance of

doubt a claim for a Compensation Event, Service Period Compensation Event and/or an Excusing Cause) pursuant to this Contract by either Party against the other Party is or would be covered by insurance (whether a Required Insurance or otherwise) required to be maintained pursuant to this Contract, the Parties shall seek first to recover any losses under such insurance before making any claim against the other Party PROVIDED THAT the amount of any deductible or excess in relation to such insurance shall not be deemed to be "covered by insurance" for the purposes of this Clause 116.6.

**116.7. No double counting**

Notwithstanding any other provision of this Contract neither Party shall be entitled to recover compensation, seek relief or an Excusing Cause or make a claim under this Contract (or upon termination of this Contract) in respect of any loss that it has incurred (or any failure of the other Party) to the extent that it has already been fully compensated in respect of that loss or failure pursuant to the Contract or otherwise (including without limitation through an insurance policy whether a Required Insurance or otherwise).

**116.8. Statutory Targets**

116.8.1. For the avoidance of doubt (save to the extent that compliance with such Legislation (or statutory requirements) binding upon the Authority is expressly set out in this Contract as an obligation of the Contractor) wherever in this Contract the Contractor undertakes to comply with Legislation (including any statutory requirements) such an undertaking shall refer to Legislation or statutory requirements applicable to the Contractor or Contractor Related Parties. Without prejudice to the Authority's express remedies for breaches of contract set out in this Contract (including under Clause 115 (Indemnities)) the Contractor shall not be responsible for the discharge of the Authority's statutory duties on the Authority's behalf or for achieving the Authority's Statutory Targets or the consequences of failing to discharge such statutory duties or failure to achieve the Authority's Statutory Targets save to the extent that such responsibility is expressly set out in this Contract as an obligation of the Contractor.

116.8.2. For the avoidance of doubt, (but without prejudice to the express remedies of the Authority under Schedule 26 (Payment Mechanism), or to the calculation of Post Termination Service Amounts), the Contractor shall not be liable to the Authority to pay any sum in respect of:

116.8.2.1. any Tradeable Landfill Allowance which may be required by the Authority; or

116.8.2.2. any fine to which the Authority or any other person may be subject as a result of the Authority being held to have been responsible for Landfilling any Contract Waste in the absence of appropriate Tradeable Landfill Allowance in respect of such Contract Waste; or

116.8.2.3. any actual or deemed loss of income in connection with the trading of Tradeable Landfill Allowances,

whether arising out of or in connection with the performance or non performance of its obligations under this Contract by the Contractor or on termination or howsoever otherwise.

116.9. Where the Authority would otherwise be expressly liable to make a payment (by way of compensation, indemnity or otherwise) to the Contractor including amounts which, in turn, comprise payments payable by the Contractor to any Sub-Contractor and/or which will be payable by the Contractor to any Sub-Contractor, the Authority shall not be entitled to withhold, reduce or avoid any such payment to the Contractor in reliance only on the fact that the amount which is due from the Contractor to the Sub-Contractor or the entitlement of the Sub-Contractor to payment of such amount is conditional on the entitlement of or receipt of payment by the Contractor from the Authority.

#### **117. DISCLAIMER OF ONEROUS PROPERTY**

117.1. In the event that one or more of the circumstances described in limbs (c), (d), (e) or (f) of the definition of Contractor Default (or any other event of insolvency of the Contractor) occurs any amounts standing to the credit of the Joint Insurance Account (and/or any other joint accounts held by the Parties for the purpose of this Contract) shall be applied for the purposes they were intended by the Parties notwithstanding the disclaimer of any onerous property by any administrator (or other relevant person) acting on behalf of the Contractor (and/or Holdco) to which such amounts are related PROVIDED ALWAYS that any such amounts are deemed to have been received by the Authority for the purpose of the definitions of "Adjusted Estimated Fair Value of the Contract" and "Adjusted Highest Compliant Tender Price".

#### **118. INSURANCE**

118.1. **Subject to the provisions of this Clause 118 (Insurance) the Contractor shall during the Contract Period take out and maintain or procure the maintenance of the insurances described in Part 1 and Part 2 of Schedule 36 (Required Insurances) and any other insurances as may be required by law. These insurances must be**

effective in each case on the date specified in Schedule 36 (Required Insurances) or if no date is specified **not later than the date on which the relevant risk commences.**

- 118.1A Notwithstanding Clause 118.1 the Contractor shall not be obliged to comply with Clause 118.1 above in relation to Part 2 of Schedule 36 (Required Insurances) for the period and to the extent set out in the Insurance Side Letter. For the avoidance of doubt, the provisions of the Insurance Side Letter and this Clause 118.1A shall not affect the Contractor's obligation to take out and maintain the insurances described in Part 1 of Schedule 36 (Required Insurances), Environmental Impairment Liability Insurance in accordance with Section 4 of Part 2 of Schedule 36 (Required Insurances) or any other insurances as may be required by law.
- 118.2. **No Party to this Contract shall (and the Contractor shall use all reasonable endeavours to procure that none of its sub-contractor's of any tier shall) take any action or fail to take any reasonable action, or (insofar as it is reasonably within its power) permit anything to occur in relation to it, which would entitle any insurer to refuse to pay any claim under any Required Insurance policy in which that Party is an insured, a co-insured or additional insured person noted on the policy.**
- 118.3. **Required Insurances shall:**
- 118.3.1. where the Authority is to be a co-insured party in accordance with Schedule 36 (Required Insurances) **name the Authority and the Contractor as co-insured with any other party maintaining the insurance;**
  - 118.3.2. **provide for non-vitiation protection in respect of any claim made by the Authority as co-insured in accordance with Endorsement 2 in Part 3 of Schedule 36 (Required Insurances);**
  - 118.3.3. **contain a clause waiving the insurers' subrogation rights against the Authority, its employees and agents in accordance with Endorsement 2 in Part 3 of Schedule 36 (Required Insurances);**
  - 118.3.4. **provide for 30 Days prior written notice of their cancellation, non-renewal or amendment to be given to the Authority in accordance with Endorsement 1 in Part 3 of Schedule 36 (Required Insurances);**
  - 118.3.5. **in respect of Physical Damage Policies provide for payment of any proceeds received by the Contractor to be applied in accordance with Clause 119 (Reinstatement after Insured Event).**

**118.4. The Contractor shall provide to the Authority:**

**118.4.1. copies on request of all Required Insurance policies (together with any other information reasonably requested by the Authority relating to such insurance policies) and the Authority shall be entitled to inspect them during ordinary business hours; and**

**118.4.2. evidence that the premiums payable under all insurances policies have been paid and that the insurances are in full force and effect in accordance with the requirements of this Clause 118 (Insurance) and Schedule 36 (Required Insurances).**

**118.5. Renewal certificates in relation to the insurances referred to in Clause 118.1 shall be obtained as and when necessary and copies (certified in a manner acceptable to the Authority) shall be forwarded to the Authority as soon as possible but in any event on or before the renewal date.**

**118.6. If the Contractor is in breach of Clause 118.1 above, the Authority may pay any premiums required to keep such insurance in force or itself procure such insurance and may, in either case, recover such amounts from the Contractor on written demand.**

**118.7. The Contractor shall give the Authority notification within 30 Days after any claim in excess of £25,000 (Indexed) on any of the insurance policies referred to in this Clause accompanied by full details of the incident giving rise to the claim;**

**118.8. Neither failure to comply nor full compliance with the insurance provisions of this Contract shall limit or relieve the Contractor of its liabilities and obligations under this Contract.**

**118.9. The insurance premiums referred to in Clause 118.1 shall be the responsibility of the Contractor.**

**118.10. The insurances referred to in this Clause shall be effected with insurers approved by the Authority, such approval not to be unreasonably withheld or delayed.**

**118.11. Professional Indemnity Insurance**

**118.11.1. The Contractor shall procure that the Construction Sub-Contractor, the New Facilities Construction Sub-Contractor and Professional Team shall take out and maintain professional indemnity insurance in accordance with the terms of the relevant Collateral Warranty.**

