

15. SCHEDULE 15:
TECHNICAL ADVISOR'S
APPOINTMENT

Schedule 15 (Technical Adviser Appointment)

DATED _____ **2008**

(1) CAMBRIDGESHIRE COUNTY COUNCIL

(2) DONARBON WASTE MANAGEMENT LIMITED

(3) FICHTNER CONSULTING ENGINEERS LIMITED

DEED OF APPOINTMENT OF TECHNICAL ADVISER
relating to the design and construction of a Mechanical
Biological Facility and associated works at Waterbeach
Waste Management Park, Ely Road, Waterbeach,
Cambridge



Pinsent Masons

BETWEEN:-

- (1) **CAMBRIDGESHIRE COUNTY COUNCIL** of Cambridgeshire Shire Hall, Cambridge, CB3 0AP (the "**Authority**") which expression shall include its successors in title and permitted assigns to the extent permitted under the Project Agreement;
- (2) **DONARBON WASTE MANAGEMENT LIMITED** a company incorporated under the laws of England and Wales with registered number 06054499 and whose registered office is at Ely Road, Waterbeach, Cambridge CB25 9PG (the "**Contractor**" which term shall include successors in title and permitted assigns);
- (3) **FICHTNER CONSULTING ENGINEERS LIMITED** a company incorporated under the laws of England and Wales with registered number 02605319 and whose registered office is at Eccles Road, Whaley Bridge, High Peak SK23 7ED (the "**Technical Adviser**").

(individually a "**Party**" and collectively referred to as the "**Parties**").

WHEREAS

- (A) The Authority and the Contractor have entered into a contract of even date comprising of a Project Agreement and schedules numbered 1-48 for, inter alia, the design, construction, financing and operation of waste management services in relation to the Sites (the "**Project Agreement**").
- (B) The Contractor has sub-contracted the design, construction and commissioning of the Mechanical Biological Treatment Facility upon the terms and subject to the conditions of a subcontract (the "**Construction Contract**") entered into by the Contractor and Edmund Nuttall Limited (the "**Construction Contractor**").
- (C) The Technical Adviser has agreed to perform the Services (as defined in clause 2.1 below) in relation to the Mechanical Biological Treatment Facility on the terms set out in this Deed.
- (D) The Authority and the Contractor have agreed to engage jointly the Technical Adviser to act independently of them but who shall owe a duty of care to both.

IT IS AGREED as follows:-**1. DEFINITIONS AND INTERPRETATION****1.1 Definitions**

In this Deed, unless the grammatical context otherwise requires, the following words and expressions have the following meanings:

"Employer"	means the Contractor and the Authority jointly;
"Fee"	means the sum stated in Appendix 4 to this Deed;
"Full Service Acceptance Certificate Date"	means the date that the Technical Adviser issues the Full Service Acceptance Certificate under and in accordance with the Project Agreement;
"Initial Acceptance Certificate Date"	means the date that the Technical Adviser issues the Initial Acceptance Certificate under and in accordance with the Project Agreement;
"Insolvency Event"	means either of the following: <ol style="list-style-type: none"> (a) a court makes an order that the Technical Adviser be wound up or a resolution for a

voluntary winding up of the Technical Adviser is passed; or

- (b) a voluntary arrangement is made for a composition of debts or a scheme of arrangement is approved under the Insolvency Act 1986 or the Companies Act 1985;

"Project Agreement Certificate"

means the Initial Acceptance Certificate and/or the Full Service Acceptance Certificate issued under and in accordance with the Project Agreement;

"Prohibited Materials"

means goods, materials, substances or products which are generally accepted as or (having regard to the knowledge generally available within the construction industry at the time of specification and/or use) are reasonably suspected of:

- (i) being deleterious in themselves; or
- (ii) being deleterious to the integrity or durability of the Works (when completed) in the particular situation or in combination with other materials; or
- (iii) becoming deleterious with the passage of time;
- (iv) being damaged by causing damage to the structure in which they are to be incorporated or to which they are to be affixed; or
- (v) creating a hazard to health or safety;

and so that for this purpose goods, materials, substances or products shall be regarded as deleterious, in the context of their use in the Works (whether alone or in combination or annexe with other materials) or which are otherwise not in accordance with Legislation, statutory requirements, British standards, codes of practice or good building practice or techniques as at the date of use;

"Variations"

means changes in the Works in accordance with the Project Agreement and/or changes in the Works in accordance with clause 33 of the Construction Contract (as the case may be).

1.2 Interpretation

- 1.2.1 The clause headings in this Deed are for the convenience of the Parties only and do not affect its interpretation.
- 1.2.2 Words importing the singular meaning include the plural meaning and vice versa.
- 1.2.3 Words denoting the masculine gender include the feminine and neuter genders and words denoting natural persons include corporations, firms and partnerships and all such words shall be construed interchangeably in that manner.

- 1.2.4 References in this Deed to a Clause or Appendix are to a clause of or appendix to this Deed.
- 1.2.5 References in this Deed to any statute or statutory instrument include and refer to any amendment or re-enactment thereof from time to time and for the time being in force.
- 1.2.6 Capitalised terms used in this Deed which are not specifically defined in Clause 1.1 shall have the same meaning as in the Project Agreement.
- 1.2.7 Where under this Deed an act is required to be done within a specified period after or from a specified date, the period shall being immediately after that date. Where the period would include Christmas Day, Good Friday or a day which under the Banking and Financial Dealings Act 1971 is a bank holiday in England and Wales that day shall be excluded.

