

16. SCHEDULE 16:
CONSTRUCTION CONTRACT

Part 1: MBT

Part 2: Alconbury

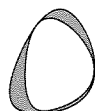
DATED

2008

(1) DONARBON WASTE MANAGEMENT LIMITED

(2) EDMUND NUTTALL LIMITED

CONSTRUCTION CONTRACT
for the provision of waste management facilities



Pinsent Masons

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THIS CONTRACT is made on

2008

BETWEEN

- (1) **DONARBON WASTE MANAGEMENT LIMITED** (Company Number 6054499) whose registered office is at Ely Road, Waterbeach, Cambridge, CB25 9PG (the "Contractor"); and
- (2) **EDMUND NUTTALL LIMITED** (Company Number 00305189) whose registered office is at St James House, Knoll Road, Camberley, Surrey GU15 3XW (the "Construction Contractor").

WHEREAS

- (A) The Contractor has entered into an agreement on even date herewith (the "Project Agreement") with Cambridgeshire County Council (the "Authority") pursuant to which the Contractor will undertake the design, construction and equipping of waste management facilities and the provision of waste management services under the Government's Private Finance Initiative (the "Project").
- (B) The Contractor wishes to appoint the Construction Contractor to design and construct the Works on and subject to the terms of this Contract.

IT IS AGREED AS FOLLOWS:-

CONDITIONS OF CONTRACT

1. CONTRACT DOCUMENTS, DEFINITIONS AND INTERPRETATION

1.1 This Contract comprises:-

1.1.1 These Conditions of Contract; and

1.1.2 the Schedules.

1.2 In this Contract unless the context otherwise requires:

1.2.1 Expressions which are defined in the Project Agreement (including definitions in the Schedules to the Project Agreement) shall have the same meanings where used in this Contract, unless differently defined below for the purposes of this Contract.

1.2.2 Where used in this Contract, the expression "Project Agreement" shall include the Schedules to that agreement, unless otherwise stated.

1.2.3 The following expressions shall, where used in this Contract, have the following meanings:-

"Acceptable Waste" means:

(a) 





Part 1 of Schedule 25 of the Project Agreement;

(b) after RT Completion:

MBT Acceptable Waste as defined under Schedule 22 of the Project Agreement that over a period of 12 months achieves on average a minimum MBT Organic Fraction percentage (by weight) of 59% or above as indicated in Table 1 within paragraph 1.1.5(b) of Schedule 10 and as measured in accordance with Part 1 of Schedule 25 of the Project Agreement;

"Authority Derived Benefit"	as defined in Clause 6.1
"Cash Flow Forecast"	means the Cash Flow Forecast set out in Schedule 15
"CDM Co-ordinator"	means RPS Planning & Development Limited or such other person as shall be appointed as CDM co-ordinator by the Contractor from time to time pursuant to the CDM Regulations
"Compensation Event"	means <ul style="list-style-type: none">(a) a breach by the Authority of any of its obligations under the Project Agreement; or(b) subject to Clause 8.3, a breach by the Contractor of any of its obligations under this Contract except those caused and/or contributed by a breach by the Authority of any of its obligations under the Project Agreement
"Completion"	means the issue of the Take-Over Certificate pursuant to Clause 22.10
"Conditions"	means Clauses 1-72 of this Contract
"Construction Contractor Event of Default"	has the meaning given to it in Clause 40.1
"Construction Contractor Party"	means any employee, consultant, agent, invitee (being a person expressly invited on the Site by the Construction Contractor), licensee or sub-contractor (of any tier) of the Construction Contractor
"Construction Contractor's Collateral Warranty"	means the collateral warranty to be provided by the Construction Contractor to the Authority pursuant to Clause 2.2
"Construction Contractor's Proposals"	means the proposals for the provision of the Works annexed at Schedule 11
"Construction Contractor's Representative"	means Giles Brooks or such other replacement person appointed pursuant to Clause 69.1
"Construction Industry"	means the current scheme under the Income and

"Scheme" or "CIS"	Corporation Taxes Act 1988
"Contamination"	has the meaning given to it in Schedule 48 of the Project Agreement
"Construction Contractor's Lender Warranty"	means the collateral warranty to be provided by the Construction Contractor to the Lender pursuant to Clause 2.2
"Contract Sum"	
"Contract Sum Analysis"	means the analysis of the Contract Sum set out in Schedule 2
"Contractor Event Default"	of has the meaning given to it in Clause 41.1
"Contractor Party"	means any employee, consultant, agent, invitee, licensee or sub-contractor (of any tier) of the Contractor (except the Construction Contractor or a Construction Contractor Party)
"Contractor Variation"	as defined in Clause 33.1
"Contractor's Representative"	means Waterman Sustainable Energy Limited or such other replacement person as may be notified to the Construction Contractor in writing, who may, for the avoidance of doubt, be an employee of the Contractor
"Dangerous Substance"	means any radioactive emissions and any natural or artificial substance (whether in solid or liquid form or in the form of gas or vapour and whether alone or in combination with any other substance) capable of causing significant harm to man or any other living organism or significantly damaging the environment or public health or welfare including but not limited to any controlled, special, hazardous, toxic radioactive or dangerous substance or waste
"Defect"	means any defect or fault in the Works or Materials supplied (not being a default or fault identified on the Snagging List) which occurs due to a failure by the Construction Contractor to meet the Specification and/or the Construction Contractor's Proposals and/or otherwise to comply with its obligations under this Contract
"Defects Liability Period"	means the period from Completion to the date being  Days after the RT Completion
"Dispute"	means any dispute, claim or difference arising out of or relating to this Contract
"Excepted Risks"	means ionising radiations or contamination by radioactivity from any nuclear fuel or from and any nuclear waste from the combustion of nuclear fuel, radioactive toxic explosive or other hazardous properties of any explosive nuclear assembly or nuclear component thereof, pressure waves caused by

		aircraft or other aerial devices travelling at sonic or supersonic speeds
"Final Account"		means the final account referred to in Clause 36
"Final Statement"		means the final statement referred to in Clause 36
"Force Majeure Event"		means the occurrence after the Works Commencement Date of: <ul style="list-style-type: none"> (a) war, civil war, armed conflict or terrorism; or (b) nuclear, chemical or biological contamination unless the source or cause of the contamination is as a result of the actions or breach of the Construction Contractor or its sub-contractors except where such actions of the Construction Contractor constitute solely the receipt or treatment by the Construction Contractor of Contract Waste (containing nuclear, chemical or biological contamination) in accordance with this Contract; or (c) pressure waves caused by devices travelling at supersonic speeds, which directly causes either Party (the "Affected Party") to be unable to comply with all or a material part of its obligations under this Contract;
"Funder"		means any person that provides finance for any part of the Works or the Site or any person having or acquiring a mortgage or charge over the Works or the Site or any part thereof
"Guarantee"		means the guarantee to be executed and delivered pursuant to Clause 2 and Schedule 1 of this Contract
"Guarantor"		means Koninklijke BAM Groep NV (Trade Register No. 30058019)
"Interface Agreement"		means the interface agreement between the Contractor, the Construction Contractor and the Operating Contractor in relation to the Project
"Interim Payments"		means one of the payments to which Clause 35 refers
"Lender"		means The Governor and the Company of the Bank of Ireland including its successors in title and assigns
"Lender's Adviser"	Technical	means Fichtner Consulting Engineers Limited or any replacement consultant appointed by the Lender
"Longstop Date"		means [REDACTED] or such later date as may be provided for by this Contract
"Materials"		means machinery, plant and other items of equipment intended to form part of the completed Works under and in accordance with this Contract

"MBT Plant"	means the waste processing machinery and plant for the mechanical biological treatment facility, including the sorting system and associated mechanical and electrical works forming part of the Works
"Operating Contractor"	means Donarbon Limited (No. 958007) including its successors in title and assigns
"Outstanding Work"	means any work or item or any part of the Works not in accordance with this Contract (including, without limitation, a failure to complete minor snagging items)
"Party"	means a party to this Contract (including any permitted successors or assigns of the original parties) and "Parties" shall be construed accordingly
"Planned Works Commencement Date"	means 13 May 2008
"Practical Completion"	means a state in which the Works are complete in all respects and free of apparent defects save for: <ul style="list-style-type: none"> • completion of the Reliability Testing; and • minor items of incomplete work or minor defects the existence, completion or rectification of which in the opinion of the Contractor's Representative would not prevent or interfere with the use or performance of the Works
"Principal Contractor"	means the Construction Contractor or, in the event of his ceasing to be the Principal Contractor, such other contractor as the Contractor shall appoint as the Principal Contractor pursuant to the CDM Regulations
"Professional Team"	means RPS Planning and Development Limited and such other consultants that may be employed by the Construction Contractor in connection with the Project.
"Project Documents"	means this Contract, the Project Agreement, the Operating Contract, the Interface Agreement, the Construction Contractor's Lender Warranty and the Construction Contractor's Collateral Warranty
"Project Relevant Event"	means any of the following: <ul style="list-style-type: none"> (a) an Authority variation pursuant to Clause 107 of the Project Agreement; and (b) any Compensation Event or other relief or event pursuant to which the Contractor is or becomes entitled to relief or compensation under the Project Agreement
"Provisional Sum"	a sum provided for work included in the Contract Sum Analysis and described in that document as a "Provisional Sum"
"Related Dispute"	means a dispute or difference arising at any time

between the Contractor and the Authority and/or the Operating Contractor (or either of them) which arises out of or in connection with the Project Agreement and/or the Operating Contract (as appropriate) which raises issues of fact or law which are substantially the same as or relate to or are connected with issues of fact or law raised in a dispute or difference between the Parties under this Contract

"Reliability Damages"	Liquidated	means the liquidated damages set out in Schedule 12
"Reliability Testing"		means the testing so described in Schedule 13
"Reliability Tests"		means one or more of the tests (as appropriate) forming part of the Reliability Testing
"Relief Event"		means: <ul style="list-style-type: none"> (a) fire, explosion, lightning, storm, tempest, flood, bursting or overflowing of water tanks apparatus or pipes, ionising radiation (to the extent it does not constitute a Force Majeure Event), earthquakes, riot and civil commotion; (b) failure by any statutory undertaker, utility company, local authority or other like body (other than the Authority acting in its capacity as WDA) or other like body to carry out works or provide services; (c) any accidental loss or damage to the Site or the MBT Facility or any roads servicing them; (d) any failure or shortage of power, fuel or transport (other than an interruption under and in accordance with an interruptible supply arrangement to which the Contractor, the Construction Contractor and/or its sub-contractors is a party); (e) any blockade or embargo which does not constitute a Force Majeure Event; (f) any official or unofficial strike, lock out, go slow or other dispute ("industrial action") generally affecting the construction, steel manufacture or the road haulage or the facilities management or waste management industries in England or a significant sector of any of them, but not including industrial action specific to the Site or industrial action which affects only the employees of the Contractor, the Construction Contractor or its sub-contractors; and (g) the occurrence of Protestor Action provided the Construction Contractor has complied with its obligations under Clauses 15.7 and 15.8; (h) the discovery of any human remains and/or

unexploded ordnance at the Site provided always that the Construction Contractor deals with any discovery in accordance with Good Industry Practice;

unless any of the events listed in paragraphs (a) to (h) inclusive (directly or indirectly) are a result of any wilful act or wilful default of the Construction Contractor and/or any Construction Contractor Party;