**118.12. Insurance Premium Risk Share**

**118.12.1. Schedule 37 (Insurance Premium Risk Share) shall apply.**

## **119. REINSTATEMENT AFTER INSURED EVENT**

- 119.1. Subject to the provisions of Clause 10.2 (Economic Reinstatement test) of the Direct Agreement all **insurance proceeds received under any policy referred to in Part 1.1 and Part 1.2 of the Schedule 36 (Required Insurances) (the "Physical Damage Policies")** shall be applied to repair, reinstate and replace each part of parts of the Assets in respect of which the proceeds were received.
- 119.2. All insurance proceeds paid under any Physical Damage Policy in respect of a single event (or a series of related events) in an amount in excess of £250,000 (Indexed) shall be paid into the Joint Insurance Account.
- 119.3. Subject to the provisions of Clause 10.2 (Economic Reinstatement test) of the Direct Agreement where a claim is made or proceeds of insurance are received or are receivable under any Physical Damage Policy in respect of a single event (or a series of related events) (the "Relevant Incident") in an amount in excess of £250,000 (Indexed):
- 119.3.1. the Contractor shall deliver to the Authority as soon as practicable and in any event within 40 Business Days after the making of the claim a plan prepared by the Contractor for the carrying out of the works necessary (the "Reinstatement Works") to repair, reinstate or replace (the "Reinstatement Plan") the Assets which are the subject of the relevant claim or claims in accordance with Clause 119.4 below. The Reinstatement Plan shall set out:
- 119.3.1.1. If not the Construction Sub-Contractor and/or the New Facilities Construction Sub-Contractor (as appropriate), the identity of the person proposed to effect the Reinstatement Works, which shall be subject to the prior written approval of the Authority (such approval not to be unreasonably withheld or delayed); and
- 119.3.1.2. the proposed terms and timetable upon which the Reinstatement Works are to be effected (including the date that the Project will become fully operational), the final terms of which shall be subject to the prior written approval of the Authority which approval shall not be unreasonably delayed,
- 119.3.2. provided that the Authority is satisfied that the Reinstatement Plan will enable the Contractor to comply



**with Clause 119.3.3 below within a reasonable timescale:**

- 119.3.2.1. the Reinstatement Plan will be adopted;**
- 119.3.2.2. the Contractor shall enter into contractual arrangements to effect the Reinstatement Works with the persons identified in the Reinstatement Plan approved by the Authority;**
- 119.3.2.3. prior to the earlier to occur of the Termination Date or the Expiry Date, any amounts standing to the credit of the Joint Insurance Account (the “Relevant Proceeds”) (together with any interest accrued) may be withdrawn by the Contractor from the Joint Insurance Account as required to enable it to make payments in accordance with the terms of the contractual arrangements referred to in sub Clause 119.3.2.2 above, and to meet any other reasonable costs and expenses of the Contractor for the sole purposes of funding the Reinstatement Works and the Parties shall operate the signatory requirements of the Joint Insurance Account in order to give effect to such payments. Following the earlier to occur of the Termination Date and the Expiry Date, the Authority may withdraw amounts standing to the credit of the Joint Insurance Account for the purposes of funding any Reinstatement Works;**
- 119.3.2.4. the Authority agrees and undertakes that, subject to compliance by the Contractor with its obligations under this Clause 119 and provided that the Contractor procures that the Reinstatement Works are carried out and completed in accordance with the contractual requirements referred to in Clause 119.3.2.2 it shall not exercise any right which it might otherwise have to terminate this Contract by virtue of the event which gave rise to the claim for the Relevant Proceeds;**
- 119.3.2.5. the Authority undertakes to use reasonable endeavours to assist the Contractor in the carrying out of the Reinstatement Plan;**



- 120.2.2.2. the Contractor has demonstrated to the Authority that the Contractor and a prudent board of directors of a company operating the same or substantially similar PFI businesses in the United Kingdom to that operated by the Contractor would in similar circumstances (in the absence of the type of relief envisaged by this Clause) be acting reasonably and in the best interests of the company if they resolved to cease to operate such businesses as a result of that risk becoming Uninsurable, taking into account inter alia (and without limitation) the likelihood of the Uninsurable risk occurring (if it has not already occurred), the financial consequences for such company if such Uninsurable risk did occur (or has occurred) and other mitigants against such consequences which may be available to such company,**
- 120.3. the Parties shall meet to discuss the means by which the risk should be managed or shared (including considering the issue of self-insurance by either Party).**
- 120.4. If the requirements of Clause 120.2 above are satisfied, but the Parties cannot agree as to how to manage the risk, then:**
- 120.4.1. in respect of third party liability insurance and Environmental Impairment Liability insurance only the Authority shall (at the Authority's option) either pay to the Contractor an amount equal to the amount calculated in accordance with Clause 96 (Compensation on Termination for Force Majeure) and the Contract will terminate, or elect to allow the Contract to continue and Clause 120.3.2 below shall thereafter apply in respect of such risk; and**
- 120.4.2. in respect of contractors' "all risks" insurance, property damage insurance, Environmental Impairment Liability insurance, third party liability insurance (if the Authority elects to allow the Contract to continue in accordance with Clause 120.3.1 above), delay in start up and business interruption insurance (but not loss of profits) or statutory insurances the Contract shall continue and on the occurrence of the risk (but only for as long as such risk remains Uninsurable) the Authority shall (at the Authority's option) either pay to the Contractor an amount equal to insurance proceeds that would have been payable had the relevant insurance continued to be available and the Contract will continue, or an**

amount equal to the amount calculated in accordance with Clause 96 (Compensation on Termination for Force Majeure) plus (in relation to third party liability insurance and Environmental Impairment Liability insurance only) the amount of insurance proceeds that would have been payable whereupon the Contract will terminate; and

120.4.3. where pursuant to Clauses 120.3.1 and 120.3.2 this Contract continues then the Annual Unitary Charge shall be reduced, in accordance with Schedule 39 (Unitary Charge Adjustment Protocol), in each year for which the relevant insurance is not maintained by an amount equal to the premium paid by the Contractor in respect of the relevant risk in the year prior to it becoming Uninsurable (Indexed from the date that the risk becomes Uninsurable). Where the risk is Uninsurable for part of a year only the reduction in the Annual Unitary Charge shall be pro rated to the number of months for which the risk is Uninsurable; and

120.4.4. where pursuant to Clauses 120.3.1 and 120.3.2 this Contract continues the Contractor shall approach the insurance market at least every four months to establish whether the risk remains Uninsurable. As soon as the Contractor is aware that the risk is no longer Uninsurable, the Contractor shall take out and maintain or procure the taking out and maintenance of insurance (to be incepted as soon as is reasonably practicable) for such risk in accordance with this Contract.

#### **Terms and Conditions that become Unavailable**

120.5. If, upon the renewal of any insurance which the Contractor is required to maintain or to procure the maintenance of pursuant to this Contract:

120.5.1. any Insurance Term is not available to the Contractor in the worldwide insurance market with reputable insurers of good standing; and/or

120.5.2. the insurance premium payable for insurance incorporating such Insurance Term is such that the Insurance Term is not generally being incorporated in insurance procured in the worldwide insurance market with reputable insurers of good standing by contractors in the United Kingdom,

(other than, in each case, by reason of one or more actions of the Contractor and/or any sub-contractor of the Contractor) (of any

**tier) then Clause 120.6 below shall apply.**

- 120.6. If it is agreed or determined that Clause 120.5 applies then the Authority shall waive the Contractor's obligations in Clause 119.1 and/or Schedule 31 (Required Insurance) in respect of that particular Insurance Term and the Contractor shall not be considered in breach of its obligations regarding the maintenance of insurance pursuant to this Contract as a result of the failure to maintain insurance incorporating such Insurance Term for so long as the relevant circumstances described in Clause 120.5 above continue to apply to such Insurance Term.**
- 120.7. To the extent that the Parties agree (acting reasonably), or it is determined pursuant to the Dispute Resolution Procedure, that an alternative or replacement term and/or condition of insurance is available to the Contractor in the worldwide insurance market which if included in the relevant insurance policy would fully or partially address the Contractor's inability to maintain or procure the maintenance of insurance with the relevant Insurance Term, at a cost which contractors in the UK are (at such time) generally prepared to pay, the Contractor shall maintain or procure the maintenance of insurance including such alternative or replacement term and/or condition. Notwithstanding any other provision of this Contract, the costs of such insurance shall be subject to the premium costs sharing mechanism set out at Schedule 37 (Insurance Premium Risk Share).**
- 120.8. [Not used]**
- 120.9. [Not used]**
- 120.10. The Contractor shall notify the Authority as soon as reasonably practicable and in any event within 5 Days of becoming aware that Clause 120.5.1 and/or Clause 120.5.2 are likely to apply or (on expiry of the relevant insurance then in place) do apply in respect of an Insurance Term (irrespective of the reason for the same). The Contractor shall provide the Authority with such information as the Authority reasonably requests regarding the unavailability of the Insurance Term and the parties shall meet to discuss the means by which such unavailability should be managed as soon as is reasonably practicable.**
- 120.11. In the event that Clause 120.5.1 and/or Clause 120.5.2 apply in respect of an Insurance Term, (irrespective of the reasons for the same) the Contractor shall approach the insurance market at least every four months to establish whether Clause 120.5.1 and/or Clause 120.5.2 remain applicable to the Insurance Term. As soon as the Contractor is aware that Clause 120.5.1 and/or Clause 120.5.2 has ceased to apply to the Insurance Term, the Contractor shall take out and maintain or procure the taking out and maintenance of insurance (to be incepted as soon as is**