2. TERMS OF APPOINTMENT

- 2.1 The Contractor and the Authority jointly appoint and the Technical Adviser hereby agrees to perform the Services in accordance with the terms of this Deed. The "**Services**" comprise the certification services described in Clause 2.2 (the "**Certification Services**") and the Additional Services (if any) described in Clause 2.3. The obligations of the Contractor and the Authority to pay the Technical Adviser for performing the Certification Services and the Additional Services (if any) shall be several and not joint.
- 2.2 The Certification Services constitute the performance of the obligations and tasks ascribed to the Technical Adviser in the Project Agreement and the Construction Contract (which are, without limitation to the foregoing summarised in Appendix 1) and all such other services which are reasonably incidental thereto.
- 2.3 The term "**Additional Services**" means any services which do not compromise Certification Services and involve the Technical Adviser in extra work (including the services designated as Additional Services in Appendix 2).
- 2.4 The Technical Adviser shall only perform Additional Services where the same are instructed by the Contractor and the Authority (as appropriate) under Clause 2.15. Where Additional Services arise or are likely to arise the Technical Adviser shall advise the Contractor and the Authority of the same together with further details as may be reasonably requested by the Contractor and/or the Authority.
- 2.5 The Technical Adviser shall familiarise itself with the Project Agreement (including the Specification and the Contractor's Works Proposals, Final Design Proposals, the Construction Contract, the Specification (as defined in) the Construction Contract, sub-contracts to the Construction Contract, any Variations issued from time to time, any other relevant documentation or information referred to in the Project Agreement insofar as the same relates to the MBT Facility and any other relevant documentation or information referred to in the Construction Contract. The Contractor shall provide copies of the same and any other documents referred to in paragraph 1 of Part 1 of Appendix 1 to the Technical Adviser on its request.
- 2.6 The Technical Adviser must at all times act objectively, fairly and impartially to and as between the Contractor and the Authority.
- 2.7 Where, in the performance of the Services, the Technical Adviser seeks the approval or agreement of the Contractor and/or the Authority to any matter or thing, the giving or confirming of the same in no way derogates from the Technical Adviser's obligations under this Deed nor diminishes any liability on its part for breach of such obligations.
- 2.8 The Technical Adviser warrants to each of the Contractor and the Authority that it has exercised and shall continue to exercise, in the performance of the Services, all the professional skill, care and diligence as may reasonably be expected of a properly qualified and competent person of the relevant discipline who is experienced in performing such services in respect of a similar PFI

project and in respect of works of a similar size, nature, scope, functionality and complexity to the MBT Facility.

- 2.9 The Technical Adviser shall provide the Services in compliance with all Legislation and good industry practice.
- 2.10 The Technical Adviser must notify the Contractor and the Authority forthwith if it becomes aware of any proposed or actual use within the MBT Facility of any Prohibited Materials.
- 2.11 The Technical Adviser must:
 - 2.11.1 in the performance of the Services insofar as the same are applicable to the Project Agreement, have full regard to any relevant requirements of the Project Agreement; and
 - 2.11.2 in the performance of the Services insofar as the same are applicable to the Construction Contract, have full regard to the relevant requirements of the Construction Contract; andmust perform the Services in such manner and at such times that no act, omission or default of the Technical Adviser in relation to the Services constitutes, causes or contributes to any breach by the Contractor and/or the Authority of any such requirements.
- 2.12 Without prejudice to Clause 2.11, the Technical Adviser must;
 - 2.12.1 liaise and co-operate with the Contractor and the Authority and provide the Contractor and the Authority with all such information in relation to the MBT Facility as the Contractor and Authority may from time to time reasonably require; and
 - 2.12.2 have due regard to any representations made by the Contractor, the Authority and the Construction Contractor in respect of any matter connected with the MBT Facility, provided that nothing in this Clause 2.12.2 in any way fetters the discretion of the Technical Adviser (acting in accordance with his obligations under this Deed), as to whether any Project Agreement Certificate should properly be issued.
- 2.13 The Technical Adviser acknowledges that the Contractor and the Authority are relying and shall continue to rely on the professional skill and judgement of the Technical Adviser in the performance of Services and that it owes a duty of care to the Contractor and the Authority in relation thereto. The Technical Adviser acknowledges that its duty of care extends to each of the Contractor and the Authority separately and that it will have regard in its dealing with each of them and in the provision of the Services, to the impact on each of the Authority and the Contractor of any decision or certificate of the technical adviser under the Project Agreement
- 2.14 The Technical Adviser acknowledges that nothing contained in this Deed prejudices or affects its liability in tort to the Contractor and/or the Authority.
- 2.15 The Technical Adviser shall comply with all reasonable instructions or requests for Additional Services given to it by the Contractor and the Authority except and to the extent that the Technical Adviser reasonably considers that any such instructions:
 - 2.15.1 vary or might vary the Services or its authority or responsibilities under this Deed; or
 - 2.15.2 prejudices or might prejudice the exercise by the Technical Adviser of its impartiality in accordance with Clause 2.6 or its professional judgment in accordance with Clause 2.8; or
 - 2.15.3 conflict with any instructions previously given and still effective (in which case the Technical Adviser shall, while continuing to comply with the earlier instructions, notify the Contractor and the Authority of the conflict and request instructions from the Contractor and the Authority on how to resolve the conflict).

- 2.16 All instructions to the Technical Adviser shall be given in writing, be signed and given jointly by the Authority's Representative and the Contractor's Representative or such other person or persons as may be appointed pursuant to and in accordance with the Project Agreement.
- 2.17 The Contractor and the Authority agree to co-operate with and provide reasonable assistance to the Technical Adviser to familiarise the Technical Adviser with all necessary aspects of the Project and to enable it to carry out its obligations under this Deed including providing copies of relevant documents and such information and instruction as the Technical Adviser may reasonably request and responding promptly to any enquiries raised by the Technical Adviser.
- 2.18 Notwithstanding compliance or otherwise by the Contractor and the Authority with their obligations under Clause 2.17, the Technical Adviser is deemed to have knowledge of the provisions of the Project Agreement and the Construction Contract and is to be deemed to be aware of and to have taken due account of all the undertakings and warranties on the part of the Authority and the Contractor which are set out in the Project Agreement and all the undertakings and warranties on the part of the Contractor and the Construction Contractor which are set out in the Construction Contract.
- 2.19 The Technical Adviser must not make or purport to make any alteration or addition to or omission from the Specification or the Contractor's Works Proposals insofar as they relate to the MBT Facility or any other aspect of the Project (including, without limitation, the setting of performance standards).
- 2.20 The Technical Adviser must not consent or agree to any waiver or release of any obligations of the Contractor or the Authority under the Project Agreement and/or any waiver or release of any of the obligations of the Contractor or the Construction Contractor under the Construction Contract.
- 2.21 The Technical Adviser must not express an opinion on and must not interfere with or make any advice, opinion or representation in relation to any matters which are beyond its role and responsibilities under this Deed.
- 2.22 To the extent that the Project Agreement provides for any decision to be binding, the Technical Adviser acknowledges that the Parties will be bound by such decisions and understands the implications for the Authority, the Contractor and the Lender of decisions made by him pursuant to the Certification Services.