"Retention Bond"	means the retention bond provided in accordance with Clause 35.1A and attached in Schedule 9.
"RT Completion"	means the issue of the RT Completion Certificate pursuant to Clause 22.22
"RT Completion Certificate"	has the meaning given to it in Clause 22.22
"RT Completion Date"	means [REDACTED] or such later date as may be provided for by this Contract
"RT Completion Longstop Date"	means [REDACTED] or such later date as may be provided for by this Contract
"Site"	means the MBT Site
"Site Conditions"	means the conditions of the Site including (but not limited to) climatic, hydrological, hydrogeological, geotechnical, environmental and contamination
"Site Materials"	means all unfixed materials and goods delivered to, placed on or adjacent to the Works and intended for incorporation therein
"Specification"	means the specification set out in Schedule 10 of this Contract and Schedules 2 (Specification), 12 (Final Design Proposals - Part 3 only) and 13 (Works Programme) (together comprising the Contractor's Works Proposals), 22 (Facility Input Specification), 23 (WCA Retained Waste and Baseline), 24 (MBT Input Composition) and 25 (Organic Fraction Measurement Protocol) of the Project Agreement
"Specified Perils"	means fire, lightening, explosion, storm, flood, escape of water from any water tank, apparatus or pipes, earthquake, aircraft and other aerial devices or articles dropped therefrom, riot and civil commotion, but excluding Excepted Risks
"Specified Sub-Contractor"	means Kelag Umwelttechnik GMBH & Co KG and any sub-contractor for the following elements of the Works: Piling; Steelwork; and Cladding

as well as any replacement of such sub-contractors

- "Take-Over Certificate"** means the certificate issued under Clause 22.10
- "Works"** means the carrying out and completion of the design, construction and successful installation and performance testing of the MBT Facility and all associated works including, but not limited to the treatment centre, the visitors' centre, the reception building, the preparation building and the car park (in each case in accordance with and as more particularly set out in the Specification and the Construction Contractor's Proposals)
- "Works Commencement Date"** means the date on which the Works are commenced
- "Works Completion Date"** means [REDACTED] as the same may be adjusted in accordance with this Contract
- "Works Programme"** means the Works Programme for the Works set out in Schedule 16 as updated by the Construction Contractor from time to time pursuant to Clause 20.2
- 1.3 If there is an inconsistency between different provisions of this Contract, the following order of precedence shall apply:-
- 1.3.1 legislation shall take priority over this Contract; then
- 1.3.2 the Conditions of Contract shall (unless expressly stated to the contrary) take priority over the provisions of any Schedule to this Contract;
- 1.3.3 the Specification;
- 1.3.4 the Schedules to this Contract (excluding Schedule 11);
- 1.3.5 Schedule 11 (the Construction Contractor's Proposal).
- 1.4 In interpreting this Contract:-
- 1.4.1 if any Party to this Contract is a partnership then the provisions of this Contract will bind each and every such partner jointly and severally;
- 1.4.2 references to the singular shall be deemed to include the plural (and vice versa) and reference to a **"person"** shall be deemed to include any individual firm, unincorporated association, partnership or body corporate and their successors in title and permitted assigns;
- 1.4.3 any reference to any enactment, code of practice, order, regulation or other similar instrument (including any EU instrument) includes and shall be construed as a reference to any consolidation, re-enactment, amendment or replacement of it and any subordinate legislation under it;
- 1.4.4 headings to Clauses shall be disregarded;
- 1.4.5 the masculine includes the feminine and the neuter and vice versa;
- 1.4.6 a reference in this Contract to any Clause, Sub-Clause, Paragraph or Schedule except where expressly stated to the contrary is a reference to a Clause, Sub-Clause, Paragraph or Schedule of this Contract;

- 1.4.7 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; and
- 1.4.8 words preceding "include", "includes", "included" and "including" 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.
- 1.5 The Parties hereby agree that no terms in this Contract shall be construed "contra proferentem".
- 1.6 Where the operation of this Contract is dependent on the operation of (rather than the requirements contained in) the Project Agreement then in the event of termination of the Project Agreement and step-in by or novation to the Authority or the Lender or their nominee, of this Contract, pursuant to the Construction Contractor's Collateral Warranty or the Construction Contractor's Lender Warranty (as relevant) the Parties acting reasonably shall seek to agree a mechanism to determine the Parties' rights and obligations under this Contract in the absence of the operation of the Project Agreement. In the event that they fail to so agree an appointee on the application of either Party to the Chairman of the Society of Construction Law shall determine an appropriate mechanism which shall be binding on all Parties.
- 1.7 Subject to Clause 1.6, if the Project Agreement is terminated, any reference in this Contract to its terms being incorporated or to an obligation, provision, liability, process or requirement of the Project Agreement, shall refer to the Project Agreement as it existed immediately prior to the termination.
- 1.8 All of the Construction Contractor's obligations, duties and responsibilities under this Contract shall be construed as separate obligations, duties and responsibilities owed to the Contractor and (save as provided hereunder) to be performed at the Construction Contractor's own cost and expense.

2. PRELIMINARIES

- 2.1 This Contract and the rights and obligations of the Parties to this Contract shall take effect on the date of this Contract.
- 2.2 The Construction Contractor shall, on or prior to the date of this Contract:-
- 2.2.1 execute and deliver to the Contractor the documents listed in Schedule 1 (save where the Construction Contractor is not a party to one of those documents); and
- 2.2.2 procure the execution and delivery to the Contractor by third parties of the documents listed in Schedule 1.

3. PROJECT DOCUMENTS

- 3.1 The Construction Contractor acknowledges that it has received and familiarised itself with copies of the Project Documents and that it is aware of the basis upon which funding is being provided to the Contractor by the Lender to enable the Contractor to finance the works and the Project.
- 3.2 The Construction Contractor acknowledges further that it is (and the Construction Contractor shall be deemed to be) on notice as to the terms of the Project Documents including the obligations and potential liabilities of the Contractor arising under them. The Construction Contractor

acknowledges that such liabilities are (and such liabilities shall be deemed to be) within the contemplation of the Construction Contractor (including any deductions from the Annual Unitary Charge under the Project Agreement as a result of the negligent acts, omissions, contract breaches or defaults of the Construction Contractor and/or a Construction Contractor Party). The Construction Contractor shall not act or omit to act in any manner which would place the Contractor in breach of any of the Contractor's obligations under the Project Documents. Without prejudice to the generality of this Clause 3.2, the Construction Contractor shall, subject to the terms of the Interface Agreement and save and except where the Construction Contractor is already obliged to pay Reliability Liquidated Damages and/or other liquidated damages under this Contract, be liable to the Contractor for Deductions incurred under the Project Agreement caused by the breach of Contract and/or negligence of the Construction Contractor.

4. **NOT USED**

5. **DOCUMENTS REQUIRED BY LAW OR UNDER PROJECT DOCUMENTS**

- 5.1 Where pursuant to the Project Documents and/or any Legislation and/or Consents any certificates, drawings, notices, programmes or other documents or data in connection with the design, construction and completion of the Works or the performance of the Construction Contractor's other obligations under this Contract are required to be submitted by the Contractor to the Authority or any other person, the Construction Contractor shall (unless otherwise provided in this Contract or otherwise instructed by the Contractor in writing) submit the same on behalf of the Contractor (and at the same time provide a copy to the Contractor) in the manner and within the time (if any) prescribed by the relevant Project Document, Legislation or Consents (as appropriate).
- 5.2 Where under the Project Documents the taking of any step is required first to be notified to, or be subject to the prior consent or approval of, the Authority or any other person, then to the extent that such step relates to the design, construction or completion of the Works or the performance of the Construction Contractor's other obligations under this Contract, the Construction Contractor shall not proceed with such step until the relevant notification has been made or consent or approval given (or has been deemed to be made or given for the purposes of the relevant Project Document).
- 5.3 To the extent that the same relate to the design, construction or completion of the Works or the performance of the Construction Contractor's other obligations under this Contract, the Contractor shall promptly pass to the Construction Contractor and (where applicable) the Construction Contractor shall promptly pass to the Contractor, all information of whatever nature which either receives at any time from the Authority.
- 5.4 Where, pursuant to any Project Document, the Contractor is deemed to have inspected, examined, approved or otherwise satisfied itself as to any matter in connection with or affecting the design, construction or completion of the Works or the performance of the Construction Contractor's other obligations under this Contract, the Construction Contractor shall to the same extent be deemed to have inspected, examined, approved and satisfied itself as to that matter.

6. **PASS-DOWN OF AUTHORITY DERIVED BENEFITS UNDER THE PROJECT AGREEMENT**

- 6.1 The Construction Contractor acknowledges and agrees that it is only entitled to receive from the Contractor any sum of money, extension of time or other relief or benefit of whatever nature which arises out of or relates to a Project Relevant Event (an "**Authority Derived Benefit**") upon satisfaction of one of the following conditions precedent:-
- 6.1.1 it is agreed between the Contractor and the Authority that the Contractor is entitled, under the Project Agreement, to receive from the Authority a sum of money, extension of time or other relief or benefit of which the Authority Derived Benefit claimed by the Construction Contractor under this Contract forms all or part (and, where the relevant Authority Derived Benefit is payment of a sum of money, any period allowed by the Project Agreement, or by the terms of the Contractor's and Authority's agreement, or otherwise determined relating to that sum, for the Authority to make payment has elapsed); or in default of such agreement;
- 6.1.2 it has been determined with binding effect pursuant to the Project Agreement that the Contractor is entitled, under the Project Agreement, to receive from the Authority a sum of money, extension of time or other relief or benefit which is attributable to the Authority Derived Benefit claimed by the Construction Contractor under this Contract (and, where the relevant Authority Derived Benefit is payment of a sum of money, any period allowed by the Project Agreement, or by the terms of the judgment, order or award by which the Contractor's entitlement was determined as aforesaid, for the Authority to make payment has elapsed).
- 6.2 Not used.
- 6.2A For the avoidance of doubt and irrespective of the validity or enforceability of Clause 6.1, the entitlement of the Construction Contractor to any Authority Derived Benefit shall not exceed any sum of money or extension of time or other benefit received by the Contractor from the Authority pursuant to the Project Agreement in respect of the Authority Derived Benefit.
- 6.2B Where there has been any breach of the Project Agreement by the Authority, or any Relief Event, Authority Change or Force Majeure Event (as each is defined in the Project Agreement), the Construction Contractor shall only be entitled to obtain an extension of time or relief from any other consequences of any such event where:-
- 6.2B.1 an agreement has been reached between the Authority and the Contractor, or a determination has otherwise been made under or in connection with the Project Agreement establishing that the Contractor is awarded such extension of time or relief under the Project Agreement; and
- 6.2B.2 the Construction Contractor is otherwise entitled to such extension of time or other relief in this Contract.
- 6.3 Subject to Clause 6.6, where the Construction Contractor claims an Authority Derived Benefit which is payment of a sum of money, and the relevant condition precedent set out in Clause 6.1 has been satisfied in respect of that sum, or part of it, then the sum (or that part) shall become due from the Contractor to the Construction Contractor immediately upon satisfaction of the conditions precedent set out in Clause 6.1 and the final date for payment of the amount due shall be three Days after that amount became due (or, if later, three Days after the Construction Contractor has served upon the Contractor a valid tax invoice for the same).