**reasonably practicable) incorporating such Insurance Term in accordance with this Contract.**

**120.12. Contractor's option to continue**

120.12.1. If pursuant to Clause 120.4.2 the Authority elects to make payment to the Contractor (such that the Contract will terminate) (the "Relevant Payment"), the Contractor shall have the option (exercisable within 20 Business Days of the date of such election by the Authority) (the "Option Period") to pay to the Authority on or before the end of the Option Period an amount equal to the insurance proceeds that would have been payable had the Insured Risk not become Uninsurable in which case this Contract will continue (and the Relevant Payment will not be made by the Authority) and the Contractor's payment shall be applied for the same purpose and in the same manner as insurance proceeds would have been applied had the risk not become Uninsurable.

120.12.2. The Contractor shall serve written notice on the Authority of its intention to exercise this option. The provisions of Clause 120.4 will then apply to any loss subsequent to the loss in respect of which the Contractor has exercised its option and the process will recommence.

**120.13. Authority Variation**

120.13.1. The Authority may during the Contract Period determine that the Required Insurances are no longer sufficient to protect the Authority's interest (including for the avoidance of doubt any requirement by the Authority pursuant to Clause 97.1.2 above or otherwise to take out Run Off Cover for EIL). In these circumstances the Authority will be entitled to require the Contractor to purchase additional insurance cover to give the Authority the protection it has determined is needed. This will be deemed to be an Authority Notice of Change pursuant to the provisions of Clause 107 (Authority and Contractor Change). For the avoidance of doubt, the requirement to increase the insured amount as detailed in Clause 121.14 (Increase in Insured Amounts) is not subject to the provisions of this Clause 120.13 (Authority Variation).

120.13.2. In the event of additional insurance covers being purchased by the Contractor in accordance with Clause 120.13 (Authority Variation), the provisions of Clause 120.2 (Uninsurable Risks) shall apply to such insurances.

**120.14. Increase in Insured Amounts**

120.14.1. The limit of indemnity in respect of the insurance procured

pursuant to paragraphs 3 and 4 of Part 2 of Schedule 36 (Required Insurances) and the Maximum Deductibles for each of the Required Insurances shall be Indexed, provided such limit of indemnity or Maximum Deductible shall only be increased on each renewal date such that the limit that is Indexed becomes equal to or exceeds the next whole insurable amount or deductible available in the insurance market.

## **121. FREEDOM OF INFORMATION AND CONFIDENTIALITY**

- 121.1. The Parties agree that provisions of this Contract and each Project Document or Ancillary Document shall, subject to Clauses 121.2 and 121.3 below, not be treated as Confidential Information and may be disclosed without restriction.**
- 121.2. Clause 121.1 above shall not apply to provisions of this Contract or a Project Document or Ancillary Document designated as Commercially Sensitive Information and listed in Part I of Schedule 46 (Commercially Sensitive Information) to this Contract which shall, subject to Clause 121.4 below, be kept confidential for the periods specified in that Part.**
- 121.3. The Parties shall keep confidential all Confidential Information received by one Party from the other Party relating to this Contract and Project Documents or the Project and shall use all reasonable endeavours to prevent their employees and agents from making any disclosure to any person of any such Confidential Information.**
- 121.4. Clauses 121.1 to 121.3 shall not apply to:**
  - 121.4.1. any disclosure of information that is reasonably required by any person engaged in the performance of their obligations under the Contract for the performance of those obligations;**
  - 121.4.2. any matter which a Party can demonstrate is already or becomes generally available and in the public domain otherwise than as a result of a breach of this Clause 121;**
  - 121.4.3. any disclosure to enable a determination to be made under Clause 113 (Dispute Resolution) or in connection with a dispute between the Contractor and any of its Sub-Contractors;**
  - 121.4.4. any disclosure which is required pursuant to any statutory, legal (including any order of a court of competent jurisdiction) or Parliamentary obligation placed upon the party making the disclosure or the**

- rules of any stock exchange or governmental or regulatory authority having the force of law or if not having the force of law, compliance with which is in accordance with the general practice of persons subject to the stock exchange or governmental or regulatory authority concerned;
- 121.4.5. any disclosure of information which is already lawfully in the possession of the receiving party, prior to its disclosure by the disclosing party;
- 121.4.6. any provision of information to the Parties' own professional advisers or insurance advisers or to the Senior Lenders or the Senior Lenders' professional advisers or insurance advisers or, where it is proposed that a person should or may provide funds (whether directly or indirectly and whether by loan, equity participation or otherwise) to the Contractor to enable it to carry out its obligations under the Contract, or may wish to acquire shares in the Contractor and/or Holdco in accordance with the provisions of this Contract to that person or their respective professional advisers but only to the extent reasonably necessary to enable a decision to be taken on the proposal;
- 121.4.7. any disclosure by the Authority of information relating to the design, construction, operation and maintenance of the Project and such other information as may be reasonably required for the purpose of conducting a due diligence exercise, to any proposed new contractor, its advisers and lenders, should the Authority decide to retender the Contract;
- 121.4.8. any registration or recording of the Consents and property registration required;
- 121.4.9. any disclosure of information by the Authority to any other department, office or agency of the Government or their respective advisers or to any person engaged in providing services to the Authority for any purpose related to or ancillary to the Contract; or
- 121.4.10. any disclosure for the purpose of:
- 121.4.10.1. the examination and certification of the Authority's or the Contractor's accounts;
- 121.4.10.2. any examination pursuant to Audit Commission Act 1998 of the economy, efficiency and effectiveness with which the Authority has used its resources;



**121.4.10.3. complying with a proper request from either party's insurance adviser, or insurer on placing or renewing any insurance policies; or**

**121.4.10.4. (without prejudice to the generality of Clause 121.4.4 above) compliance with the FOIA and/or the Environmental Information Regulations**

**provided that, for the avoidance for the avoidance of doubt, neither Clause 121.4.10.4 nor Clause 121.4.4 above shall permit disclosure of Confidential Information otherwise prohibited by Clause 121.3 above where that information is exempt from disclosure under section 41 of the FOIA.**

**121.4.11. Where disclosure is permitted under Clause 121.4, other than Clauses 121.4.2, 121.4.4, 121.4.5, 121.4.8 and 121.4.10 the Party providing the information shall procure that the recipient of the information shall be subject to the same obligation of confidentiality as that contained in this Contract.**

**121.4.12. For the purposes of the Audit Commission Act 1998, the Audit Commissioner and District Auditor may examine such documents as he may reasonably require which are owned, held or otherwise within the control of the Contractor and any Sub-Contractor and may require the Contractor and any Sub-Contractor to produce such oral or written explanations as he considers necessary. For the avoidance of doubt it is hereby declared that the carrying out of an examination under section 6(3)(d) of the National Audit Act 1983 in relation to the Contractor is not a function exercisable under this Contract.**

**121.4.13. The Contractor shall not make use of the Contract or any information issued or provided by or on behalf of the Authority in connection with the Contract otherwise than for the purpose of the Contract, except with the written consent of the Authority.**

**121.4.14. Where the Contractor, in carrying out its obligations under the Contract, is provided with information relating to an individual or company, the Contractor shall not disclose or make use of any such information otherwise than for the purpose for which it was provided, unless the Contractor has sought the prior written consent of that individual or company and has obtained the prior written consent of the Authority.**