3. TECHNICAL ADVISER'S PERSONNEL

- 3.1 The Technical Adviser must forthwith identify and appoint a partner/director to direct and control the overall performance by the Technical Adviser of the Services. Such person (or any replacement from time to time approved by the Contractor and the Authority pursuant to Clause 3.2) must not be or have previously been involved in the Project in any other capacity and must have full authority to act on behalf of the Technical Adviser for all purposes in connection with this Deed. Such person (or any replacement) must be available for so long as may be necessary for the proper performance by the Technical Adviser of the Services.
- 3.2 Subject to Clause 3.3, the Technical Adviser must appoint and use the person identified in accordance with Clause 3.1 in connection with the performance of the Services and must not replace that person without the prior approval of the Contractor and the Authority as to the fact and identity of such replacement.
- 3.3 The Technical Adviser must not unlawfully discriminate within the meaning and scope of the Race Relations Act 1976 or the Sex Discrimination Acts 1975 to 1986 and must take all reasonable steps to ensure that all of its servants, employees and agents observe the provisions of this Clause 3.3.

4. REMUNERATION

- 4.1 The Contractor and the Authority shall pay the Fee in equal proportions (for the avoidance of doubt, being fifty per cent (50%) by the Contractor and fifty per cent (50%) by the Authority) to the Technical Adviser as full remuneration for the performance of the Certification Services in

accordance with this Deed. Such Fee shall be paid by instalments as provided in Appendix 4 and in accordance with the provisions of Clauses 4.4 and 4.5.

- 4.2 Subject to Clause 4.3, the additional remuneration payable to the Technical Adviser in respect of the performance of the Additional Services shall be an amount agreed by the Parties prior to the commencement of such Additional Services or, in the absence of such agreement, on a time charge basis at the rates set out in paragraph 2 of Appendix 4. Such remuneration shall be paid for in equal proportions by the Contractor and the Authority and otherwise in accordance with this Clause 4 (save for any fees incurred as a result of the Consultant's reinspection following a failure of the Mechanical Biological Treatment Facility to pass the Initial Acceptance Tests and/or to meet the Full Service Acceptance Criteria which shall be paid for by the Contractor).
- 4.3 No additional remuneration shall be payable to the Technical Adviser to the extent that the Additional Services are necessitated, in whole or in part by the Technical Adviser's default, negligence or breach of contract.
- 4.4 The Technical Adviser must submit to the Contractor and the Authority invoices (in respect of their 50% shares where appropriate) on the dates set out in Appendix 4, showing sums due to the Technical Adviser under this Deed together with such supporting documentation as may reasonably be required in writing or agreed by the Contractor and the Authority and properly prepared VAT invoices showing the amount of the VAT due (in respect of each 50% share where appropriate).
- 4.5 The Contractor and/or the Authority (as appropriate) are liable to pay to the Technical Adviser all sums properly due from the Contractor and/or the Authority (as appropriate) to the Technical Adviser under this Deed by the final date for payment which shall be 30 days following receipt by the Contractor and /or the Authority (as appropriate) of the Technical Adviser's invoices and supporting documentation in accordance with Clause 4.4.
- 4.6 The Contractor and the Authority shall pay to the Technical Adviser any Value Added Tax properly chargeable (in respect of their 50% shares where appropriate) by the Technical Adviser on the supply by the Technical Adviser of the Services under this Deed.
- 4.7 If more than one currency or currency unit are at the same time recognised by the Bank of England as being the lawful currency of the United Kingdom, then any reference to this Deed to, and any obligations arising under this Deed in, Pounds Sterling must be translated into, or paid in, the currency or currency unit of England designated by the Contractor and the Authority. If a change in the currency of the United Kingdom occurs, this Deed must be amended to the extent the Parties, acting reasonably, agree is necessary to reflect the change in currency.
- 4.8 Not later than 5 days after the receipt of each fee invoice the Contractor and/or the Authority (as appropriate may, if it disagrees with such invoice, give written notice to the Technical Adviser specifying the amount of payment proposed to be made in respect of that fee invoice, the basis on which such amount is calculated and to what the amount relates and, subject to Clause 4.9, shall pay the amount proposed no later than the final date for payment.
- 4.9 Not later than 5 days before the final date for payment of an amount due pursuant to Clause 4.8, the Contractor and/or the Authority (as appropriate) may give one or more written notices to the Technical Adviser which shall specify any amount proposed to be withheld and/or deducted from that due amount, the ground or grounds for such withholding and/or deduction and the amount of withholding and/or deduction attributable to such grounds.
- 4.10 Where the Contractor and/or the Authority give written notice pursuant to Clause 4.8 and/or Clause 4.9, the Contractor and/or the Authority (as appropriate) shall pay to the Technical Adviser the undisputed amount no later than the final date for payment.
- 4.11 Where the Contractor and/or the Authority (as appropriate) do not give written notice pursuant to Clause 4.8 and/or Clause 4.9, the Contractor and/or the Authority (as appropriate) shall pay to the Technical Adviser the amount stated in the relevant fee invoice issued by the Technical Adviser.