- 6.4 Where the Construction Contractor claims an Authority Derived Benefit which is payment of a sum of money, then unless and until one of the conditions precedent set out in Clause 6.1 has been satisfied in respect of that sum the Construction Contractor may not recover the same from the Contractor by way of set-off, counterclaim or otherwise.
- 6.5 If any of the conditions precedent referred to in Clause 6.1 are void or unenforceable then Clauses 6.3 and 6.4 shall not apply and:-
- 6.5.1 the Construction Contractor shall be entitled to submit a written request to the Contractor's Representative that the Authority Derived Benefit be assessed by the Contractor's Representative on an interim basis and such a request shall contain reasonably detailed particulars of the entitlement claimed by the Contractor;
- 6.5.2 within 28 days of receipt by the Contractor's Representative of the notice referred to in Clause 6.5.1 the Contractor's Representative shall, subject to Clause 6.2A, inform the Construction Contractor in writing of his interim assessment of the sum of money, extension of time or other relief or benefit attributable to the relevant Authority Derived Benefit ("**Interim Assessment**") and where the Interim Assessment states that sum of money is payable to the Construction Contractor that sum shall become due from the Contractor to the Construction Contractor 7 Days after the date of such Interim Assessment; and
- 6.5.3 the final date for payment of any sum which has become due from the Contractor to the Construction Contractor under this Clause 6 shall be the earliest of:-
- (a) 12 (twelve) months after the same became due pursuant to this Clause 6.5; and
 - (b) 3 Days after the date on which the conditions precedent referred to in Clause 6.1 would have been satisfied in respect of that sum;
- provided in each case that the Construction Contractor has served upon the Contractor a valid tax invoice for the same.
- 6.5.4 Any Interim Assessment made pursuant to this Clause 6.5.2 shall be subject to a reassessment in accordance with Clause 6.7 once the Contractor's entitlement under the Project Agreement has been established.
- 6.6 Where in relation to any Authority Derived Benefit claimed by the Construction Contractor it is not explicitly stated:-
- 6.6.1 in any relevant agreement between the Authority and the Contractor (as referred to at Clause 6.1.1); or
- 6.6.2 in any judgment, order or award by which a relevant entitlement of the Contractor was or may have been determined (as referred to in Clause 6.1.2);

whether or to what extent the entitlement of the Contractor so agreed or determined is attributable to the Authority Derived Benefit claimed by the Construction Contractor then the entitlement of the Construction Contractor as against the Contractor shall be to such proportion of the Contractor's relevant corresponding entitlement against the Authority as is fair and reasonable, having regard to the following factors (but not to the exclusion of other relevant evidence):-

- 6.6.3 whether and to what extent the relevant Authority Derived Benefit claimed by the Construction Contractor formed part of the basis of the Contractor's submissions to the Authority (or the decision making body making any judgment, order or award referred to at Clause 6.1.2) from which the relevant Contractor entitlement arose;
- 6.6.4 whether and to what extent the conditions for establishing a Contractor entitlement under the Project Agreement, attributable to the Authority Derived Benefit claimed by the Construction Contractor, were met;
- 6.6.5 any available evidence as to whether the Authority (or the decision making body making any judgment, order or award referred to at Clause 6.1.2) in fact recognised that the relevant entitlement of the Contractor, or any element of it, was attributable to the Authority Derived Benefit claimed by the Construction Contractor; and
- 6.6.6 any other claims, in addition to the claim for a Contractor entitlement attributable to the relevant Authority Derived Benefit sought by the Construction Contractor, which were advanced by the Contractor, on its own behalf or on behalf of others, in its submissions to the Authority (or the decision making body making any judgment, order or award referred to at Clause 6.1.2) from which the relevant Contractor entitlement arose.

For the avoidance of doubt, a fair and reasonable proportion may be none if the relevant Contractor entitlement as against the Authority is not attributable to the Authority Derived Benefit claimed by the Construction Contractor. In default of agreement between the Construction Contractor and the Contractor the question of what is a fair and reasonable proportion of the Contractor's entitlement, as aforesaid, shall be determined as between the Construction Contractor and the Contractor pursuant to Clause 46.

- 6.6A Pending the agreement or determination of an Authority Derived Benefit under the Project Agreement the Construction Contractor shall take no steps to enforce any right under this Contract to the extent that such right depends on the outcome under the Project Agreement (provided that nothing in this Clause shall prevent either of the Parties from referring a dispute or difference to the Dispute Resolution Procedure under Clause 46).
- 6.7 If, after an Interim Assessment has been made pursuant to Clause 6.5.2, the actual entitlement of the Construction Contractor, in relation to the matters forming all or part of the Interim Assessment ("**Actual Entitlement**"), is established by reference to Clauses 6.2A and/or 6.6, then:
 - 6.7.1 the Actual Entitlement shall supersede the relevant part or parts of the Interim Assessment; and
 - 6.7.2 the Construction Contractor's entitlements under this Contract shall be adjusted to reflect the Actual Entitlement in place of the Interim Assessment; and
 - 6.7.3 , if the Construction Contractor has been paid a sum of money pursuant to an Interim Assessment and the Actual Entitlement provides that a lesser sum of money is payable in relation to the same matter, then the difference between the Interim Assessment and the Actual Entitlement shall be immediately repaid to the Contractor by the Construction Contractor at the request of the Contractor.

7. PURSUIT OF CONTRACTOR ENTITLEMENTS UNDER THE PROJECT AGREEMENT

7.1 In order that the Contractor may establish all entitlements under the Project Agreement which are necessary:-

7.1.1 for the Construction Contractor to become entitled, in turn, to any Authority Derived Benefit under this Contract;

7.1.2 in order to challenge any liability of the Contractor under the Project Agreement which is asserted by the Authority and for which the Construction Contractor in turn is in substance liable, wholly or in part, to the Contractor by virtue of this Contract (including deductions from the Unitary Charge pursuant to the Project Agreement);

7.1.3 in order to obtain an approval from the Authority's Representative where the Construction Contractor is, under this Contract, responsible for obtaining any approval by the Authority's Representative of any item submitted by the Construction Contractor on the Contractor's behalf, and such consent has not been forthcoming; and/or

7.1.4 in order to resolve any matter where the Construction Contractor is responsible for obtaining the agreement of the Authority or the Authority's Representative to the same and such agreement is not forthcoming;

the following provisions of this Clause 7 shall apply.

7.2 The Construction Contractor may in cases where this Clause 7 applies (as provided in Clause 7.1) operate the following provisions in order to seek to establish the relevant entitlement of the Contractor under the Project Agreement:

7.2.1 the Contractor shall upon written request by the Construction Contractor submit to the Authority an application (prepared by the Construction Contractor on the Contractor's behalf with all necessary supporting particulars) for any such entitlement, unless it would be frivolous or vexatious to do so, and provided that such application as prepared by the Construction Contractor complies with any requirements as to format, content and timing stipulated by this Contract and/or relevant provisions of the Project Agreement;

7.2.2 the Contractor shall not without the consent of the Construction Contractor compromise or waive any entitlement under the Project Agreement where either the Construction Contractor has asserted in writing to the Contractor that such entitlement is attributable, wholly or in part, to an Authority Derived Benefit claimed by the Construction Contractor under this Contract; or

7.2.3 where an application to the Authority for a Contractor entitlement of the kinds referred to in Clause 7.1 is unsuccessful, the Construction Contractor may require the further pursuit of that entitlement in accordance with Clause 7.3 or Clause 7.4, provided that the Construction Contractor may only require that Clause 7.4 shall apply if:

(a) the Authority objects to the Construction Contractor having conduct of a claim in the manner provided for in Clause 7.3 (and the Construction Contractor acknowledges the absence of provisions in the Project Agreement affording the Construction Contractor a right formally to participate in the Project Agreement's "Dispute Resolution Procedure" or affording the Construction Contractor a right to step-into the claim on behalf of the Contractor); and/or

- (b) the Contractor asserts that the Contractor entitlement to be pursued against the Authority is attributable partly to the Authority Derived Benefit claimed by the Construction Contractor and partly to the Contractor itself (provided further that in such case the Contractor shall endeavour to obtain the agreement of the Construction Contractor, as to who should have conduct of the relevant claim, before itself assuming conduct of the claim in accordance with Clause 7.4, and if such agreement is reached the agreed arrangements for pursuit of the Contractor's relevant entitlement shall apply instead of Clauses 7.3 and 7.4).
- 7.3 Where pursuant to the Construction Contractor's election under Clause 7.2.3 this Clause 7.3 applies, the Construction Contractor shall (in the name of the Contractor) pursue the relevant Contractor entitlement by invoking the Project Agreement's "Dispute Resolution Procedure" and the following provisions shall have effect:
 - 7.3.1 the Construction Contractor shall act in good faith in the operation of this Clause 7.3;
 - 7.3.2 the Contractor shall in a timely manner afford to the Construction Contractor such co-operation as may reasonably be requested by the Construction Contractor to assist the Construction Contractor in pursuing a Contractor entitlement against the Authority under this Clause 7.3. Such co-operation shall include the provision of documents and the making available of witnesses;
 - 7.3.3 the Construction Contractor shall bear and discharge (and shall indemnify the Contractor against) all claims, proceedings, loss, damage, costs and expenses (including legal costs, expert witness costs, witness expenses, court, adjudicator's, mediator's, expert's and arbitrators' fees and charges and any expenses incurred by the Contractor in affording the co-operation requested by the Construction Contractor pursuant to Clause 7.3.2) whether incurred by the Construction Contractor or the Contractor (and including costs and expenses of the Authority or other persons, where the Construction Contractor or the Contractor become liable to pay the same) arising from the operation of this Clause 7.3 by the Construction Contractor, save in all cases to the extent arising from any breach of this Contract by the Contractor or the Contractor's negligence;
 - 7.3.4 the Construction Contractor shall keep the Contractor fully informed as to the progress of the Construction Contractor's claim and shall if requested by the Contractor provide copies of all documentation relating to the same; and
 - 7.3.5 the Construction Contractor shall not without the consent of the Contractor (such consent not to be unreasonably withheld or delayed) waive or compromise any claim being pursued by it against the Authority, which is attributable to an Authority Derived Benefit claimed by the Construction Contractor under this Contract or an application by the Construction Contractor on the Contractor's behalf for approval by the Authority or the Authority's Representative.
- 7.4 Where pursuant to Clause 7.2.3 this Clause 7.4 applies, the Contractor shall pursue the relevant Contractor entitlement by invoking the Project Agreement's "Dispute Resolution Procedure" and the following provisions shall have effect:
 - 7.4.1 the Construction Contractor shall act in good faith in the operation of this Clause 7.4;

- 7.4.2 the Construction Contractor shall in a timely manner afford to the Contractor such co-operation as may reasonably be requested by the Contractor to assist in pursuing a Contractor entitlement against the Authority under this Clause 7.4. Such co-operation shall include the provision of documents and the making available of witnesses;
- 7.4.3 the Construction Contractor shall bear and discharge (and shall indemnify the Contractor against) all claims, proceedings, loss, damage, costs and expenses (including legal costs, expert witness costs, witness expenses and court, adjudicator's, mediator's, expert's and arbitrators' fees and charges) incurred by the Construction Contractor or the Contractor (and including costs and expenses of the Authority or other persons, where the Construction Contractor or the Contractor become liable to pay the same) arising from the operation of this Clause 7.4 by the Contractor at the Construction Contractor's request, but excluding any such costs and expenses which arise from the Contractor's negligence or breach of this Contract or which relate to the pursuit of the Contractor's entitlements under the Project Agreement other than those which the Construction Contractor has requested that the Contractor pursue in accordance with this Clause 7.4; and
- 7.4.4 the Contractor shall keep the Construction Contractor fully informed as to the progress of the Contractor's claim and shall, if requested by the Construction Contractor and at the Construction Contractor's expense, provide copies of all documentation relating to the same.