- 121.4.15. **On or before the Expiry Date, the Contractor shall ensure that all material documents or computer records in its possession, custody or control, which contain material information relating to Service Users including any documents in the possession, custody or control of a Sub-Contractor, are delivered up to the Authority.**
- 121.4.16. **The Parties acknowledge that the Audit Commission has the right to publish details of the Contract (including Commercially Sensitive Information) in its relevant reports to Parliament.**
- 121.5. **The Contractor acknowledges that the Authority is subject to the requirements of the FOIA and the Environmental Information Regulations and shall facilitate the Authority's compliance with its Information disclosure requirements pursuant to the same in the manner provided for in Clauses 121.6 to 121.11 (inclusive) below.**
- 121.6. **Where the Authority receives a Request for Information in relation to Information that the Contractor is holding on its behalf and which the Authority does not hold itself the Authority shall refer to the Contractor such Request for Information that it receives as soon as practicable and in any event within five Business Days of receiving a Request for Information and the Contractor shall:**
  - 121.6.1. **provide the Authority with a copy of all such Information in the form that the Authority requires as soon as practicable and in any event within ten Business Days (or such other period as the Authority acting reasonably may specify) of the Authority's request; and**
  - 121.6.2. **provide all necessary assistance as reasonably requested by the Authority in connection with any such Information, to enable the Authority to respond to a Request for Information within the time for compliance set out in section 10 of the FOIA or Regulation 5 of the Environmental Information Regulations.**
  - 121.6.3. **Following notification under Clause 121.6 and up until such time as the Contractor has provided the Authority with all the Information specified in Clause 121.6.2 the Contractor may make representations to the Authority as to whether or not or on what basis Information requested should be disclosed, and whether further information should reasonably be provided in order to identify and locate the information requested, provided always that the Authority shall be responsible for determining at its absolute discretion:-**
    - 121.6.3.1. **whether Information is exempt from**

**disclosure under the FOIA and the  
Environmental Information Regulations;**

**121.6.3.2. whether Information is to be disclosed in  
response to a Request for Information, and**

**in no event shall the Contractor respond directly, or  
allow its Subcontractors to respond directly, to a  
Request for Information unless expressly authorised to  
do so by the Authority.**

- 121.7. The Contractor shall ensure that all Information held on behalf of  
the Authority is retained for disclosure for at least 6 years (from  
the date it is acquired) and shall permit the Authority to inspect  
such Information as requested from time to time.**
- 121.8. The Contractor shall transfer to the Authority any Request for  
Information received by the Contractor as soon as practicable and  
in any event within 2 Business Days of receiving it.**
- 121.9. The Contractor acknowledges that any lists provided by him  
listing or outlining Confidential Information, are of indicative value  
only and that the Authority may nevertheless be obliged to  
disclose Confidential Information in accordance with the  
requirements of the FOIA and the Environmental Information  
Regulations.**
- 121.10. In the event of a request from the Authority pursuant to Clause  
121.6 above, the Contractor shall as soon as practicable, and in  
any event within 5 Business Days of receipt of such request,  
inform the Authority of the Contractor's estimated costs of  
complying with the request to the extent these would be  
recoverable if incurred by the Authority under section 12(1) of the  
FOIA and the Fees Regulations. Where such costs (either on their  
own or in conjunction with the Authority's own such costs in  
respect of such Request for Information) will exceed the  
appropriate limit referred to in section 12(1) of the FOIA and as set  
out in the Fees Regulations (the "Appropriate Limit") the  
Authority shall inform the Contractor in writing whether or not it  
still requires the Contractor to comply with the request and where  
it does require the Contractor to comply with the request the 10  
Business Days period for compliance shall be extended by such  
number of additional days for compliance as the Authority is  
entitled to under section 10 of the FOIA. In such case, the  
Authority shall notify the Contractor of such additional days as  
soon as practicable after becoming aware of them and shall  
reimburse the Contractor for such costs as the Contractor incurs  
in complying with the request to the extent it is itself entitled to  
reimbursement of such costs in accordance with its own FOIA  
policy from time to time.**

**121.11. The Contractor acknowledges that (notwithstanding the provisions of Clause 121) the Authority may, acting in accordance with the Department of Constitutional Affairs' Code of Practice on the Discharge of Functions of Public Authorities under Part I of the Freedom of Information Act 2000 (the "Code"), be obliged under the FOIA, or the Environmental Information Regulations to disclose Information concerning the Contractor or the Project:-**

**121.11.1. in certain circumstances without consulting with the Contractor; or**

**121.11.2. following consultation with the Contractor and having taken their views into account,**

**provided always that where Clause 121.11 above applies the Authority shall, in accordance with the recommendations of the Code, draw this to the attention of the Contractor prior to any disclosure.**

## **122. CONTRACTOR'S RECORDS**

**122.1. The Contractor shall at all times:**

**122.1.1. maintain a full record of particulars of the costs of performing the Services, including those relating to the design, construction, maintenance, operation and finance;**

**122.1.2. when requested by the Authority, provide a summary of any of the costs referred to in Clause 122.1.1 above, including details of any funds held by the Contractor specifically to cover such costs, in such form and detail as the Authority may reasonably require to enable the Authority to monitor the performance by the Contractor of its obligations under this Contract;**

**122.1.3. provide such facilities as the Authority may reasonably require for its representatives to visit any place where the records are held and examine the records maintained under this Clause 122;**

**122.1.4. at the request of the Authority provide to the Authority any information provided by it and, on a regular basis, to the Senior Lenders during the term of the Contract;**

**122.2. Compliance with the above shall require the Contractor to keep (and where appropriate shall procure that the Operating Sub-Contractor and the Construction Sub-Contractor shall keep) books of account in accordance with best accountancy practice with respect to the Contract showing in detail:**

**122.2.1. administrative overheads;**

- 122.2.2. **payments made to Sub-Contractor/s;**
- 122.2.3. **capital and revenue expenditure;**
- 122.2.4. **such other items as the Authority may reasonably require to conduct cost audits for verification of cost expenditure or estimated expenditure, for the purpose of Clauses 36 (Compensation Events), 107 (Authority and Contractor Change) and 105 (Change in Law),**

**and the Contractor shall have (and procure that the Operating Sub-Contractor shall have) the books of account evidencing the items listed in Clauses 122.2.1 to 122.2.4 available for inspection by the Authority (and any expert) upon reasonable notice, and shall present a report of these to the Authority as and when requested.**

- 122.3. **The Contractor shall maintain or procure that the following are maintained:**

- 122.3.1. **a full record of all incidents relating to health, safety and security which occur during the Contract Period; and**
- 122.3.2. **full records of all maintenance procedures carried out during the term of the Contract,**

**and the Contractor shall have the items referred to in sub-Clauses 122.3.1.1 and 122.3.1.2 available for inspection by the Authority upon reasonable notice, and shall present a report of them to the Authority as and when requested.**

- 122.4. **Subject to Clause 121 (Freedom of Information and Confidentiality) the Contractor shall permit records referred to in this Clause 122 to be examined and copied by the Authority's Representative and other representatives of the Authority, and by the Audit Commission, District Auditor and their representatives.**
- 122.5. **The records referred to in this Clause 122 shall be retained for a period of at least 5 years after the Contractor's obligations under the Contract have come to an end.**
- 122.6. **Upon termination of the Contract, and in the event that the Authority wishes to enter into another contract for the operation and management of the Project the Contractor shall (and shall ensure that the Operating Sub-Contractor and Construction Sub-Contractor will) comply with all reasonable requests of the Authority to provide information relating to the Contractor's costs of operating and maintaining the Project.**
- 122.7. **All information referred to in this Clause 122 is subject to the obligations set out in Clause 121 (Freedom of Information and Confidentiality).**