- 4.12 Where by virtue of a notice issued pursuant to Clause 4.8 and/or Clause 4.9 there are matters in dispute, the Parties must use all reasonable endeavours to resolve the dispute in question within 30 days of the dispute arising. Notwithstanding that obligation, any Party may refer the matter at any time to the disputes resolution procedure under Clause 15. Following resolution of the dispute, any amount agreed or adjudged to be due must be paid promptly on demand, together with interest on it at a rate per annum equal to 3% above the Bank of England base lending rate from time to time from the day after the date on which payment was due to (and including) the date of payment. The Parties agree that the provisions of this Clause 4.12 constitute a substantial remedy for the purposes of section 9(1) of the Late Payment of Commercial Debts (Interest) Act 1998.
- 4.13 Without prejudice to any other rights and remedies of the Technical Adviser, if the Contractor and/or the Authority (as appropriate) fail to pay the Technical Adviser in full by the final date for payment as required by this Deed (excluding for this purpose any amounts notified to the Technical Adviser pursuant to Clause 4.9) and such failure shall continue for 30 days after the Technical Adviser has given to the Contractor and the Authority written notice of the Technical Adviser's intention to suspend performance of its obligations under this Deed and the ground or grounds on which it is intended to suspend performance then the Technical Adviser may suspend such performance of its obligations under this Deed until payment in full occurs, whereupon such performance of its obligations under this Deed shall be resumed. Such suspension shall not be treated as a default to which Clause 9.1.1 refers.
- 4.14 Subject to Clause 4.15, the Fee is deemed to be an inclusive payment for the Certification Services and all other matters relating to this Deed and for all costs, expenses, disbursements and overheads of every kind incurred by the Technical Adviser in connection therewith.
- 4.15 In addition to the Fee, the Contractor and the Authority shall in equal proportions reimburse the Technical Adviser for all out of pocket expenses reasonably and properly incurred in performance of the Certification Services. The preceding provisions of this Clause 4 shall apply mutatis mutandis to such expenses.
- 4.16 Neither the Contractor nor the Authority shall issue instructions or do anything which does or is reasonably likely materially to increase the fees payable to the Technical Adviser without the prior approval of the other (such consent not to be unreasonably withheld or delayed).

5. INSURANCE

- 5.1 Without prejudice to its other obligations under this Deed or otherwise at law, the Technical Adviser must maintain with reputable insurers or underwriters, from the date of this Deed and for a period expiring no earlier than twelve (12) years after the completion of the Services or twelve (12) years after termination of this Deed (whichever is the earlier) and notwithstanding the termination for any reason of the Technical Adviser's engagement under this Deed, professional indemnity insurance without onerous conditions to cover each and every liability which it may incur under this Deed, with a limit of indemnity of not less than ten million pounds (£10,000,000) in respect of each and every claim (except in relation to claims arising from contamination or pollution where this level shall be in the annual aggregate and claims arising from asbestos where the level shall be £1 million in the annual aggregate), provided always that such insurance continues to be available in the market upon reasonable terms and at commercially reasonable rates.
- 5.2 As and when it is reasonably required to do so, the Technical Adviser must produce to the Contractor and the Authority for inspection copies of the insurance policy and any other relevant documents which are required under the insurance policy, as well as proof that the relevant premium has been paid, and that the relevant policy remains in full force and effect.
- 5.3 The Technical Adviser must forthwith notify the Contractor and the Authority if the insurance required to be maintained by it under Clause 5.1 ceases to be available upon reasonable terms and at commercially reasonable rates or if, for any other reason, the Technical Adviser is unable to continue to maintain such insurance but, unless all the Parties agree an alternative way of protecting their respective interests, must continue to maintain insurance upon such terms and with such a limit of indemnity as may then be so available and reasonable for the Technical Adviser to maintain.

- 5.4 The Technical Adviser must not compromise, settle or waive any claim which it may have under such insurance in respect of any professional liability which it may incur under this Deed without the prior written consent of the Contractor and the Authority, provided that nothing in this Clause 5.4 precludes the Technical Adviser's insurers from taking over (in the name of the Technical Adviser) the defence of any claim made by the Contractor and/or the Authority under this Deed and from conducting and settling the same as they see fit. In this event the Technical Adviser must keep the Contractor and the Authority informed of the progress of any claim.

6. CONFIDENTIALITY

- 6.1 Save in the proper course of his duties under this Deed, the Technical Adviser must not:

6.1.1 either during the period of its engagement under this Deed, or at any time after its expiry or termination for any reason, disclose to any person nor otherwise make use of any confidential information (including but not limited to, information relating to methods and techniques of construction of the MBT Facility and financial information relating to the MBT Facility which it has become aware of in the course of its engagement under this Deed); nor

6.1.2 disclosure to any person whatsoever (save his insurance or other professional advisers and only then when reasonably satisfied that such information will be treated confidentially by such advisers) anything contained in this Deed;

without the prior authority of the Contractor and the Authority.

- 6.2 The restriction contained in Clause 6.1 continues to apply without limitation unless and until such information comes properly into the public domain through no fault of the Technical Adviser.

- 6.3 The Technical Adviser acknowledges and agrees that either the Contractor's and/or Authority's auditors (or any other such persons as the Contractor and/or the Authority may nominate (acting reasonably)) may examine such documents as they may reasonably require which are owned, held or otherwise within the control of the Technical Adviser.

7. INTELLECTUAL PROPERTY

- 7.1 Unless otherwise agreed, the Technical Adviser shall retain copyright in all documents and drawings prepared by it in performing the Services.

- 7.2 The Technical Adviser hereby grants to the Contractor and the Authority a perpetual, irrevocable, non-exclusive, transferable, royalty-free licence (carrying the right to grant sub-licences) to use all and any Intellectual Property Rights which are or which become vested in the Technical Adviser in its performance of the Services for any purpose relating to the Project or for the carrying out of any statutory duties.

8. ASSIGNMENT AND SUB-LETTING

- 8.1 The Technical Adviser must not assign or transfer its interest in this Deed or any part thereof nor any right arising hereunder to any person without the prior consent of the Contractor and the Authority (such consent not to be unreasonably withheld or delayed).

- 8.2 The Technical Adviser must not sub-contract to any person the performance of any of the Services without the prior consent of the Contractor and the Authority (such consent not to be unreasonably withheld or delayed).

- 8.3 Neither the Contractor nor the Authority shall be entitled to assign or transfer any of their respective rights or obligations under this Deed save that the Parties hereby consent to any such assignment or transfer which is contemporaneous with the assignment or transfer of the Project Agreement and is made to the same assignee or transferee.