8. INTERFACES WITH THE AUTHORITY AND OTHER CONTRACTORS

- 8.1 The Contractor is not responsible or liable (whether in contract, tort, breach of statutory duty or under any other legal theory), as against the Construction Contractor, for any breach of contract, act, omission or statement by the Authority, the Authority's Representative or any Authority Related Party. The Construction Contractor's sole remedy under this Contract in respect of any such breach, act, omission or statement shall be to such Authority Derived Benefits as may expressly be provided for in this Contract (and subject to Clause 6). This Clause 8.1 shall not prejudice any rights or remedies which the Construction Contractor may possess directly against the Authority.
- 8.2 Where, as a result of a breach by the Authority of the Project Agreement, the Construction Contractor suffers loss or damage, then subject to Clause 6, the Construction Contractor shall be entitled to receive, as an Authority Derived Benefit, compensation in respect of the same to the extent that it is agreed or determined pursuant to the Project Agreement that the Contractor is entitled to receive compensation from the Authority attributable to the Construction Contractor's loss or damage.
- 8.3 The Contractor is not responsible or liable (whether in contract, tort, breach of statutory duty or under any other legal theory), as against the Construction Contractor, for any breach of this Contract where such breach is caused by the negligent act or omission or default of the Operating Contractor under the Operating Contract or the Interface Agreement or their employees, agents or sub-contractors. This Clause 8.3 shall not prejudice any rights or remedies which the Construction Contractor may possess directly against the Operating Contractor.
- 8.4 The Construction Contractor shall allow the Operating Contractor access to the Site at all times subject to reasonable prior notice. The Construction Contractor shall co-ordinate its Works with the Operating Contractor (including without limitation the co-ordination of site and design team

meetings). The Operating Contractor will be given the opportunity to attend all relevant site meetings and design team meetings. The Construction Contractor shall not at any time hinder or prevent the Operating Contractor from the performance of its duties. The Construction Contractor shall provide the Operating Contractor with health and safety files and draft operating and maintenance manuals and original documents of all plant and capital equipment warranties and guarantees upon the issue of the Take-Over Certificate.

- 8.5 The Contractor shall use reasonable endeavours to procure that the Operating Contractor shall co-ordinate their duties under the Operating Contract with the Construction Contractor and that the Operating Contractor shall not at any time hinder or prevent the Construction Contractor from the performance of its duties.

9. **OCCUPATION OF THE SITE**

The Construction Contractor shall have non-exclusive access to the Site as necessary for the carrying out the Works up to the date of Completion and at such times during the Defects Liability Period (or any extended Defects Liability Period) as are necessary for the making good of any defects to the Works. The Construction Contractor hereby warrants and undertakes to the Contractor that during such occupation it shall not do anything to place the Contractor in breach of its obligations under the Project Agreement and the Sub-Lease relating to the Site.

10. **CONSENTS**

- 10.1 Save in respect of any Permits or the Planning Permission for the MBT Facility the Construction Contractor shall at its own expense obtain and maintain and renew (as necessary) all Consents which are from time to time required to carry out and complete the Works and the Construction Contractor shall promptly supply to the Contractor and to the Authority free of charge a copy of every application for a Consent (with a copy of the accompanying drawings and other documents) and a copy of every Consent obtained.
- 10.2 The Construction Contractor shall not (and shall procure that no other person under its control shall) without the prior consent in writing of the Contractor (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 date of this Contract) or of any condition attached to any such Consent but subject to compliance by the Contractor with its obligations under this Clause 10 references in this Contract to "Consents" shall be construed as referring to the Consents as from time to time varied, relaxed or waived.
- 10.3 The Construction Contractor shall (and ensure that all Construction Contractor Parties shall):
- 10.3.1 comply with conditions 2, 5, 6, 9, 15, 17, 19, 21, 22, 23, 24, 26, 27, 29 and 32 of the Planning Permission;
- 10.3.2 in addition to and without prejudice to the specific obligations in Clause 10.3.1, comply with the conditions and requirements attached to the Consents;
- 10.3.3 procure that no such Consent is breached by it 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 Construction Contractor to carry out the Works; and

- 10.3.4 notify the Contractor and 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 a copy of any such notice within 2 Business Days of receipt of the same to the Contractor and the Authority.
- 10.4 The Construction Contractor shall provide all advice and assistance and information required by the Contractor to enable the Contractor to comply with any Permits, the Planning Permission for the MBT Facility and Clause 19 of the Project Agreement.
- 10.5 Subject to Clause 10.4, the Contractor shall be responsible for obtaining, maintaining and renewing (as necessary) the Permits and the Planning Permission for the MBT Facility.

11. **THIRD PARTY CONSENTS OF ADJOINING OWNERS AND ANY INDEMNITY**

- 11.1 The Construction Contractor shall not do or permit or suffer to be done anything which might:-
 - 11.1.1 be or become a danger or unreasonable nuisance (which danger or nuisance could be prevented by a construction contractor using reasonable and practicable measures) or give rise to liability in tort to any Adjoining Owners or to members of the public generally;
 - 11.1.2 cause damage to any Adjoining Property; or
 - 11.1.3 (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 Construction Contractor shall at its own expense in the carrying out of the Works 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.

- 11.2 If the Works cannot be carried out without interfering with any Adverse Right the Construction 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 Contractor and the Authority a copy of every Third Party Consent obtained.
- 11.3 The Construction 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 Construction Contractor or any Construction Contractor Party.
- 11.4 The Construction Contractor shall be responsible for and shall indemnify the Contractor against all actions reasonable costs, claims, demands and liability whatever in relation to any failure by the Construction Contractor to comply with its obligations under this Clause 11 or with the terms of any Consents or any Third Party Consent (including without limitation all actions costs claims demands and liability in respect of the death or of personal injury to any person whomsoever or not engaged in the carrying out of the Works or otherwise) unless it shall arise from any wilful act, negligence or other default of the Contractor or any person for whom the Contractor is responsible including any failure by the Contractor to disclose to the Construction Contractor any Adverse Right or requirement for a Third Party Consent of which it is aware.

12. GENERAL OBLIGATIONS OF THE CONSTRUCTION CONTRACTOR

- 12.1 The Construction Contractor shall perform the Works in accordance with:
- 12.1.1 this Contract;
 - 12.1.2 Good Industry Practice;
 - 12.1.3 Legislation; and
 - 12.1.4 subject to Clause 10, the terms and requirements of all Consents.

13. GENERAL REPRESENTATIONS WARRANTIES AND UNDERTAKINGS

- 13.1 The Construction Contractor warrants to the Contractor that:-
- 13.1.1 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;
 - 13.1.2 it has the power to enter into and to exercise its rights and perform its obligations under this Contract;
 - 13.1.3 all necessary action to authorise the execution of and the performance of its obligations under this Contract has been taken;
 - 13.1.4 the obligations expressed to be assumed by the Construction Contractor under this Contract are legal, valid, binding and enforceable upon and against the Construction Contractor to the extent permitted by law;
 - 13.1.5 the execution, delivery and performance by it of this Contract does not contravene any provision of:
 - (a) any existing Legislation either in force, or enacted but not yet in force binding on the Construction Contractor;
 - (b) the Memorandum and Articles of Association of the Construction Contractor;
 - (c) any order or decree or decision of any court or arbitrator or adjudicator; or
 - (d) any obligation which is binding upon the Construction Contractor or upon any of its assets or revenues;
 - 13.1.6 at the date of this Contract, the information, representation and other matters of fact committed in writing to the Contractor by the Construction Contractor in connection with or arising out of its tender are true and complete in all material respects in the context of the Project;
 - 13.1.7 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 Construction Contractor, pending or threatened against it or any of its assets which will or might have a material adverse effect on the ability of the Construction Contractor to perform its obligations under this Contract;
 - 13.1.8 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 Construction Contractor to perform its obligations under this Contract;

- 13.1.9 no proceedings or other steps have been taken and not discharged (nor, to the best of the knowledge of the Construction 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;
- 13.1.10 no Construction Contractor Default has occurred which is continuing;
- 13.1.11 each of the Project Documents to which it is a party 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;
- 13.1.12 the copies of the Project Documents to which is a party 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 which would materially affect the interpretation or application of any of the Project Documents;
- 13.1.13 there are no material facts or circumstances in relation to the financial position or operational constitution of the Construction Contractor which have not been fully and fairly disclosed to the Contractor and which if disclosed might reasonably have been expected to affect the decision of the Contractor to enter into this Contract; and
- 13.1.14 there has been no omission by the Construction Contractor to disclose a fact which in any such case would entitle any insurer providing the professional indemnity insurance cover referred to in Clause 48.11 to avoid or otherwise reduce its liability under that insurance policy to less than the minimum level of cover required by that Clause 48.11,

and the Contractor relies upon such warranties.

- 13.2 The Construction Contractor undertakes with the Contractor that for so long as this Contract remains in full force, the Construction Contractor will immediately upon becoming aware that, any litigation, arbitration, administrative, 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 Works) the Construction Contractor's ability to perform its obligations under this Contract, may be threatened or pending or commenced give the Contractor notice of all such litigation, arbitration, administrative, adjudication or mediation proceedings, such notice being no later than:
 - 13.2.1 within 2 Business Days of becoming aware of such proceedings, if the relevant proceedings are commenced against the Construction Contractor itself;
 - 13.2.2 within 15 Business Days of becoming aware of such proceedings, where the relevant proceedings are against a sub-contractor and/or a member of the Professional Team; and
 - 13.2.3 within 15 Business Days after becoming aware of such proceedings where the proceedings are threatened or pending.
- 13.3 All warranties made, given or undertaken by the Construction Contractor in this Clause 13 are cumulative and none shall be given a limited construction by reference to any other.

14. CONSTRUCTION CONTRACTOR'S DUE DILIGENCE

- 14.1 The Construction 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 site conditions, environmental contamination, archaeological considerations, levels, services and the suitability of the Site.
- 14.2 Without prejudice to the generality of Clause 14.1 above, the Construction Contractor shall be deemed to have gathered all information necessary to perform its obligations under this Contract and other obligations assumed, including:-
- 14.2.1 information as to the nature, location and condition of the Site (including hydrological, geological, geo-technical and sub-surface conditions); and
- 14.2.2 information relating to archaeological finds, areas of archaeological scientific or natural interest, local conditions and facilities and the quality of existing structures.
- 14.3 Except in respect of any statement, information or advice which was made or given fraudulently by the Contractor or a Contractor Party, the Construction Contractor shall not in any way be relieved from any obligation under this Contract nor shall it be entitled to claim against the Contractor on grounds that any information, whether obtained from the Authority, Contractor or otherwise (including information made available by the Contractor) is incorrect or insufficient and shall make its own enquiries as to the accuracy and adequacy of that information.