123. **[NOT USED]**

124. **INTELLECTUAL PROPERTY RIGHTS AND IT SYSTEMS LICENCES**

**Software Licensing**

- 124.1. In relation to any computer software that is used in order to deliver the Services the Contractor acknowledges that the use of same by the Authority may be prohibited or restricted (for example by the terms of the software licence between the Contractor and a third party). In such circumstances, the Contractor shall use its reasonable endeavours at its own expense to enable the Authority and any relevant third party contractor to use the software for the purposes of providing the Services including, where permissible, novating, assigning, sub-licensing or otherwise transferring to the Authority the right to use the software for the said purpose.
- 124.2. Nothing in this Clause 124:
- 124.2.1. imposes any obligation on the Authority to do anything which might prejudice or restrict its right to use the software in question for any other purpose; nor
  - 124.2.2. constitutes a warranty or representation that the Contractor has the right to permit the Authority to use the software and/or the right to novate, assign or sub-license the right to use the software to the Authority.
- 124.3. The Contractor undertakes to use reasonable endeavours to defend the Authority from and against any claim or action that the software used in order to deliver the Services (the "Software") or its use infringes the Intellectual Property Rights of a third party (the "IPR Claim") and shall fully indemnify and hold harmless the Authority (and any person claiming through it) from and against any losses, damages, costs (including legal fees) and expenses incurred by or awarded against the Authority as a result of or in connection with the IPR Claim.
- 124.4. The Authority agrees that:
- 124.4.1. the Authority shall as soon as reasonably practicable notify the Contractor in writing of any IPR Claim of which it has notice;
  - 124.4.2. the Authority shall not make any admission as to liability or agree to any settlement of or compromise any IPR Claim without the prior written consent of the Contractor which consent shall not be unreasonably withheld or delayed; and
  - 124.4.3. the Contractor shall, on request and at its own expense, be entitled to have the conduct of or settle all negotiations and

litigation arising from any IPR Claim and the Authority shall, at the Contractor's request and expense, give the Contractor all reasonable assistance in connection with those negotiations and litigation.

124.5. If any IPR Claim is made, or in the Contractor's reasonable opinion is likely to be made, against the Authority, the Contractor may promptly and at its own expense either:

124.5.1. procure for the Authority the right to continue using and possessing the Software; or

124.5.2. without diminishing or curtailing any of the functions or facilities or the performance of the Software, modify or replace the infringing part of the Software so as to avoid the infringement or alleged infringement.

### **Design and other Data**

124.6. The Contractor shall, without charge, make available to the Authority (to the extent it is entitled to do so having used reasonable efforts):

124.6.1. all data, documents, reports, drawings, specifications, software designs and/or other materials of any nature (including all Design Data) acquired or in the possession of the Contractor for the purposes of the Project and which might reasonably be required by the Authority for the purposes of exercising its rights or carrying on its duties under the Project Documents or carrying out any statutory duty; and

124.6.2. all such data, materials and documents acquired or brought into existence by third parties specifically for the purposes of the Project as may reasonably be required for the purposes referred to in Clause 124.6.1.

### **Authority's Materials**

124.7. All Intellectual Property Rights in data, reports, drawings, specifications, software designs and/or other material produced or developed by the Authority will vest in and be the property of the Authority.

### **Licence**

124.8. The Contractor:

124.8.1. hereby grants to the Authority in consideration of the Authority entering into this Contract and the other Ancillary Documents and other good and valuable consideration (receipt of which the Contractor hereby acknowledges) a perpetual, transferable, irrevocable, non-exclusive, royalty-

free licence (carrying the right to grant sub-licences) to use all Intellectual Property Rights which are or become vested in the Contractor for any purpose (whether during or after the Contract Period) relating to the design, construction, completion, commissioning or testing of the Works, the management and provision of the Services or the conduct of all the Services or the carrying out by the Authority of any statutory duties in respect of the Facilities; and

124.8.2. where any Intellectual Property Rights are vested in any third party, shall use all reasonable endeavours to procure the grant of a like licence to the Authority for any purpose referred to in Clause 124.8.1.

124.9. With respect to Intellectual Property Rights arising during the Contract Period, the licence granted pursuant to sub-Clause 124.8.1 above shall take effect immediately upon the coming into existence of such Intellectual Property Rights.

124.10. The Authority:

124.10.1. hereby grants to the Contractor in consideration of the Contractor entering into this Contract and the other Project Documents a non-exclusive licence (with the right to grant sub-licences to the extent necessary to perform the Services) to use any Intellectual Property Rights or computerised data which is vested in the Authority and which is being used exclusively in the provision of the Services; and

124.10.2. where any Intellectual Property Rights or computerised data is vested in any third party, shall use all reasonable endeavours to procure the grant of a like licence to the Contractor, provided that the Contractor shall be liable for any third party costs arising from such licence.

### **Indemnity**

124.11. For the avoidance of doubt, the provisions of Clause 115 (Indemnities) may apply in accordance with its terms to claims made or brought by any person for or on account of infringement of any Intellectual Property Rights used in connection with the Works or other Services.

### **Further Assurances**

124.12. The Contractor undertakes to execute all documents and do all acts that may be reasonably necessary to bring into effect or confirm the terms of any assignment or licence contained or made pursuant to this Clause 124.

## **125. DATA PROTECTION**



- 125.1. In relation to all Personal Data, the Contractor shall at all times comply with the DPA as a data controller if necessary, including maintaining a valid and up to date registration or notification under the DPA covering the data processing to be performed in connection with the Service.
- 125.2. The Contractor and any Sub-Contractor shall only undertake processing of Personal Data reasonably required in connection with the Services and shall not transfer any Personal Data to any country or territory outside the European Economic Area.
- 125.3. The Contractor shall not disclose Personal Data to any third parties other than:
- 125.3.1. to employees and Sub-Contractor to whom such disclosure is reasonably necessary in order for the Contractor to carry out the Service; or
- 125.3.2. to the extent required under a court order,
- provided that disclosure under Clause 125.3.1 is made subject to written terms substantially the same as, and no less stringent than, the terms contained in this Clause 125 and that the Contractor shall give notice in writing to the Authority of any disclosure of Personal Data it or a Sub-Contractor is required to make under Clause 125.3.2 immediately, it is aware of such a requirement.
- 125.4. The Contractor shall bring into effect and maintain all technical and organisational measures to prevent unauthorised or unlawful processing of Personal Data and accidental loss or destruction of, or damage to, Personal Data including but not limited to taking reasonable steps to ensure the reliability of staff having access to the Personal Data.
- 125.5. The Authority may, at reasonable intervals, request a written description of the technical and organisational methods employed by the Contractor or the Sub-Contractor referred to in Clause 125.4. Within 20 Business Days of such a request, the Contractor shall supply written particulars of all such measures detailed to a reasonable level such that the Authority can determine whether or not, in connection with the Personal Data, it is compliant with the DPA.
- 125.6. The Contractor shall indemnify and keep indemnified the Authority against all losses, claims, damages, liabilities, costs and expense (Including reasonable legal costs) incurred by it in respect of any breach of this Clause 125 by the Contractor and/or any act or omission of any Sub-Contractor which causes a breach of this Clause 125.

## **126. PUBLIC RELATIONS AND PUBLICITY**

- 126.1. **The Contractor shall not by itself, its employees or agents and procure that its sub-contractors shall not communicate with representatives of the press, television, radio or other communications media on any matter concerning this Contract or the Project without the prior written approval of the Authority.**
- 126.2. **No facilities to photograph or film in or upon any Site or Facility shall be given or permitted by the Contractor unless the Authority has given its prior written approval.**

## **127. NOTICES**

- 127.1. Any demand, notice or other communication given in connection with or required by this Contract shall be made in writing (entirely in the English language) and shall be delivered by hand to, or sent by pre-paid first class post to, the recipient at its registered office or its address stated in this Contract (or such other address as may be notified in writing from time to time) or sent by facsimile transmission to the recipient, in the case of:

127.1.1. Cambridgeshire County Council to Mr. Bernard Warr (Fax: 01223 717103);

127.1.2. the Contractor to Mr. Jon Jones (Fax: 01223 861013),

or such other numbers as may be notified in writing from time to time) and unless otherwise expressly stated in this Contract marked for the attention of the Project Director in the case of the Authority, and the Operations Manager in the case of the Contractor.

- 127.2. Where any information or documentation is to be provided or submitted to the Authority's Representative or the Contractor's Representative it shall be provided or submitted by sending the same by first class post, facsimile, email or by hand, leaving the same at:

127.2.1. if to the Contractor's Representative:

Ms. Gerran McCrea

Donarbon Waste Management Limited,

Ely Road,

Waterbeach,

Cambridge,

CB25 9PG.

Fax: 01223 861013,

E-Mail: gerran@donarbon.com; and

127.2.2. if to the Authority's Representative:

Mr. Bernard Warr,

Head of Waste Management,

Cambridgeshire County Council,

Shire Hall,

Cambridge,

CB3 0AP,

Fax: 01223 717103,

Email: bernard.warr@cambridgeshire.gov.uk.