- 8.4 The Parties agree that in the event that the Project Agreement and/or the Construction Contract are assigned, novated or otherwise transferred, the terms "**Project Agreement**" and "**Construction Contract**" shall include any replacement contract arising from such novation.
- 8.5 The Technical Adviser shall not be entitled to contend that any person to whom this Deed is assigned in accordance with Clause 8.3 is precluded from recovering under this Deed any loss incurred by such assignee resulting from any breach of this Deed (whenever happening) by reason that such person is an assignee and not a named promisee under this Deed.
9. **TERMINATION OF TECHNICAL ADVISER'S ENGAGEMENT BY CONTRACTOR**
- 9.1 The Contractor and the Authority may, at any time by fourteen (14) days' prior written joint notice to the Technical Adviser, terminate the Technical Adviser's engagement under this Deed, if the Technical Adviser:
- 9.1.1 is in breach of any of the terms of this Deed which, in the case of a breach capable of remedy, has not been remedied by the Technical Adviser within 21 days of receipt by the Technical Adviser of a notice from the Contractor and/or the Authority specifying the breach and requiring its remedy;
 - 9.1.2 is incompetent, guilty of gross misconduct and/or any material negligence or delay in the provision of the Services;
 - 9.1.3 fails to comply with Clauses 2.6, 2.8, 2.9, 2.20 or 6;
 - 9.1.4 fails or refuses after written warning to provide the Services reasonably and properly required of it; or
 - 9.1.5 suffers the occurrence of any Insolvency Event.
- 9.2 If the Project Agreement is rescinded, terminated or repudiated for any reason and, notwithstanding that the validity of such rescission, termination or repudiation may be disputed, the Technical Adviser's appointment under this Deed may be terminated by a joint notice from the Contractor and the Authority with immediate effect, subject to either the Contractor or the Authority choosing to exercise their right of step-in under Clause 18.
10. **TERMINATION OF TECHNICAL ADVISER'S ENGAGEMENT BY TECHNICAL ADVISER**
- Subject to the provisions of Clause 11, the Technical Adviser shall only be entitled to terminate this Deed where either the Contractor or the Authority are in material breach of its or their obligations under this Deed. In the event of any material breach by the Contractor or the Authority of its or their obligations under this Deed (as the case may be) which it or they, as appropriate, shall fail to remedy after receiving a notice from the Technical Adviser (such notice to be copied simultaneously to the other parties to this Deed) specifying the breach and requiring its remedy within twenty (20) Business Days of the date of the relevant notice, the Technical Adviser shall then serve a Step-in Notice pursuant to Clause 18.1 upon both the Contractor and the Authority and in the event that both of the Contractor and the Authority decline to exercise their rights under Clause 18, the Technical Adviser may then by a further notice to the Contractor and the Authority (the "**TA Termination Notice**") terminate its engagement under this Deed twenty (20) Business Days after the date of the TA Termination Notice.
11. **CONSEQUENCES OF TERMINATION**
- 11.1 Upon any termination of the Technical Adviser's engagement under Clauses 9 or 10, the Technical Adviser is relieved of its obligation to continue with the performance of the Services and must:
- 11.1.1 take immediate steps to bring to an end the Services in an orderly manner but with reasonable speed and economy;

- 11.1.2 within fourteen (14) days deliver to the Contractor and the Authority copies of all reports, minutes of meetings and other documents prepared or in the course of preparation by the Technical Adviser pursuant to this Deed; and
- 11.1.3 (in the event that a replacement Technical Adviser has been appointed to complete the performance of the Services), co-operate fully with such replacement for the orderly transfer of the Services.
- 11.2 Following any termination of the Technical Adviser's appointment, but subject to any set-off or deductions which the Contractor and/or the Authority may be entitled properly to make as a result of any breach of this Deed by the Technical Adviser, the Technical Adviser shall be entitled to be paid in full and final settlement of any claim which the Technical Adviser may have in consequence thereof, any fees due under Clause 4 (and in accordance with Clause 4) in respect of the Services carried out in accordance with this Deed prior to the date of termination.
- 11.3 Termination of the Technical Adviser's engagement howsoever arising is, without prejudice to the rights and remedies of the Contractor and the Authority in relation to any negligence, omission or default of the Technical Adviser prior to such termination.
- 11.4 The provisions of this Deed continue to bind each Party insofar as and for as long as may be necessary to give effect to their respective rights and obligations hereunder.
- 11.5 Termination of this Deed shall not affect the continuing rights and obligations of the Contractor and the Authority under Clause 5, Clause 7, Clause 16 and this Clause or any other Clause which is expressed to survive termination or which is required to give effect to such termination or the consequences of such termination.
12. **ALTERATIONS TO TERMS**
- All additions, amendments and variations to this Deed are binding only if in writing and signed by the duly authorised representatives of each and every Party.
13. **WHOLE AGREEMENT**
- This Deed supersedes any previous communication, agreement, arrangement or representation between the Parties in respect of the Services (whether oral or written) and represents the entire understanding between the Parties in relation thereto. All Services whether provided before or after the date of this Deed shall be treated as if and shall be deemed to have been carried out under the terms of this Deed.
14. **CAP ON LIABILITY**
- Notwithstanding anything to the contrary contained in this Deed the maximum liability of the Consultant under this Deed shall not exceed the sum of £10 million for each and every claim (except when the Consultant has acted fraudulently and except in relation to claims arising from contamination or pollution where the maximum liability shall be £10 million in the annual aggregate and claims arising from asbestos where the maximum liability shall be £1 million in the annual aggregate). Should the maximum liability be exceeded in a claim brought by the Employer, the liability of the Consultant to the Authority and the Contractor shall be proportional to the losses suffered by the Contractor and Authority independently.
15. **NOTICES**
- 15.1 **Addresses**
- Except as otherwise stated, all notices or other communications required in connection with this Deed must be in writing and sent by hand, by first class prepaid post or by facsimile transmission to the relevant address or facsimile number set out below or to such other address or facsimile number as either Party may notify to the other in writing by not less than five Business Days' prior notice.