15. CONDUCT OF THE WORKS

- 15.1 The Construction Contractor warrants to the Contractor that there has been exercised and will be exercised in the design of the Works under this Contract all the reasonable skill and care as to be expected of a competent, duly qualified and experienced designer carrying out the design of works of a similar scope, nature and complexity to the Works and the Construction Contractor's liability in relation to the design of the Works shall be limited accordingly.
- 15.2 The Construction Contractor shall carry out, or shall procure the carrying out of the design (including the preparation of Design Data), construction, completion, commissioning and testing of the Works to ensure that:-
- 15.2.1 the Works and the Final Design Proposals comply with and meet all the requirements of this Contract, the Specification, the Construction Contractor's Proposals, Good Industry Practice, Guidance, all Consents and all applicable Legislation;
- 15.2.2 new materials or recycled materials of equivalent quality only will be used in carrying out the Works (unless the Contractor agrees otherwise in writing or the contrary is set out in the Specification (as defined, in this instance only, in the Project Agreement) and/or the Contractor's Works Proposals), and all goods used or included in the Works will be of satisfactory quality, and no products or materials will be used or included in the Works that 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;

- 15.2.3 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 15.2.4;
- 15.2.4 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 Site;
- 15.2.5 the Works are maintained in good order, kept in a safe condition and protected from damage, and working areas of the Site are secure against trespassers and kept clean and tidy so far as practicable having regard to the nature of the Works; and
- 15.2.6 adequate retaining and supporting walls are provided to support any land adjacent to the Site during the carrying out of the Works.
- 15.3 During the carrying out of the Works the Construction Contractor shall and shall-procure that its sub-contractors shall:-
 - 15.3.1 not use or occupy or permit the Site upon which the Works are being undertaken to be used or occupied for any purpose other than the carrying out of the Works;
 - 15.3.2 not deposit or manufacture or permit to be deposited or manufactured on the Site upon which the Works are being undertaken any materials which are not required for the carrying out of the Works;
 - 15.3.3 not sell or dispose of any earth, clay, sand, gravel, chalk or other material from the Site 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 Contractor;
 - 15.3.4 at the Construction 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 Construction 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;
 - 15.3.5 not permit or suffer the storage of materials or the parking of vehicles in the immediate external vicinity of the boundaries of the Site by the Construction Contractor, or any Construction Contractor Party, other than for reasonable periods necessary for the carrying out of the Works or for loading and unloading or as set out in the Construction Contractor's Proposals;
 - 15.3.6 ensure that all vehicles used in the Works leaving the Site are adequately cleaned to prevent the deposit of waste materials and debris on any Adjoining Property;
 - 15.3.7 not, in breach of any Legislation, Guidance or Consents permit any Contamination from the Site to enter into any rivers or any ditches or services media on the Site and/or any Adjoining Property and shall not permit or suffer the blockage of any of such rivers, ditches and services media by reason of anything done or omitted on the Site or any land upon which the Works are being undertaken;

- 15.3.8 , save in the case of Emergency, not gain access to or egress from the Site except in accordance with lawful rights of access, any Consents or as contemplated by the Construction Contractor's Proposals;
- 15.3.9 not without the written consent of the Contractor erect or permit or suffer to be erected on the Site any temporary structure except as is reasonably required for the carrying out of the Works or as contemplated by the Construction Contractor's Proposals;
- 15.3.10 not erect or exhibit or permit or suffer to be erected or exhibited on any part of the Site any signs or trade boards save those previously approved in writing by the Contractor;
- 15.3.11 take all necessary steps required in accordance with Legislation with regard to ensuring that the health and safety of all:-
- (a) occupants of the Site;
 - (b) individuals invited or trespassing onto the Site; and
 - (c) occupants of Adjoining Properties;
- is not adversely impacted upon by the undertaking of the Works;
- 15.3.12 be responsible at its own cost for obtaining all road closure and/or orders necessary to enable the Works proceed;
- 15.3.13 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;
- 15.3.14 notify the Contractor 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 Contractor shall have the sole property in any such articles and they shall be dealt with as the Contractor shall reasonably direct provided that any such directions shall constitute a Contractor Variation; and
- 15.3.15 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 Construction Contractor's own expense any Conduits wrongly laid and any wrong or crossed connection.
- 15.4 The Construction Contractor acknowledges the provisions of Clauses 15.4 to 15.7 of the Project Agreement and accordingly acknowledges and agrees that the Contractor shall have no liability to the Construction Contractor in respect of any of the matters for which the Authority has excluded Liability to the Contractor under those clauses of the Project Agreement.
- 15.5 The Construction Contractor shall fit out and equip the Works with the plant and equipment and all other plant, services, machinery, goods, fixtures, fittings, materials, consumables and equipment necessary to enable the Construction Contractor to carry out and complete the Works in accordance with the Contract.
- 15.6 The Construction Contractor shall, on or before Completion, procure that any Contractor Parties nominated by the Contractor, receive the training set out in section 6 of Schedule 10.

- 15.7 The Construction Contractor shall use all reasonable endeavours to prevent Protester Action causing delay to the Works and disruption at and/or damage to the Works including, for the avoidance of doubt, providing appropriate security and security fencing 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.
- 15.8 Notwithstanding the provisions of Clause 15.7 above, in the event Protester Action arises at or around the Site or on the access road to the Site the Construction 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. Subject to Clause 38, the Construction Contractor shall be responsible for the consequences of any delay or disruption at and or damage to the Works consequent upon any Protester Action.
- 15.9 The Lender and the Lender's Technical Adviser shall be entitled to attend any formal meetings, regular programmed meetings and/or other progress critical meetings relating to the Works and shall be given reasonable prior written notice of such meetings by the Construction Contractor.
- 15.10 The Construction Contractor shall ensure that regular programmed meetings and other progress critical meetings relating to the Works are held (with progress meetings being held no less frequently than once a month) and are fully and properly minuted in accordance with the Contractor's Integrated Management System.
- 15.11 The Construction Contractor shall on request by the Contractor (such requests being no frequent than once a month) from the Works Commencement Date send to the Contractor's Representative copies of all certificates, instructions, variations or equivalent contract documentation issued under the terms of this Contract sorted into chronological order.
- 15.12 The Construction Contractor warrants to the Contractor that no Dangerous Substance has been or shall be used, disposed of, generated, stored, transported, dumped, released, deposited, buried or emitted at the Site.
- 15.13 The Construction Contractor shall issue a monthly report to the Contractor's Representative (copied to the Lender's Technical Adviser) in accordance with the requirements of the Specification/Schedule 10.

16. **NOT USED**

17. **DESIGN RESPONSIBILITY AND DISCREPANCIES**

- 17.1 The Construction Contractor accepts full responsibility in all respects for the design of the Works (including: the selection of materials for incorporation into the Works, all design work carried out prior to the date of this Contract, the Final Design Proposals and all design work forming part of the Specification) so that the Works will satisfy all the requirements of this Contract.
- 17.2 The Construction Contractor shall not be relieved of such responsibility as aforesaid by virtue of the Specification, or the Construction Contractor's Proposals having been prepared, reviewed, approved or commented upon by or on behalf of the Contractor or the Authority or by virtue of the incorporation of any such documents within this Contract.

- 17.3 No inspection, testing, approval or review nor any omission to inspect, test, approve or review on the part of the Contractor or the Authority shall diminish any duty or liability hereunder of the Construction Contractor.
- 17.4 Where there is a discrepancy within the Specification the Construction Contractor shall inform the Contractor in writing of his proposed amendment to deal with the discrepancy and the Contractor shall either agree the proposed amendment or himself decide how the discrepancy shall be dealt with; such agreement or decision shall be notified in writing to the Construction Contractor and the Construction Contractor shall be obliged to comply with the decision or acceptance by the Contractor without any adjustment of the Contract Sum or any extension to the Works Completion Date.
- 17.5 Where there is a discrepancy within the Construction Contractor's Proposals or between the Specification and the Construction Contractor's Proposals the Construction Contractor shall inform the Contractor in writing of his proposed amendment to remove the discrepancy; and (subject always to compliance with Legislation) the Contractor shall decide between the discrepant items or otherwise may accept the Construction Contractor's proposed amendment and the Construction Contractor shall be obliged to comply with the decision or acceptance by the Contractor without cost to the Contractor or any adjustment to the Contract Sum or any extension to the Works Completion Date.
- 17.6 If the Construction Contractor or the Contractor find any such discrepancy as is referred to in Clause 17.4 or Clause 17.5 he shall immediately give the other written notice specifying the discrepancy.

18. **NOT USED.**

19. **THE EFFECT OF THE CONTRACTOR'S AGREEMENT**

19.1 The agreement, consent, certification or approval by the Contractor, the Technical Adviser and/or the Contractor's Representative is required for any matter where:

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

19.1.2 the Construction Contractor seeks such agreement voluntarily;

and 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 Construction Contractor's obligation to design, construct and test the Works and make them Available in accordance with this Contract and the Project Agreement.

19.2 Further, and for the avoidance of doubt, in the event that the Contractor, the Technical Adviser, the Lender, the Lender's Technical Adviser and/or the Contractor's Representative provide any assistance, proffer an opinion or give advice to the Construction Contractor the same shall not, subject to the express terms of this Contract, diminish or limit the Construction Contractor's obligations under this Contract and in particular shall not detract from the Construction Contractor's responsibilities under Clause 15.

20. **TIME FOR COMPLETION OF THE WORKS**

20.1 The Construction Contractor shall commence, or procure the commencement of, the Works no later than the Planned Works Commencement Date and shall thereafter regularly and diligently proceed

with the designs and construction of the Works in accordance with the Works Programme.

- 20.2 The Construction Contractor shall be responsible for maintaining and updating the Works Programme throughout the course of the Works and shall ensure that the Contractor promptly receives a copy of each revision of the Works Programme.
- 20.3 Subject to the provisions of Clause 20.7, the Construction Contractor shall carry out and complete the Works such that the Take-Over Certificate is issued by the Works Completion Date.
- 20.4 Without prejudice to the time periods in Clauses 37 and 38, if at any time the Construction Contractor becomes aware that there will be or is likely to be a delay in the Works, such that Completion may not be achieved by the Works Completion Date, then the Construction Contractor shall as soon as reasonably practicable and in any event within 10 Business Days of becoming aware of the likely delay give notice to the Contractor to that effect specifying:
 - 20.4.1 the reason for the delay or likely delay; and
 - 20.4.2 an estimate of the likely effect of the delay on the Works including the Works Completion Date (taking into account any measures that the Construction Contractor proposes to adopt to mitigate the consequences of the delay) in accordance with Clause 20.6.
- 20.5 Following service of a notice by the Construction Contractor pursuant to Clause 20.4, the Contractor shall promptly supply to the Contractor any further information relating to the delay which:
 - 20.5.1 is received by the Construction Contractor; or
 - 20.5.2 is reasonably requested by the Contractor.
- 20.6 The Construction Contractor shall use best endeavours to mitigate the delay and the consequences of any delay which is the subject of a notice pursuant to Clause 20.4.
- 20.7 If the carrying out of any part of the Works is delayed and the delay is notified to the Contractor by the Construction Contractor as being in the Construction Contractor's reasonable opinion attributable to:
 - 20.7.1 a Compensation Event, then the provisions of Clause 37 as appropriate, shall apply; or
 - 20.7.2 a Relief Event, then the provisions of Clause 38 shall apply; or
 - 20.7.3 a Force Majeure Event, then the provisions of Clause 43 shall apply.
- 20.8 Any design, design development work or any other part of the Works carried out prior to the Works Commencement Date will not obviate, diminish or alter the Construction Contractor's obligations hereunder and will be deemed to have been carried out pursuant to this Contract.