127.3. Either Party to this Contract (and either the Authority's Representative or the Contractor's Representative) may change its nominated address, facsimile number or email address by prior notice to the other Party.

127.4. Notices given by post shall be effective upon the earlier of (i) actual receipt, and (ii) five (5) Business Days after mailing.

127.5. Notices delivered by hand shall be effective upon delivery.

127.6. Notices by facsimile shall be deemed to have been received where there is confirmation of uninterrupted transmission by a transmission report and where there has been no telephonic communication by the recipient to the senders (to be confirmed in writing) that the facsimile has not been received in legible form:

127.6.1. Within two (2) hours after sending, if sent on a Business Day between the hours of 9.00 am and 4.00 pm; or

127.6.2. By 11.00 am on the next following Business Day, if sent after 4.00 pm, on a Business Day but before 9.00 am on that next following Business Day.

## 128. **REPRESENTATIVES**

### 128.1. **Authority Representative**

128.1.1. The Authority's Representative shall be Mr. Bernard Warr, Head of Waste Management, Cambridgeshire County Council, Shire Hall, Cambridge, CB3 0AP or such other person appointed pursuant to this Clause 128. The Authority's Representative shall exercise the functions and

powers of the Authority in relation to the project operations which are identified in this Contract as functions or powers to be carried out by the Authority's Representative. The Authority's Representative shall also exercise such other functions and powers of the Authority under this Contract as the Authority may notify to the Contractor from time to time.

- 128.1.2. The Authority's Representative shall be entitled at any time, by notice to the Contractor, to authorise any other person to exercise the functions and powers of the Authority delegated to him pursuant to this Clause 128, either generally or specifically. Any act of any such person shall, for the purposes of this Contract, constitute an act of the Authority's Representative and all references to the "Authority's Representative" in this Contract (apart from this Clause 128) shall be taken as references to such person so far as they concern matters within the scope of such person's authority.
- 128.1.3. The Authority may by notice to the Contractor change the Authority's Representative. The Authority shall (as far as practicable) consult with the Contractor prior to the appointment of any replacement for the Authority's Representative, taking account of the need for liaison and continuity in respect of the Project. Such change shall have effect on the date specified in the written notice (which date shall, other than in the case of emergency, be such date as will not cause material inconvenience to the Contractor in the execution of its obligations under this Contract).
- 128.1.4. During any period when no Authority's Representative has been appointed (or when the Authority's Representative is unable to exercise his functions under this Contract) the Authority shall carry out the functions which would otherwise be performed by the Authority's Representative.
- 128.1.5. No act or omission of the Authority, the Authority's Representative (or any of its delegates) or any officer, employee or other person engaged by the Authority shall, except as otherwise expressly provided in this Contract:
  - 128.1.5.1. in any way relieve or absolve the Contractor from, modify, or act as a waiver or estoppel of, any liability, responsibility, obligation or duty under this Contract; or
  - 128.1.5.2. in the absence of an express order or authorisation, constitute or authorise a Change.
- 128.1.6. Except as previously notified in writing before such act by the Authority to the Contractor, the Contractor and

Contractor's Representative shall be entitled to treat any act of the Authority's Representative which is authorised by this Contract as being expressly authorised by the Authority and the Contractor and the Contractor's Representative shall not be required to determine whether an express Authority has in fact been given.

## **128.2. Representative of the Contractor**

- 128.2.1. The Contractor's Representative shall be Ms. Gerran McCrea of Donarbon Waste Management Limited, Ely Road, Waterbeach, Cambridge, CB25 9PG or such other person appointed pursuant to this Clause 128. The Contractor's Representative shall have full authority to act on behalf of the Contractor for all purposes of this Contract. Except as previously notified in writing before such act by the Contractor to the Authority, the Authority and the Authority's Representative shall be entitled to treat any act of the Contractor's Representative in connection with this Contract as being expressly authorised by the Contractor and the Authority and the Authority's Representative shall not be required to determine whether any express authorisation has in fact been given.
- 128.2.2. Immediately upon the Contractor's Representative ceasing to act in the case of death, serious illness or gross misconduct, and not less than ten (10) Business Days prior to termination of the appointment in all other cases, the Contractor shall by written notice to the Authority appoint a substitute, taking account of the need for liaison and continuity in respect of the Project.
- 128.2.3. A competent representative of the Contractor (being either the Contractor's Representative or other person duly appointed by him) is to be available between 7.30 am and 6.00 pm Monday to Friday inclusive at Donarbon Waste Management Limited, Ely Road, Waterbeach, Cambridge, CB25 9PG and shall supervise the provision of the Services under this Contract with the Authority. Outside such hours such agent or representative shall be contactable by telephone.
- 128.2.4. The Contractor shall give or provide all necessary management and superintendence during the performance of the Services. Such management and superintendence shall be given by sufficient persons having proper and adequate knowledge, skill, training and standing as may be requisite for the satisfactory supervision, management and performance of the Services.

## **129. PRIVITY**

- 129.1. **No term of this Contract is enforceable under the Contracts (Rights of Third Parties) Act 1999 by a person who is not a party to this Contract.**

## **130. NO AGENCY**

- 130.1. Neither the Contractor nor its employees agents or Sub-Contractors shall in any circumstances hold itself or themselves out as being the servant or agent of the Authority, otherwise than in circumstances expressly permitted by this Contract.
- 130.2. Neither the Contractor nor its employees agents or Sub-Contractors shall in any circumstances hold itself or themselves out as being authorised to enter into any contract on behalf of the Authority or in any other way to bind the Authority to the performance, variation, release or discharge of any obligation.
- 130.3. Neither the Contractor nor its employees agents or Sub-Contractors shall in any circumstances hold itself or themselves out as having the power to make, vary, discharge or waive any bye-law or any regulation of any kind.
- 130.4. Nothing in this Contract shall be construed as creating a legal partnership or as a contract of employment between the Authority and the Contractor.

## **131. ASSIGNMENT AND SUB-CONTRACTING**

### **Assignment**

- 131.1. **The rights and obligations of the Authority under this Contract shall not be assigned, novated or otherwise transferred (whether by virtue of any Legislation or any scheme pursuant to any Legislation or otherwise) to any person other than to any public body (being a single entity) acquiring the whole of the Contract having the legal capacity, power and authority to become a party to and to perform the obligations of the Authority under this Contract being:**
- 131.1.1. **a Minister of the Crown pursuant to an Order under the Ministers of the Crown Act 1975;**
- 131.1.2. **any local authority which has sufficient financial standing or financial resources to perform the obligations of the Authority under this Contract and the Direct Agreement; or**
- 131.1.3. **any other public body whose obligations under this Contract and the Direct Agreement are unconditionally and irrevocably guaranteed (in a form reasonably**

**acceptable to the Contractor) by the Authority or a Minister of the Crown having the legal capacity, power and authority to perform the obligations under the guarantee and the obligations of the Authority under this Contract and the Direct Agreement.**

### **Restrictions on the Contractor**

- 131.2. The provisions of Clauses 131.3 and to 131.6 do not apply to Off-Take Contracts which shall instead be regulated by the provisions of Clause 132 (Off-Take Contracts and RDF Consent).
- 131.3. Save as provided in the Direct Agreement and subject to Clauses 131.3 to 131.7 and Clause 133 (Change of Ownership of the Contractor) the Contractor shall not, sub-contract or otherwise Dispose of the benefit of this Contract in whole or in part except with the prior written consent of the Authority (which the Authority may in its absolute discretion refuse).