Contractor

Address: Donarbon Waste Management Limited
Ely Road
Waterbeach
Cambridge
CB25 9PG

Fax: 01223 861013

Attention: Gerran McCrea

Authority

Address: Cambridgeshire County Council
Shire Hall
Cambridge
CB3 0AP

Fax: 01223 717103

Attention: Mr Bernard Warr (Head of Waste Management)

Technical Adviser

Address: Fichtner Consulting Engineers Ltd
Kingsgate (Floor 3)
Wellington Road North
Stockport
Cheshire
SK4 1LW

Fax: 0161 474 0618

Attention: Mr Phin Eddy

15.2 Effective Receipt

Subject to Clause 14.3:

- (a) a letter delivered by hand is effective when left at the proper address for service;
- (b) a letter sent by first class prepaid post is deemed received on the second Business Day after it is put in the post (and proof that any such communication was properly paid, addressed, registered or recorded and posted shall be sufficient evidence of it having been duly served); and
- (c) a facsimile transmission is effective on the day of transmission provided that a confirmation copy is on the same day that the facsimile is transmitted sent in accordance with Clause 14.2(b) above.

15.3 Timing

A notice or other communication received on a day which is not a Business Day or after 4 p.m. on any Business Day is deemed to be received on the next following Business Day.

16. DISPUTES RESOLUTION PROCEDURE

The Parties agree that any dispute or difference arising under this Deed shall be resolved in accordance with the procedure detailed in Appendix 6 to this Deed.

17. **CUMULATIVE RIGHTS AND ENFORCEMENT, COLLATERAL WARRANTY AND THIRD PARTY RIGHTS**

- 17.1 Any rights and remedies provided for in this Deed whether in favour of the Contractor or the Authority or the Technical Adviser are cumulative and in addition to any further rights or remedies which may otherwise be available to those Parties.
- 17.2 The Technical Adviser shall, on the date of this Deed, execute and deliver to the Contractor a deed of collateral warranty (duly completed) in the form contained in Appendix 5 in favour of Bank of Ireland.
- 17.3 A person who is not a party to this Deed has no right under the Contracts (Rights of Third Parties) Act 1999 to enforce any term of this Deed but this does not affect any right or remedy of a third party which exists or is available apart from that Act.
- 17.4 The duties and obligations of the Technical Adviser arising under or in connection with this Deed are owed to the Contractor and the Authority both jointly and severally and the Contractor and the Authority may accordingly enforce the provisions hereof and pursue their respective rights hereunder in their own name, whether separately or with each other.

18. **"STEP-IN" PROVISIONS**

- 18.1 The Technical Adviser shall not exercise nor seek to exercise any right to terminate its engagement under this Deed pursuant to Clause 10 as a consequence of any breach of this Deed by either the Contractor or the Authority (the relevant defaulting party being the **"Defaulting Party"**) without giving to the other party to this Deed (the **"Non-defaulting Party"**) not less than twenty (20) Business Days' written notice of the Technical Adviser's intention to do so and specifying the grounds for the proposed termination (the **"Step-in Notice"**).
- 18.2 Any period stipulated in this Deed for the exercise by the Technical Adviser of a right of termination shall be extended as necessary to take account of the period of notice required under Clause 18.1.
- 18.3 The Technical Adviser's right to terminate its engagement under this Deed or to discontinue the performance of the Services shall cease if, within the period of twenty (20) Business Days referred to in Clause 18.1, a Non-defaulting Party shall give notice to the Technical Adviser:
- 18.3.1 requiring it to continue the performance of the Services;
- 18.3.2 acknowledging that it is assuming all of the obligations of the Defaulting Party under this Deed; and
- 18.3.3 undertaking to the Technical Adviser to discharge all payments which may subsequently become due to the Technical Adviser by the Defaulting Party under this Deed and paying to the Technical Adviser any sums which have already become due to it by the Defaulting Party but which remain unpaid.
- 18.4 Upon compliance by a Non-defaulting Party with the provisions of Clause 18.3, this Deed shall continue in full force and effect as if the right of termination on the part of the Technical Adviser had not arisen.
- 18.5 Where a Non-defaulting Party has (a) given notice to the Technical Adviser in compliance with Clause 18.3, (b) given an undertaking to the Technical Adviser pursuant to Clause 18.3.3 and (c) has assumed responsibility under this Deed in accordance with Clause 18.4, the Defaulting Party shall reimburse and indemnify such Non-defaulting Party against each and every liability which that Non-defaulting Party has or may have to the Technical Adviser by virtue of such undertaking.
19. **WAIVER**
- 19.1 The failure of any Party at any one time to enforce any provision of this Deed in no way affects its right thereafter to fully enforce its rights under this Deed against any other Party, nor may the

waiver of any breach or any provision be taken or held to be a waiver of any subsequent breach of any provision or be a waiver of the provision itself.

- 19.2 The Contractor and the Authority covenant with each other that they shall not waive any rights, remedies or entitlements or take any other action under this Deed which would or might reasonably be expected to adversely affect the rights, remedies or entitlements of the others without the others' prior written consent.

20. **SEVERABILITY**

In the event that any term, condition or provision contained in this Deed is held to be invalid, unlawful or unenforceable to any extent, such term, clause or provision is to that extent omitted from this Deed and the rest of this Deed stands, without affecting the remaining Clauses.

21. **GOVERNING LAW**

The application and interpretation of this Deed is in all respects governed by English Law and the Parties hereby submit to the non-exclusive jurisdiction of the Courts of England and Wales.

22. **COUNTERPART**

This Deed may be executed in any number of counterparts all of which when taken together shall constitute one and the same instrument.

IN WITNESS WHEREOF the Parties have executed and delivered this as a deed on the date first written.