21. FAILURE OF CONSTRUCTION CONTRACTOR TO COMPLETE ON TIME

- 21.1 If the Construction Contractor has not achieved:
 - 21.1.1 Completion before the Works Completion Date; and/or

21.1.2 RT Completion before the RT Completion Date;

then the Contractor shall in each case issue a notice in writing to the Construction Contractor to that effect. In the event of a revised Works Completion Date and/or RT Completion Date being fixed after the issuing of such a notice, such fixing shall cancel any relevant notice and the Contractor shall issue such further notices in writing under this Clause 21.1 as may be necessary.

21.2 Without prejudice to the Contractor's rights under Clauses 40 to 45 (inclusive) and provided that a notice has been issued under Clause 21.1 as aforesaid (and has not been cancelled), the Construction Contractor shall upon the Contractor's demand pay or allow to the Contractor liquidated damages, at the relevant rate as stated in Clause 21.7, in respect of each day that elapses between (as appropriate):

21.2.1 the Works Completion Date and Completion; and/or

21.2.2 the RT Completion Date and RT Completion.

The Contractor may not make any fresh demand for such liquidated damages after the Final Statement or Contractor's Final Statement has been agreed or determined. The Contractor may (at any time after demanding the same) deduct liquidated damages arising under this Clause 21.2 from any sum due or to become due to the Construction Contractor under this Contract (including any balance stated as due to the Contractor in the Final Statement or Contractor's Final Statement). Further or alternatively, the Contractor may recover the same from the Construction Contractor as a debt, and such debt shall be payable by the Construction Contractor within five (5) Business Days of the Contractor's demand.

21.3 If a later Works Completion Date and/or RT Completion Date is fixed in accordance with this Contract and prior to such fixing the Contractor has recovered from the Construction Contractor liquidated damages in respect of the late completion of the Works based on a previously applicable Works Completion Date and/or RT Completion Date (as appropriate) which is earlier than that newly fixed, the Contractor shall repay or credit to the Construction Contractor any amount of liquidated damages recovered which was in excess of the Contractor's entitlement.

21.4 Notwithstanding the cancellation of any notice previously issued under Clause 21.1 or the issuing of any further such notice, any demand of the Contractor which has been previously issued in writing in accordance with Clause 21.2 shall remain effective unless and until withdrawn or replaced by the Contractor.

21.5 For the purposes of this Clause 21 only, the term "achieve" shall mean Completion has been certified pursuant to Clause 22.10 and/or RT Completion has been certified pursuant to Clause 22.22 (as appropriate).

21.6 The Parties agree and intend that the liquidated damages amounts which the Contractor may become liable to pay pursuant to this Clause 21 are not a penalty but rather a genuine pre-estimate of the loss which the Contractor will suffer as a result of a delay in the achievement of Completion by the Works Completion Date.

21.7 The rate of liquidated damages referred to in Clause 21.2 shall be:

21.7.1

[REDACTED]

21.7.2

(a)

(b)

21.8

21.8.1 achieve Completion on or before the Works Completion Date; and

21.8.2 achieve RT Completion on or before the RT Completion Date,

22. COMPLETION AND READY FOR USE

22.1 Not used.

22.2 15 weeks before the date, when in the Construction Contractor's opinion, the whole of the Works shall be Practically Complete and achieve Completion, the Construction Contractor shall notify the Contractor, the Contractor's Representative, the Authority and the Authority's Representative (complying as necessary with Schedule 13) and shall submit to the Technical Adviser (the documentary packages and all other details and documents (if any) required to be submitted to the Technical Adviser and/or Contractor's Representative pursuant to Schedule 19 of the Project Agreement).

22.3 The Construction Contractor shall notify the Contractor's Representative (copied simultaneously to the Technical Adviser, the Lender and the Authority) not less than 12 Business Days in advance as to the date upon which the Construction Contractor considers that the MBT Facility will be in a condition to proceed with the Initial Acceptance Tests and the Construction Contractor shall keep those notified parties informed of any alterations to the proposed date.

22.4 The Construction Contractor shall, not less than 5 Business Days prior to the anticipated date upon which the Construction Contractor considers that the MBT Facility will be in a condition to proceed with the Initial Acceptance Tests, confirm to the Contractor (copied simultaneously to the Authority) the Contract Waste delivery requirements reasonably necessary for commissioning and Initial Acceptance Testing of the MBT Facility.

22.5 The Contractor shall provide the levels and timings and periods of deliveries of Contract Waste required under Clause 22.4. Such arrangements shall be made in accordance with the Contract Waste delivery requirements for such

Contract Waste confirmed in the notice issued under Clause 22.4. The Contractor shall be kept informed as to the likely need for a further finite period of delivery of Contract Waste to the MBT Facility to allow for further Initial Acceptance Testing.

- 22.6 The Construction Contractor in the presence of the Contractor's Representative shall undertake the Initial Acceptance Tests in accordance with the provisions of Schedule 19 of the Project Agreement, and Schedule 13 and the Technical Adviser, the Lender and the Authority (or each of their authorised representatives) shall be entitled to witness the Initial Acceptance Tests.
- 22.7 When the Contractor's Representative is of the opinion that the Initial Acceptance Tests have been satisfactorily passed it shall forthwith promptly notify the Construction Contractor, the Technical Adviser, the Lender's Technical Adviser and the Authority of the same.
- 22.8 If, following Initial Acceptance Testing, the Technical Adviser provides a report pursuant to Clause 37.2.4.2 of the Project Agreement the Construction Contractor shall when it is of the opinion that each of the matters referred to in the Technical Adviser's report have been satisfied notify the Contractor, the Technical Adviser and the Authority of the same and thereafter the procedures in Clauses 22.3 to 22.7 shall be repeated to the extent required (although the period of notice referred to in Clauses 22.3 shall be reduced to 3 Business Days) until the Initial Acceptance Certificate is issued or it is determined under the Project Agreement that the certificate should have been issued.
- 22.9 The Contractor shall use reasonable endeavours to procure that the Technical Adviser complies with the requirements of Clauses 37.2 and 37.4 of the Project Agreement.
- 22.10 Provided that the Contractor's Representative is satisfied that Practical Completion has occurred and that:-
- 22.10.1 the Initial Acceptance Tests have been satisfactorily passed; and
- 22.10.2 the Construction Contractor has supplied the Contractor's Representative with a suitable "Health and Safety File" as defined in the CDM Regulations in respect of the Works and the operation and maintenance manuals required under Schedule 10; and
- 22.10.3 the Construction Contractor has discharged its training obligations in Clause 15.6; and
- 22.10.4 all Outstanding Works in the Snagging List (if there is one) will be carried out within forty five (45) Days of any certificate issued in accordance with this Clause 22.10; and
- 22.10.5 the criteria set out in paragraphs 1.1 and 1.2 of Schedule 13 has been satisfied; and
- 22.10.6 the Technical Adviser has issued the Initial Acceptance Certificate pursuant to the Project Agreement (or it is determined under the Project Agreement that the Initial Acceptance Certificate should have been issued);

then the Contractor's Representative shall issue a certificate of completion (the "**Take-Over Certificate**") to the Construction Contractor (copied simultaneously to the Authority and the Lender) stating the date upon which the matters referred to in this Clause 22.10 have been achieved.

- 22.11 If the Contractor's Representative is not satisfied that any of the matters referred to in Clause 22.10 have been achieved and/or a Snagging List cannot be agreed, then the Contractor's Representative shall, within 10 Business Days after the Initial Acceptance Tests have been completed, notify the Construction Contractor of this fact. At the same time as such notification the Contractor's Representative shall provide to the Construction Contractor a report setting out which of, and in what respects, the matters referred to in Clause 22.10 have not been achieved.
- 22.12 The Construction Contractor shall then complete the Works as necessary and shall repeat the relevant tests required by this Clause 22. The Construction Contractor shall, when it is of the opinion that each of the matters referred to in the Contractor's Representative's report in Clause 22.11 have been satisfied, notify the Contractor's Representative (copied simultaneously to the Authority and the Lender) of the same and thereafter the procedures set out in Clauses 22.10, 22.11 and 22.12 shall be repeated until the Take-Over Certificate is issued by the Contractor's Representative or it is determined that the Take-Over Certificate should have been so issued.
- 22.13 The following provisions shall apply in respect of any Outstanding Work included in the Take-Over Certificate and/or the RT Completion Certificate:
- 22.13.1 the Construction Contractor shall complete the Outstanding Work to the reasonable satisfaction of the Contractor's Representative as soon as reasonably practicable in the circumstances and in accordance with this Clause 22.13;
- 22.13.2 the Construction Contractor shall, within five (5) Days of the date of issue of the Take-Over Certificate and/or the RT Completion Certificate (as appropriate), submit to the Contractor's Representative for approval a draft programme and method statement for the carrying out of the Outstanding Work, which shall take into account all reasonable steps to ensure minimum impact on the commercial operation of the completed Works;
- 22.13.3 the Contractor's Representative's approval or other response to the draft programme and method statement referred to in Clause 22.13.2 or any revised version thereof shall be given by the Contractor's Representative within five (5) Days of its receipt;
- 22.13.4 the Construction Contractor shall keep the Contractor and the Authority informed regarding progress in addressing the Outstanding Work;
- 22.13.5 the Contractor shall allow or shall procure that the Operating Contractor shall allow the Construction Contractor and the Technical Adviser such access as is agreed in the approved programme and method statement for the Construction Contractor to complete the Outstanding Works within the agreed period;
- 22.13.6 the Contractor's Representative shall be entitled to be present during completion of the Outstanding Work; and
- 22.13.7 should the Construction Contractor not complete the Outstanding Work within the time as agreed in the approved programme and method statement or not complete all of the Outstanding Work within such period of forty five (45) Days (as the case may be), the Contractor may proceed to carry out the incomplete work at the Construction Contractor's expense provided that it does so in a reasonable manner and gives the Construction Contractor reasonable advance notice of its intention to do so and in such circumstances the costs properly incurred by the Contractor shall be a debt

due by the Construction Contractor to the Contractor in so doing and either deducted from the amounts remaining due to the Construction Contractor, or shall be paid by the Construction Contractor to the Contractor.