### **Exceptions**

- 131.4. The provisions of Clause 131.2 do not apply to the grant of any security for any loan made to the Contractor under the Financing Agreements.
- 131.5. Nothing in this Contract shall prohibit the Contractor from providing or procuring the provision of the Works or the Services from a Sub-Contractor of sound financial standing, technical ability and good repute and whose identity has been notified to the Authority by the Contractor and approved by the Authority in writing prior to the appointment of such Sub-Contractor (such approval not to be unreasonably withheld or delayed) provided that:
- 131.5.1. the Contractor shall comply with Clause 11 (Collateral Warranties) to the extent applicable; or
- 131.5.2. the Contractor shall remain primarily liable for the Contractor's obligations under this Contract.
- 131.6. The Authority shall have the right to require the Contractor to submit such information as the Authority shall reasonably require regarding the financial standing, technical ability and good repute of the Sub-Contractor.
- 131.7. The restriction contained in Clause 131.3 (Authority's consent required for sub-contracting arrangements) shall not apply in respect of sub-contractors of Sub-Contractor's directly appointed by the Contractor PROVIDED THAT:
- 131.7.1. the Contractor shall procure that none of the Sub-Contractors listed below shall sub-contract all (or substantially all or any Material and Critical Part) of their obligations under or in the sub-contract set out next to its

name

**Sub-Contractor**

**Sub-Contract**

Construction  
Contractor

Sub- Construction Contract

New Facilities  
Construction Contractor

Sub- New Facilities Construction  
Contract

Operating Sub-Contractor

Operating Contract

without in each case the prior written consent of the Authority to be obtained in accordance with Clause 131.5; and

131.7.2. the Authority shall be deemed to have consented to an appointment of:

131.7.2.1. WRG in respect of the receipt of Contract Waste at March Landfill as provided for in Schedule 21 (Delivery Points and Contingency Delivery Points);

131.7.2.2. Donarbon Limited as Landfill Contractor;

131.7.2.3. Donarbon Limited as Operating Sub-Contractor;

131.7.2.4. Northstone (NI) Limited;

131.7.2.5. KELAG Umwelttechnik GmbH & Co.KG;

131.7.2.6. Wasteology Systems Limited;

131.7.2.7. Edmund Nuttall Limited as Construction Sub-Contractor

as Sub-Contractors or sub-contractors as appropriate.

**Contractor's Obligations**

131.8. The Contractor shall perform its obligations under and observe all the terms of any Sub-Contract to which it is a party and procure the performance of any obligations under the terms of any Sub-Contract to which it is not a party.

**Sub-Contractors**

131.9. Nothing in this Contract shall prohibit or prevent any Sub-Contractor employed by the Contractor from being employed by the Authority at any establishments of the Authority.



## **Subcontracting**

131.10. The Contractor shall not be relieved or excused of responsibility or liability under this Contract nor shall performance of its obligations be affected by the appointment of any Sub-Contractor or any other delegation of its duties under this Contract.

## **Replacement of Sub-Contractors**

131.11. On not more than two occasions during the Contract Period on the substitution or replacement of a defaulting Sub-Contractor or a defaulting sub-contractor to the Sub-Contractor, the Contractor may elect that for the purposes of Clause 84 (Termination on Contractor Default) only:

131.11.1. any accrued Deductions or any accrued periods of Unavailability; and/or

131.11.2. any accrued Performance Points or any accrued deductions in the Annual Unitary Charge under L(2) of the Payment Mechanism; and/or

131.11.3. any warning notices or final warning notices in respect of Clause 88 (Termination for Persistent Breach),

in each case relating to the relevant Services in respect of which the Sub-Contractor or any sub-contractor to the Sub-Contractor is being replaced, shall be cancelled. The Contractor shall notify the Authority on or before the appointment of any such substitute or replacement Sub-Contractor or sub-contractor whether it elects for this Clause 131.11 to apply on that occasion.

131.12. Where an election is made pursuant to Clause 131.11 above or the substitution or replacement of the defaulting Sub-Contractor or a defaulting sub-contractor to the Sub-Contractor then, for the purposes of Clause 84 (Termination on Contractor Default) only:

131.12.1. no accrued Deductions or periods of Unavailability or deductions under L(2) of the Payment Mechanism; and

131.12.2. no Performance Points or accrued deductions in the Annual Unitary Charge under L(2) of the Payment Mechanism; and

131.12.3. any warning notices or final warning notices in respect of Clause 88 (Termination for Persistent Breach),

shall apply for the purposes of limbs (b); (j); (k) and (q) of the definition of Contractor Default in respect of a Service during a period of two (2) months from the date on which that Service is first provided by the replacement or substitute Sub-Contractor or sub-contractor as

appropriate. For the avoidance of doubt, Deductions may still be made from the Unitary Charge in respect of Unavailability or Performance Failures incurred during that period pursuant to Section 10 of the Payment Mechanism.

### **132. OFF-TAKE CONTRACTS AND CONSENT FOR RDF**

Subject always to the Contractor complying with the provisions of Clauses 132.1 and 132.2, in respect of an Off-Take Contract the Contractor is not required to obtain the Authority's consent to enter into that Off-Take Contract save for any Off-Take Contract for RDF to which the provisions of Clause 132.3 (Consent for RDF Off-Take) shall apply in addition to the provisions of Clauses 132.1 and 132.2.

132.1. At any time after the Contract Commencement Date, if and whenever the Contractor shall enter into any Off-Take Contract or any Off-Take Contract for RDF approved by the Authority pursuant to Clause 132.3, the Contractor shall ensure or procure as the case may be that any such contract is in writing and:

132.1.1. is on reasonable arms' length terms including as to breakage costs;

132.1.2. does not include any terms or conditions which are unusual having regard to standard market practice including as to breakage costs.

132.1.3. in the case of an Off-take Contract for RDF or any Off-take Contract having a term of more than 12 months or a value of greater than £500,000 (Indexed) (where (the Contractor having used reasonable endeavours) agreed by the counter party):

132.1.3.1. includes a right of the part of the Contractor to assign or novate (without any charge by any person for agreeing to such assignment or novation) the benefit and burden of such contract to the Authority or at the Authority's direction to any new contractor (subject to such contractor providing such reasonable security and/or guarantor as may be reasonably required by the relevant counter party as a condition of such assignment) upon expiry or termination of the Contract Period and without triggering any material adverse change in the terms of such contract upon assignment; and

132.1.3.2. does not include any term or condition which renders it personal to the Contractor or a Sub-Contractor or otherwise means that any

permitted assignee thereof could not take full benefit of the remaining balance of the Contract Period of such assigned contract.

## **132.2. Due diligence over Off-Take Contracts**

### **132.2.1. In respect of:**

132.2.1.1. any Off-Take Contract having a term of greater than 12 months;

132.2.1.2. any Off-Take Contract for RDF approved by the Authority pursuant to Clause 132.3

to the extent reasonably practicable (having regard, inter alia, to the Contractor's reasonable requirements to accept the terms offered in the time available to conclude the Off-Take Contract in question), the Contractor shall:

132.2.1.3. afford the Authority a reasonable opportunity to conduct due diligence over any Off-Take Contract (including for the avoidance of doubt any Off-Take Contract for RDF) before the Contractor enters into the same to enable the Authority to assess its terms for compliance with the provisions of Clause 132.1 above and to raise comments thereon; and

132.2.1.4. take into account any reasonable comments made by the Authority and shall use its reasonable endeavours to amend the Off-Take Contract accordingly before such Off-Take Contract is concluded.

132.2.2. The Contractor shall on reasonable written request by the Authority provide copies of any Off-Take Contracts to the Authority's Representative free of charge.

## **132.3. Consent for RDF Off-Take**

132.3.1. The Contractor shall not enter into any Off-Take Contract for RDF without the prior written consent of the Authority.

132.3.2. If the Authority refuses consent to any Off-Take Contract for RDF:

132.3.2.1. in the event the Authority acts reasonably in refusing consent, then the Contractor shall be entitled to apply for relief under Clause 70 (Excusing Cause) such relief to take into account inter alia the contribution to achievement of the Contract Targets and

reduction in Prohibited Landfill which the Off-take Contract for RDF would reasonably have been projected to have provided to the Contractor;

- 132.3.2.2. in the event the Authority acts unreasonably in refusing consent, then the Contractor shall be entitled to apply for relief under Clause 70 (Excusing Cause) and in addition (but without any double counting) shall also be entitled to apply for compensation pursuant to the provisions of Clauses 36 (Compensation Events) and 46 (Service Delay) taking into account inter alia matters referred to in Clause 132.3.2.1.