APPENDIX 1

SUMMARY OF CERTIFICATION SERVICES RELATING TO THE PROJECT AGREEMENT

1. Familiarise itself with and acquire a good understanding of:
 - (a) the provisions of the Project Agreement (including the Specification and the Contractor's Works Proposals) and the relevant aspects of the Project Documents (both expressed and implied) to the extent necessary to be in a position to carry out the Services in accordance with this Deed; and
 - (b) Variations in relation to the MBT Facility implemented pursuant to the Project Agreement including their effect on the Specification and the Contractor's Works Proposals.
2. Promptly notify the Contractor and the Authority in writing if the Technical Adviser becomes aware of the Contractor's and/or the Authority's failure to comply with its obligations under the Project Agreement which may, in its opinion, prevent achievement of satisfactory completion of the Initial Acceptance Tests and/or compliance with the Full Service Acceptance Criteria (as the case may be) of the MBT Facility.
3. Conduct site visits as often as may be necessary in order to familiarise itself with the Works (insofar as they relate to the MBT Facility) and perform the Services.
4. Carry out activities as are necessary for it to determine whether or not the Initial Acceptance Tests have been satisfactorily passed and the Full Service Acceptance Criteria has been met in accordance with Clause 37 and Schedule 19 of the Project Agreement including by making appropriate enquiries of the Contractor, Authority and the Construction Contractor, reviewing the Works (insofar as they relate to the MBT Facility) and notifying the Contractor and Authority of any outstanding matters to be attended before the Initial Acceptance Tests can be considered to have been satisfactorily passed and the Full Service Acceptance Criteria can be considered to have been met (as the case may be), each by reference to the standards required by Clause 37 and Schedule 19 of the Project Agreement.
5. Without limiting paragraph 4, observe and witness the Initial Acceptance Tests and the Full Service Acceptance Tests (insofar as they relate to the MBT Facility) and review all results and data resulting from all such tests (insofar as they relate to the MBT Facility). Having reviewed such results and data, the Technical Adviser shall advise the Contractor, the Lender and the Authority of which tests have been passed and which tests have failed by reference to Clause 37 and Schedule 19.
6. Within the period of 10 Business Days of the Technical Adviser's receipt of a notice from the Contractor that the Contractor considers that the Initial Acceptance Tests have been satisfactorily passed and/or within 10 Business days of the date of any inspection of the MBT Facility by the Technical Adviser to consider whether the Full Service Acceptance Criteria of the MBT Facility has been met (as the case may be), each by reference to the standards required by Clause 37 and Schedule 19 of the Project Agreement either issue:
 - (a) the Initial Acceptance Certificate or the Full Service Acceptance Certificate (as the case may be); or
 - (b) notify the Contractor that it considers that the Initial Acceptance Tests have not been satisfactorily passed or Full Service Acceptance Criteria has not been met (as the case may be), each by reference to the standards required by Clause 37 and Schedule 19 of the Project Agreement, together with a report setting out the respects in which it considers that the same has not been so passed or achieved (as the case may be).

The Technical Adviser shall provide a copy of such certificate or notice (as the case may be) simultaneously upon its issue by the Technical Adviser to the Authority and the Lender.

7. Perform the role of the "Technical Adviser" as defined in and in accordance with the requirements of the Project Agreement and carry out all the services that may reasonably be required in order to discharge that role.
8. Annual review of the Maintenance Programme and the updated Lifecycle Maintenance Matrix pursuant to Schedule 6 of the Operating and Maintenance Contract.

APPENDIX 2

SUMMARY OF ADDITIONAL SERVICES

1. Attendance at any dispute resolution proceedings under the Project Agreement if so requested by the Contractor and/or the Authority.
2. Assessment of significant Variations applied for under the Construction Contract.
3. Attendance and certification of any repeat tests to demonstrate satisfactory completion of the Initial Acceptance Tests and/or compliance with the Full Service Acceptance Criteria (as the case may be) of the MBT Facility.
4. Surveys as requested by the Authority or Contractor under Schedule 6 of the Operating and Maintenance Contract.
5. Requests from the Authority for significant amounts of information or analysis throughout the Project Period.
6. Other Services requested and agreed between the Authority and the Contractor which are not included in the fixed scope.

APPENDIX 3

PART 1

INITIAL ACCEPTANCE CERTIFICATE

I/We refer to the Project Agreement dated [], between (1) Cambridgeshire County Council and (2) Donarbon Waste Management Limited (the "**Project Agreement**") and to the agreement for the appointment of a Technical Adviser dated [] between (1) Cambridgeshire County Council and (2) Donarbon Waste Management Limited and (3) Fichtner Consulting Engineers Limited (the "**Technical Adviser's Appointment**").

I/We [Name] being [position] of Fichtner Consulting Engineers Limited hereby certify that:

1. the Initial Acceptance Tests relating to the MBT Facility were satisfactorily passed by reference to the standards referred to in Clause 37 and Schedule 19 of the Project Agreement on [insert date]; and
2. the only matters that are outstanding in respect of the MBT Facility are the Snagging Items set out in [the attached list] which must be completed by [].

This certificate is issued pursuant to the Project Agreement and [my/our] obligations under the Technical Adviser's Appointment.

When used in this certificate, the words which are defined in the Project Agreement have the meanings given to such words in that agreement.

.....

[Technical Adviser]

.....

[Date]

APPENDIX 3

PART 2

FORM OF FULL SERVICE ACCEPTANCE CERTIFICATE

I/We refer to the Project Agreement dated [], between (1) Cambridgeshire County Council and (2) Donarbon Waste Management Limited (the "**Project Agreement**") and to the agreement for the appointment of a Technical Adviser dated [] between (1) Cambridgeshire County Council and (2) Donarbon Waste Management Limited and (3) Fichtner Consulting Engineers Limited (the "**Technical Adviser's Appointment**").

I/We [Name] being [position] of Fichtner Consulting Engineers Limited hereby certify that:

- (1) the Full Service Acceptance Criteria of the MBT Facility was met by reference to the standards referred to in Clause 37 and Schedule 19 of the Project Agreement on [insert date]; and
- (2) the only matters which are outstanding in respect of the MBT Facility are the Snagging Items set out in [the attached list] which must be completed by [].

This certificate is issued pursuant to the Project Agreement and [my/our] obligations under the Technical Adviser's Appointment.