- 22.14 If the Construction Contractor completes all of the Outstanding Work in accordance with Clause 22.13, then the Contractor's Representative shall issue a certificate to that effect.
- 22.15 The Contractor's Representative shall, as soon as is reasonably practicable after the Take-Over Certificate has been issued pursuant to Clause 22.10, provide written notice to the Construction Contractor of the date that the Contractor intends to commence Reliability Testing. The date stated in such notice as the date that the Contractor intends to commence Reliability Testing shall be no later than fourteen (14) Days from the date of such notice.
- 22.16 The Contractor shall carry out such Reliability Testing in accordance with this Clause 22 and the provisions of Schedule 13.
- 22.17 Either Party shall be entitled to order the cessation of any Reliability Testing if damage to the Works or personal injury is likely to result from continuation. Cessation of Reliability Testing on account of this Clause 22 shall not release the Construction Contractor from its obligations in relation to the relevant Reliability Testing.
- 22.18 The Contractor shall notify the Construction Contractor of the completion of Reliability Testing.
- 22.19 The Contractor shall give the Construction Contractor, the Authority and the Technical Adviser not less than 5 Business Days' notice of the date when the Contractor's Representative may inspect the MBT Facility with a view to verifying whether the MBT Facility satisfies the Full Service Acceptance Criteria.
- 22.20 Representatives from the Construction Contractor, the Lender, the Authority 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 satisfied. The Technical Adviser shall carry out and discharge his obligations under Schedule 19 of the Project Agreement in relation to determining whether the Full Service Acceptance Criteria has been satisfied.
- 22.21 If, following any inspection pursuant to Clause 22.20, the Technical Adviser provides a report pursuant to Clause 37.4.2 of the Project Agreement the Construction Contractor shall when it is of the opinion that each of the matters referred to in the Technical Adviser's report have been satisfied notify the Contractor, the Technical Adviser and the Authority of the same and thereafter the procedures in Clauses 22.19 and 22.20 shall be repeated to the extent required (although the period of notice referred to in Clauses 22.19 shall be reduced to 3 Business Days) until the Full Service Acceptance Certificate is issued or it is determined under the Project Agreement that the certificate should have been issued.
- 22.22 Within 10 Days of completion of the Reliability Testing if the Contractor's Representative is satisfied that:
 - 22.22.1 the Reliability Testing has been successfully completed; and

22.22.2 the Technical Adviser has issued the Full Service Acceptance Certificate (or it is determined under the Project Agreement that the Full Service Acceptance Certificate should have been issued); and

22.22.3 all Outstanding Works in the Snagging List (if there is one) will be carried out within forty five (45) Days of any certificate issued in accordance with this Clause 22.22;

the Contractor's Representative shall issue a certificate to that effect (the "**RT Completion Certificate**").

The Parties agree that the Contractor's Representative shall be permitted to issue a RT Completion Certificate notwithstanding the existence of snagging matters (which are minor and temporary in nature, unlikely to give rise to Unavailability and likely to be repaired without giving rise to Unavailability).

The Contractor's Representative shall sign the RT Completion Certificate with an endorsement stating:

22.22.4 the date that RT Completion was achieved; and

22.22.5 a list of any Outstanding Work which requires rectification.

22.23 If the Contractor's Representative is not satisfied that RT Completion has been achieved, then the Contractor's Representative shall, within 2 Business Days after the completion of such Reliability Testing, notify the Construction Contractor of this fact. At the same time as such notification the Contractor's Representative shall provide the Construction Contractor with a report setting out the respects in which it considers RT Completion not to have been achieved.

22.24 Subject to Clause 22.25, the Construction Contractor shall then, as necessary, modify, tune up, readjust and otherwise complete the Works, at no additional cost to the Contractor, and carry out those obligations with the utmost speed, but always with due care and diligence consistent with the requirements of such a process plant in operation and shall notify the Contractor's Representative that the relevant Reliability Testing stated in the report referred to in Clause 22.23 may be repeated. The Contractor shall then start such repeated tests within 7 Days of that notice. The Contractor shall, when it is of the opinion that each of the matters referred to in the Contractor's Representative report in Clause 22.23 have been satisfied, notify the Contractor's Representative and the Construction Contractor of the same and thereafter the procedures set out in this Clause 22 shall be repeated until a RT Completion Certificate is issued by the Contractor's Representative or it is determined that the RT Completion Certificate should have been so issued.

22.25 If RT Completion has not been achieved by the RT Completion Longstop Date then a Construction Contractor Event of Default shall be deemed to have occurred and the provisions of Clause 40 shall apply.

22.26 Without prejudice to Clause 23 and to any sums due under Clause 21, if the Works fail to achieve RT Completion by the RT Completion Date as a result of:

22.26.1 the Reliability Tests which test the matters referred to in paragraph 2.1.4(i) of Schedule 13 (the "**Bio-Tests**") failing to be passed and the results of such tests are:

(a) within the permissible limits for the Bio-Tests as stated in Schedule 12, then the Contractor shall, at its option and in its sole discretion, either:

- (i) require the Construction Contractor to repeat the failed Bio-Tests in accordance with Clause 22.24 and this Clause 22.26 continues to apply if the Works (following such repeated tests) again fail to pass the Bio-Tests; or
- (ii) subject always to Clause 22.26A require the Construction Contractor to pay to the Contractor, or withhold or deduct from the Construction Contractor the Reliability Liquidated Damages provided for in paragraph 1 of Schedule 12;

provided that the Contractor may not elect for Clause 22.26.1(a)(ii) to apply until the date falling 6 months after the RT Completion Date unless, at any point during the said 6 month period, in the reasonable opinion of the Contractor's Representative:

- (1) the failed Bio-Tests are not likely to be passed within such 6 month period; and/or
- (2) the Construction Contractor is not using reasonable endeavours to satisfy the failed Bio-Tests;

(b) outside the permissible limits for the Bio-Tests as stated in Schedule 12 then the Contractor shall, at its option and in its sole discretion, either:

- (i) require the Construction Contractor to repeat the failed Bio-Tests in accordance with Clause 22.24 and this Clause 22.26 continues to apply if the Works (following such repeated tests) again fail to pass the Bio-Tests;
- (ii) subject to Clause 22.26B reject the Works under Clause 23.12; or
- (iii) subject always to Clause 22.26A attempt to agree with the Construction Contractor a reasonable reduction in the Contract Sum to compensate for the deficiencies in such results and the loss, damage, costs and expenses that have been and are likely to be suffered as a result of such deficiencies, provided that:

- (1) the Construction Contractor shall continue to repeat the failed Bio-Tests and, where applicable, any other Reliability Tests that have failed to be passed, in accordance with Clause 22.24 during the discussions, if requested to do so by the Contractor; and
- (2) if no agreement is reached within 90 days, either party shall be entitled to refer the amount of the reasonable reduction for determination in accordance with Clause 46 (Dispute Resolution Procedure) provided always that the reasonable reduction in the Contract Sum agreed or determined pursuant to this Clause

22.26.1(b)(iii)(2) shall not be less than
[REDACTED]

22.26.2 Not used;

22.26.3 the Reliability Tests other than the Bio-Tests (the "Non-Bio Tests") failing to be passed, then:

- (a) the Construction Contractor shall take all steps necessary (which shall be approved in advance by the Contractor (such approval not to be unreasonably withheld or delayed)) which may include, without limitation, any redesign, replacement and/or rectification of any Defects in order to ensure that the Construction Contractor shall satisfy any failed Non-Bio Tests and the Construction Contractor shall repeat the failed Non-Bio Tests in accordance with Clause 22.24 and this Clause 22.26 continues to apply if the Works (following such repeated Non-Bio Tests) again fail to pass the Non-Bio Tests; and
- (b) without prejudice to the other provisions of this Contract (including, but not limited to, Clauses 21, 23 and 40), the Contractor may require the Construction Contractor to pay to the Contractor, or withhold or deduct from the Construction Contractor a sum which reasonably represents the losses that have been and are likely to be suffered by the Contractor as a result of the deficiencies in the Works and the shortfall in performance that are evidenced by the results of the Non-Bio Tests (such calculation shall include consideration of the factors set out in paragraph 2 of Schedule 12) provided that the sum agreed or determined pursuant to this Clause 22.26.3(b) shall not exceed the maximum amount of [REDACTED] and upon the Contractor receiving or withholding the agreed or determined sum from the Construction Contractor in full the Non-Bio Tests shall be deemed to be passed.

22.26A If Clause 22.26 applies, the RT Completion Certificate shall be issued by the Contractor's Representative within 2 Business Days after:

- (a) any previously failed Reliability Tests have been passed upon being repeated; or
- (b) where relevant tests are not passed, any amounts owing to the Contractor applicable to those tests pursuant to Clauses 22.26.1(a)(ii), 22.26.1(b)(iii) and 22.26.3(b) (as appropriate) have been paid by the Construction Contractor or withheld in full by the Contractor.

22.26B If the Contractor exercises any right to reject the whole of the Works under this Clause 22.26, the Contractor shall be prohibited from:

- (a) making an election to proceed in accordance with Clauses 22.26.1(a)(ii), 22.26.1(b)(iii) or Clause 22.26.3(b); and
- (b) requiring the Construction Contractor to repeat or continue any Reliability Tests being performed in accordance with this Clause 22.26.

22.27 The Contractor shall be responsible for ensuring that, for the purpose of testing and determining the performance of the Works pursuant to this Clause 22, the Contract Waste provided by the Contractor is Acceptable Waste.

- 22.28 In addition to any sums payable by the Construction Contractor pursuant to Clauses 22.26.1(a)(ii), 22.26.1(b)(iii) and Clause 22.26.3(b), the Construction Contractor shall be responsible for and shall indemnify the Contractor for any additional sums of money payable by the Contractor to the Technical Adviser (in accordance with the Technical Adviser's appointment) due to additional meetings, tests, reports, inspections and/or other services provided by the Technical Adviser pursuant to its appointment, which are required as a result of the Works failing to comply with the Initial Acceptance Tests and/or the Reliability Tests.

23. DEFECTS LIABILITY PERIOD AND FINAL ACCEPTANCE CERTIFICATE

- 23.1 If at any time within the Defects Liability Period the Contractor's Representative shall:

23.1.1 decide that there is a Defect or that there are Defects; and

23.1.2 as soon as reasonably practicable give to the Construction Contractor notice in writing of such decision giving particulars of the alleged Defect(s);

then the Construction Contractor shall rectify the Defect(s) (including any other consequences arising from such Defect(s)) so specified in accordance with the standards required by this Contract and in accordance with the programme and method statement agreed pursuant to this Clause 23.1.

Within 7 Days of the Contractor's Representative having notified the Construction Contractor, the Construction Contractor shall provide the Contractor's Representative for its approval a draft programme and method statement for the carrying out of remedial works to rectify the Defect(s) that has been identified in the notice. The Construction Contractor agrees that the programme and method statement shall describe the method and programme for the carrying out of such remedial works and shall provide the quickest possible method of obtaining delivery of necessary goods and materials and for the quickest possible execution of such work (but taking into account the need to cause as little disturbance as reasonably practicable to the Contractor). The Contractor's Representative's approval or other response to such draft programme and method statement or any revised version thereof shall be given by the Contractor's Representative within 7 Days of its receipt.

23.2 The costs and expense of any Defect(s) rectified by the Construction Contractor shall be solely borne by the Construction Contractor. The Contractor's Representative shall, acting reasonably, be entitled to make an appropriate deduction from any certificate relating to any payment instalment in respect of any Defect(s) until the work to rectify such Defect(s) is completed.

23.3 If a Defect(s) is rectified after the issue of the Take-Over Certificate the Contractor's Representative may, after such Defect has been rectified, require the carrying out any appropriate test for the purpose of establishing that the Defect has indeed been rectified.

23.4 If, in the course of rectifying any Defect(s), the Construction Contractor carries out a repair or replaces or renews any portion of the Works, the provisions of this Clause 23 shall apply to the repairs or to that portion of the Works so replaced or renewed until the expiry of the Defects Liability Period or the expiry of a period of three hundred and sixty-five Days (365) from the date of such repair or replacement or renewal ("**the extended Defects Liability Period**") which ever occurs later.

23.5 If the Contractor reasonably requires that any Defect(s) notified to the Construction Contractor under Clause 23.1 be rectified urgently and the

Construction Contractor is unable to comply or refuses to rectify any such Defect(s) within the time specified by the Contractor's Representative (acting reasonably), then the Contractor may, subject to Clause 23.6 and without prejudice to any other remedies or relief available to it under this Contract, proceed to do or have such work done on its behalf.