### **133. CHANGE OF OWNERSHIP OF CONTRACTOR**

#### **Ownership Information**

- 133.1. **The Contractor represents and warrants to the Authority that at the Contract Commencement Date the legal and beneficial ownership of the Contractor and Holdco is as set out in Schedule 6 (Legal and Beneficial Ownership of the Contractor) but that this subject at all times to the security rights of the Senior Lender under the Financing Agreements.**
- 133.2. **The Contractor shall inform the Authority as soon as reasonably practicable and, in any event, within 30 Days of any Change of Ownership occurring.**
- 133.3. **The Authority may, not more than twice in any Contract Year, or at any time when a Contractor Default is outstanding, require that the Contractor inform it, as soon as reasonably practicable and in any event within 30 Days or receipt of the Authority's request for details, of any Change of Ownership.**
- 133.4. **The Contractor's obligations under 133.2 and 133.3 above shall, except where a legal transfer of shares has occurred, be limited to the extent of the Contractor's awareness having made all reasonable enquiry.**

#### **Change of Ownership**

- 133.5. **No Change of Ownership may occur before such date as is 24 months after the Contract Commencement Date without the prior written consent of the Authority, the giving of which shall be at the absolute discretion of the Authority.**
- 133.6. Any Change of Ownership arising as a consequence of:
- 133.6.1. **the grant or enforcement of security in favour of the**

**Senior Lenders over or in relation to any of the shares of the Contractor or Holdco, provided that any document conferring security over any shares has been approved by the Authority (such approval not to be unreasonably withheld or delayed); or**

**133.6.2. any change in legal or beneficial ownership of any shares that are listed on a recognised investment exchange (as defined in section 285 of the Financial Services and Markets Act 2000); or**

**133.6.3. any transfer by a Shareholder to an Affiliate of such transferor,**

**shall be disregarded for the purposes of Clause 133.5 above.**

**Where Clause 133.6.3 above applies and subsequent to any such transfer (the “Original Transfer”) the transferee ceases to be an Affiliate of the original transferor, it shall be a breach of this Clause 133 if the shares or interests which were the subject of the Original Transfer are not within 20 Business Days of the transferee ceasing to be an Affiliate of the original transferor transferred to that original transferor or any Affiliate of such transferor.**

#### **Restricted Share Transfer**

**133.7. The Contractor shall obtain the Authority’s prior written consent (which may be given subject to conditions) to any Restricted Share Transfer.**

#### **134. DISCRIMINATION**

**134.1. The Contractor shall at all times comply with the requirements of the Race Relations Act 1976 and the Race Relations (Amendment) Act 2000 and the requirements of the Authority’s Equal Opportunities Policy as amended from time to time and shall take all reasonable steps to ensure compliance by the Contractor’s employees, agents and Sub-Contractors.**

#### **135. AMENDMENTS**

**135.1. This Contract may not be varied except by an agreement in writing signed by the duly authorised Representatives of the Parties.**

#### **136. CONTINUATION OF OBLIGATIONS**

**136.1. Save as otherwise expressly provided in this Contract or as already taken into account in the calculation of any Termination Sum or other payment of compensation on termination pursuant to this Contract:**

- 136.1.1. **termination of this Contract shall be without prejudice to any accrued rights or obligations under this Contract as at the Termination Date; and**
- 136.1.2. **termination of this Contract shall not affect the continuing rights, duties and liabilities (accrued prior to termination) of the Authority and the Contractor under this Clause and Clauses Save as otherwise expressly provided in this Contract termination of the Contract shall not affect the continuing rights of the Authority and the Contractor under Clauses 1 (Definitions), 2 (Interpretation), 5 (Precedence of Documentation), 9 (Authority Vires: Local Government (Contracts) Act 1997), 15 (General Representations, Warranties and Undertakings), 49 (Planned Maintenance), 50 (Equipment), 66 (Employees), 67 (TUPE), 69 (Transfer of Assets), 74 (Set Off), 75 (Late Payments), 76 (Value Added Tax), 77 (Landfill Tax), 78 (Utilities), 79 (NNDR), 80 (Third Party Income), 81 (Fees, Costs and Expenses), Clause 82 (Euro Continuity of Contract), 92 (Compensation on Termination for Contractor Default), 93 (Compensation on Termination for Voluntary Termination), 94 (Compensation on Termination for Authority Default), 95 (Compensation on Termination for Corrupt Gifts and Fraud), 96 (Compensation on Termination for Force Majeure), 97 (Transfer of Assets on Termination), 98 (Contractor's Accounts), 99 (Gross Up of Termination Payments), 100 (Set Off on Termination), 101 (Method of Payment), 102 (Surveys on Expiry and Termination), 103 (Open Book), 106 (Payment of Irrevocable VAT), 111 (Audit Access and Ombudsman Co-operation), 113 (Dispute Resolution), 114 (Mitigation), 115 (Indemnities), 116 (Exclusive Remedies and Accrued Rights), 117 (Disclaimer of Onerous Property), 118 (Insurance), 119 (Reinstatement after Insured Event), 120 (Uninsurable Risks), 121 (Freedom of Information and Confidentiality), 122 (Contractor's Records), 124 (Intellectual Property Rights and IT Systems Licences), 125 (Data Protection), 126 (Public Relations and Publicity), 127 (Notices), 129 (Privity), 136 (Continuation of Obligations), 137 (Waiver), 138 (Entire Agreement), 139 (Severability), 141 (Law of the Contract and Jurisdiction), Schedule 1 (Definitions), Schedule 5 (Relevant Discharge Terms), Schedule 10 (Authority Warranties), Schedule 26 (Payment Mechanism), Schedule 36 (Required Insurance), Schedule 46 (Commercially Sensitive Information), Schedule 47 (TUPE and Pensions), Schedule 48 (Environmental Provisions) or under any other provision of this Contract which is expressed to survive termination or which is required to give effect to such termination or the consequences of such termination or under any other provision of this**

**Contract which is expressed to survive termination or which is required to give effect to such termination or the consequences of such termination.** To avoid doubt, such provisions shall continue in force after termination of the Contract.

**137. WAIVER**

137.1. **No term or provision of this Contract shall be considered as waived by any Party to this Contract unless a waiver is given in writing by that Party.**

137.2. **No waiver under Clause 137.2 shall be a waiver of a post or future default or breach, nor shall it amend, delete or add to the terms, conditions or provisions of this Contract unless (and then only to the extent) expressly stated in that waiver.**

**138. ENTIRE AGREEMENT**

138.1. Except where expressly provided in this Contract and all documents referred to herein this Contract constitutes the entire agreement between the Parties in connection with its subject matter and supersedes all prior representations, communications, negotiations and understandings concerning the subject matter of this Contract.

138.2. Each of the Parties acknowledges that:

138.2.1. it does not enter into this Contract on the basis of and does not rely, and has never relied, upon any statement or representation (whether negligent or innocent) or warranty or other provision (in any case whether oral, written, express or implied) made and agreed to by any person (whether a party to this Contract or not) except those expressly repeated or referred to in this Contract and the only remedy or remedies available in respect of any misrepresentation or untrue statement made to it shall be any remedy available under this Contract; and

138.2.2. this Clause 138 shall not apply to any statement, representation or warranty made fraudulently, or to any provision of this Contract which was induced by fraud, for which the remedies available shall be all those available under the law governing this Contract.

**139. SEVERABILITY**

139.1. **If any term, condition or provision contained in this Contract shall be held to be invalid, unlawful or unenforceable to any extent, such term, condition or provision shall not affect the validity, legality or enforceability of the remaining parts of this Contract.**

**140. COUNTERPARTS**

- 140.1. **This Contract may be executed in any number of counterparts, all of which when taken together shall constitute one and the same instrument.**

141. **LAW OF THE CONTRACT AND JURISDICTION**

- 141.1. **The Contract shall be governed by the laws of England and Wales and, subject to Clause 113 (Dispute Resolution), the Parties submit to the exclusive jurisdiction of the courts of England and Wales to settle any disputes which may arise out of or in connection with this Contract.**

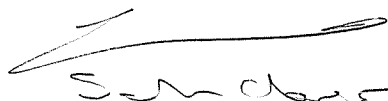


**IN WITNESS** whereof the Contractor and the Authority have signed this Contract as a deed the day and year first above written

SIGNED as a deed by  
**DONARBON WASTE  
MANAGEMENT LIMITED**  
by two directors or a director  
and the company secretary

)  
)  
)

.....  
Director



.....  
Director/Company Secretary

THE COMMON SEAL of  
**CAMBRIDGESHIRE COUNTY  
COUNCIL** was hereunto affixed in the  
presence of

)  
)  
)  
)



.....  
Head of Legal  
Services

Authorised Signatory