When used in this certificate, the words which are defined in the Project Agreement have the meanings given to such words in that agreement.

.....

[Technical Adviser]

.....

[Date]

APPENDIX 4
TECHNICAL ADVISER'S REMUNERATION

1. The Fee for the Certification Services shall be paid in accordance with the following instalments:

Task	Month/Year	Fee£
Progress Review Year 1	December 2008	£2,300
Initial Acceptance Certification	September 2009	£7,500
Full Service Acceptance Certification	September 2010	£14,400
Lifecycle Maintenance Review	July 2011	£3,900

and annually from this point

The month indicated in the table above is indicative only, and the fees will be invoiced upon completion of each stage of the services.

All rates and prices will be held firm in 2008 and are then subject to escalation in January of each year. Rates and prices will be escalated by the percentage change of the UK Average Earnings Index (AEI) for the whole economy over the most recently available and verified 12 month period as published on the IDS web-site – www.incomesdata.co.uk

All fees exclude VAT, but are inclusive of travel and expenses.

2. The remuneration for any Additional Services referred to in Appendix 1 shall be an amount agreed prior to the commencement of such Additional Services or, in the absence of such agreement on a time and expenses basis at the following hourly rates:

Title/Grade	Rate£/hour
Director	£125.00
Senior Consultant	£110.00
Consultant	£100.00
Project Engineer	£75.00
Technician with CAE facilities	£60.00

All rates and prices will be held firm in 2008 and are then subject to escalation in January of each year. Rates and prices will be escalated by the percentage change of the percentage change of the UK Average Earnings Index (AEI) for the whole economy over the most recently available and verified 12 month period as published on the IDS web-site – www.incomesdata.co.uk

APPENDIX 5
FUND WARRANTY

APPENDIX 6
DISPUTE RESOLUTION PROCEDURE

1. If a dispute or difference arises between:
 - 1.1 the Employer; and/or
 - 1.2 the Contractor and the Authority independently;and the Technical Adviser under this Deed either party may give notice of its intention to refer such dispute or difference to adjudication at any time and shall within 7 days thereafter refer the same to the decision of the Adjudicator. The party referring such dispute shall be called the "**Referrer**" and the party responding shall be called the "**Respondent**".
2. Where the Referrer has given notice of his intention to refer a dispute to adjudication then:-
 - 2.1 any agreement by the parties on the appointment of the Adjudicator must be reached and the appointment made in sufficient time so that the dispute or difference can be referred to the Adjudicator within 7 days of the date of the notice of intention to refer; and
 - 2.2 if the parties are unable to agree on the appointment of the Adjudicator then application to the Chartered Institute of Arbitrators for the appointment of the adjudicator must be made with the object of securing the appointment of and the referral of the dispute or difference to the Adjudicator within 7 days of the date of the intention to refer.
3. Upon the appointment of the Adjudicator the parties shall comply with all the directions which he may issue for the purposes of fairly and expeditiously considering the facts and issues in the dispute and so that the Adjudicator shall reach a decision within 28 days of the date of referral to him under paragraph 1 or such longer period as is agreed by the parties after the dispute has been referred and the Adjudicator may extend the period of 28 days by up to 14 days with the Referrer's consent.
4. The Adjudicator shall act fairly and impartially and shall take the initiative in ascertaining the facts and the law and shall reach his decision in accordance with the applicable law in relation to this Deed and shall publish his decision simultaneously to both parties. The Adjudicator shall give reasons for his decision.
5. In determining any dispute referred to him for a decision the Adjudicator:-
 - 5.1 shall consider any written representations, statements and expert's reports submitted to him by the parties (which shall be exchanged between the parties when the same are supplied to the Adjudicator);
 - 5.2 shall afford the parties the opportunity to address him in a meeting or meetings at which both parties must be present;
 - 5.3 shall permit the parties to be represented by such legal or other representatives as they shall see fit;
 - 5.4 shall have the power to require the parties to produce to him and to the other party copies of any documents they are able to produce which may assist in the reference (save any which would be privileged from production in Court proceedings) between the parties relating to the dispute; and
 - 5.5 shall be entitled to instruct an expert and to take Counsel's opinion as to any matter within their field of expertise raised by the reference (subject to compliance with the principles of natural justice), but shall not be entitled to delegate any decision to such expert or Counsel.

6. The Adjudicator's decision is binding upon the parties until finally determined by legal proceedings or by agreement.
7. The parties hereby agree that the Adjudicator (including any employee or agent of the Adjudicator) appointed in accordance with this Appendix shall not be 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.
8. If either party does not comply with the decision of the Adjudicator the other party shall be entitled to take proceedings in the Courts to secure such compliance pending any final determination of the referred dispute or difference pursuant to paragraph 6.
9. Subject to the provisions of paragraphs 3, 4, 5 and 11, in deciding any dispute referred to him, the Adjudicator shall determine and take into account any matter ("**Cross-claim**") raised by the Respondent to the notice to refer by way of defence or set-off or counter claim, provided such Cross-claim arises under this Deed.
10. Paragraphs 3 to 8 (inclusive) shall apply to any Cross-claim as they apply to any dispute referred to the Adjudicator pursuant to Paragraph 1.
11. Paragraphs 9 and 10 shall not apply to any Cross-claim if such Cross-claim is being decided or has been decided by an adjudicator other than the Adjudicator appointed pursuant to Paragraphs 1 to 3 inclusive to determine the relevant dispute or difference.

THE COMMON SEAL of)
CAMBRIDGESHIRE COUNTY COUNCIL)
was hereunto affixed by order:-)

EXECUTED as a DEED and delivered (but not)
until the date hereof) as a Deed by)
DONARBON WASTE MANAGEMENT LIMITED)
acting by two of its Directors)
or a Director and its secretary)

.....
Director

.....
Director / Secretary

EXECUTED as a DEED and delivered (but not)
until the date hereof) as a Deed by)
FICHTNER CONSULTING ENGINEERS LIMITED)
acting by two of its Directors or a)
Director and its secretary)

.....
Director

.....
Director / Secretary