23.6 If:

23.6.1 in circumstances where the Contractor's Representative has acted reasonably taking into account the provisions of Clause 23.1 for the requirements of the relevant programme and method statement, the relevant programme and method statement has not been approved by the Contractor's Representative within 14 Days of the notice provided pursuant to Clause 23.1;

23.6.2 the Construction Contractor fails to rectify such Defect(s) in accordance with the standards required by this Contract; or

23.6.3 the Construction Contractor fails to rectify any Defect(s) for which it is responsible in accordance with the agreed programme and method statement;

the Contractor may, without prejudice to any other remedy or relief available to it under this Contract, proceed to rectify or have rectified on its behalf the relevant Defect(s), provided that the Contractor gives at least fourteen (14) Days written notice to the Construction Contractor of its intention to take such action.

23.7 If the Contractor has rectified (or procured the rectification of) a Defect in pursuance of Clause 23.5 and/or Clause 23.6 then the Construction Contractor shall, within thirty (30) Days of the Contractor's demand, reimburse the Contractor its properly incurred costs of so doing.

23.8 The Defects Liability Period mentioned in Clause 23.1 shall be extended by a period equal to the period during which the completed Works, in which a Defect has appeared or occurred, cannot be used by reason of that Defect.

23.9 Not used.

23.10 As soon as the Defects Liability Period and any extended Defects Liability Period for the completed Works has expired and the Construction Contractor has rectified all Defects that have within such a period appeared in the Works (including any snagging matters endorsed on the RT Completion Certificate) to the standards required by this Contract the Contractor's Representative shall issue to both the Contractor and to the Construction Contractor a certificate stating the date that the Works are considered to be finally completed (the "**Final Acceptance Certificate**").

23.11 It shall be a condition precedent to the issue of the Final Acceptance Certificate that the RT Completion Certificate has been issued in accordance with Clause 22.22.

23.12 If, as a result of the testing referred to in Clause 22.26 or because of the failure of the Construction Contractor to perform such testing, the Contractor decides that the Works or a material part thereof, is seriously defective or incomplete or not in accordance with this Contract, then the Contractor shall, within fourteen (14) Days of forming such view, notify the Construction Contractor of its intention to reject the Works or such material part of the Works. The notice shall state the Contractor's objections with reasons. The Contractor shall not reject the Works or such substantial part thereof for minor defects which do not significantly affect the commercial operation of

the same. The Construction Contractor shall then with all speed rectify the relevant Defect(s) and/or ensure that the Works comply with this Contract. The Contractor may eventually reject the Works or such substantial part thereof, if it so desires, if any such Defect shall not have been substantially rectified within six (6) months from the RT Completion Date (the "**Works Rejection Period**") unless the Parties have agreed on a mutually acceptable extension period and/or acceptable compensation.

23.13 If the Contractor's Representative requires the Works to be retested following repair of any such Defect as is referred to above, the tests shall be repeated under the same terms and conditions as are set out in Clauses 22 and 23. All costs properly incurred by the Contractor by the repetition of the tests shall be deducted from the Contract Sum or recoverable from the Construction Contractor as a debt.

23.14 In the event of a rejection of the Works or material part thereof in accordance with the above provisions, the Construction Contractor shall be obliged, at the option of the Contractor, to:

23.14.1 remove the Works or such defective part(s) thereof at its sole cost and risk; and

23.14.2 reimburse the Contractor:

(a) the price of the Works (where the Works have been rejected) or of the defective part(s) thereof; and

(b) any and all direct costs incurred, including but not limited to the cost of selecting another contractor, as a consequence of the Defect(s) and the attempts to rectify them.

24. HEALTH SAFETY AND CDM REGULATIONS

24.1 For the purposes of this Clause, the terms "**construction phase plan**", "**contractor**", "**designer**" and "**health and safety file**" have the same meanings as the equivalent un-capitalised terms have in the CDM Regulations. The term "**executive**" as used in this Clause shall mean the Health and Safety Executive.

24.2 The Construction Contractor is appointed as the Principal Contractor. The Construction Contractor shall carry out, observe, perform, discharge and otherwise comply with all of the obligations, requirements and duties of a Principal Contractor, a contractor and a designer under the CDM Regulations and shall do so in accordance with the Approved Code of Practice issued by the Health and Safety Commission or any successor organisation (the "**Approved Code**").

24.3 As the Principal Contractor, the Construction Contractor shall:

24.3.1 carry out, observe, perform, discharge and otherwise comply with all of the obligations, requirements and duties of a principal contractor set out in the CDM Regulations and the Approved Code;

24.3.2 ensure that the construction phase plan for the Works has the features required by the CDM Regulations and the Approved Code and that any amendment by the Construction Contractor to the construction phase plan is notified to the Contractor who shall thereupon notify the CDM Co-ordinator (unless that role is filled, at the relevant time, by the Construction Contractor);

- 24.3.3 Not Used.
- 24.4 The Construction Contractor shall not at any time terminate, withdraw or derogate in any manner from its acceptance of its responsibilities as Principal Contractor.
- 24.5 The Contractor shall be entitled to revoke the appointment of the Construction Contractor as the Principal Contractor at any time by giving notice to the Construction Contractor. If the Contractor considers in its reasonable opinion that the Construction Contractor has ceased to be competent to perform the obligations, requirements and duties imposed on a Principal Contractor and if thereupon the Contractor revokes such appointment, the Construction Contractor shall be liable for the reasonable additional cost incurred by the Contractor in procuring the performance of the obligations, requirements and duties of a replacement Principal Contractor.
- 24.6 The Construction Contractor shall comply at no cost to the Contractor with all the reasonable requirements of the Principal Contractor (where the Construction Contractor is not the Principal Contractor) and/or the CDM Co-ordinator to the extent that such requirements are necessary for compliance with the CDM Regulations; and no extension of time shall be given in respect of such compliance.
- 24.7 The Construction Contractor shall provide, and shall ensure that any subcontractor, through the Construction Contractor, provides, such information to the Principal Contractor (where the Construction Contractor is not the Principal Contractor) and/or CDM Co-ordinator as the Principal Contractor and/or CDM Co-ordinator (as relevant) reasonably requires for the preparation of the construction phase plan and/or the health and safety file required by the CDM Regulations.
- 24.8 The Construction Contractor warrants to the Contractor that:
- 24.8.1 it has and shall continue to have the competence to perform the obligations, requirements and duties imposed on it under this Contract in respect of the CDM Regulations (whether as a Principal Contractor, contractor or designer) and to conduct its undertaking without convening any prohibition contained in the CDM Regulations; and
- 24.8.2 it has allocated or (as appropriate) will allocate adequate resources to enable it to comply with such obligations, requirements and duties.
- 24.9 The Contractor shall notify the Construction Contractor (in its capacity as Principal Contractor under the CDM Regulations) of any change in circumstances relating to the Works of which it is or ought reasonably to be aware which may affect the health and safety of persons involved, or likely to become involved, in the Works.
- 24.10 The Construction Contractor shall:
- 24.10.1 include in the design of the Works all information relating to the design and materials which might reasonably affect the health and safety of persons working on the Works, including persons involved in the maintenance and repair of the Works; and
- 24.10.2 indemnify the Contractor against any liability incurred by the Contractor in connection with any breach by the Construction Contractor of any of its obligations under this Clause 24.

- 24.11 The Construction Contractor shall observe and shall ensure the observance 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 Site or the Works including all precautions required to be taken by or under any Legislation (including the CDM Regulations).
- 24.12 The Construction Contractor shall ensure the observance by itself and the Construction Contractor Parties of all current and relevant rules, regulations and requirements of statutory or regulatory authorities and environmental protection binding upon the Construction Contractor and/or any Construction Contractor Party concerning building works and fire prevention.
- 24.13 The Construction Contractor shall allow the Contractor and the Authority and their representatives access upon giving notice requesting access without charge to each and every health and safety file upon giving written notice and if this Contract shall determine for any reason the Construction Contractor shall hand over to the Contractor the health and safety file.
- 24.14 The Construction Contractor shall make available to the Contractor prior to Completion upon notice and without charge a copy of every current health and safety file in respect of the Works.
- 24.15 On termination or expiry of this Contract the Construction Contractor shall hand over to the Contractor all existing copies of the health and safety file in respect of the Works.
- 24.16 The Construction Contractor hereby grants to the Contractor an irrevocable, royalty-free and non-exclusive licence to use and reproduce any information or documents contained at any time within any health and safety file for any purpose connected with the Works. Such licence shall carry the right to grant sub-licences and shall be transferable to third parties.
- 24.17 Insofar as the beneficial ownership of copyright and all other intellectual property and design rights in any information or documents contained at any time in a health and safety file will be vested in any person other than the Construction Contractor, the Construction Contractor shall procure, as a condition precedent to the appointment of such beneficial owner, that they grant to the Contractor an irrevocable, perpetual, royalty free and non-exclusive licence to use and reproduce the health and safety file for any and all purposes connected with the Works. Such licence shall carry the right to grant sub-licences and shall be transferable to the third parties.
- 24.18 The Construction Contractor shall provide all the assistance and information reasonably required by the Contractor to enable the Contractor to comply with its obligations to the Authority under Clause 62 of the Project Agreement.

25. SUBCONTRACTING BY THE CONSTRUCTION CONTRACTOR

- 25.1 The Construction Contractor shall not be relieved or excused of any responsibility, liability or obligation under this Contract by the appointment of any sub-contractor and/or consultants (including, but not limited to, the Professional Team). The Construction Contractor shall, as between itself and the Contractor, be responsible for the selection, pricing, performance, acts, defaults, omissions, breaches and negligence of all sub-contractors and/or consultants. All references in this Contract to any act, default, omission, breach or negligence of the Construction Contractor shall be

construed accordingly to include any such act, default, omission, breach or negligence of the Construction Contractor's sub-contractors and/or consultants.

25.2 The Construction Contractor may not sub-contract all, or substantially all, of the carrying out of the Works (including any design thereof) without the prior written approval of the Contractor.

25.3 The Construction Contractor shall:

25.3.1 following the approval of the Contractor pursuant to Clause 25.2 above procure the appointment of any Specified Sub-Contractor and/or consultants as soon as practicable on terms to be approved by the Contractor (such approval not to be unreasonably withheld or delayed) and within 7 Days after the appointment of each Specified Sub-Contractor and/or consultant supply the Contractor with a copy of each completed appointment;

25.3.2 at all times comply with its obligations under sub-contracts and shall not terminate or vary (save for minor amendments which are not material to the Project and which do not adversely affect the rights of the Contractor or the Authority) the same without the written consent of the Contractor (which shall not be unreasonably withheld or delayed);

25.3.3 take reasonable steps to ensure that sub-contractors and all other persons employed by the Construction Contractor in connection with the Works comply with all relevant Legislation relating to employment including (without limitation) the Race Relations Act 1976, the Sex Discrimination Act 1975 and the Disability Discrimination Act 1996;

25.3.4 notify the Contractor promptly of any notices received by the Construction Contractor (whether from any local or other competent authority or from any Adjoining Owner) relating in any way to the Site and shall supply a copy of every such notice to the Contractor within five Days after the receipt of it;

25.3.5 be wholly responsible (in accordance with and subject to the terms of this Contract) for the acts, omissions, negligence or defaults in carrying out the Works of all Construction Contractor Parties engaged in connection with the Works;

25.3.6 pay all fees, charges and other payments whatever which may at any time be payable to any third party and/or Relevant Authority in respect of the Works (except planning fees payable in respect of the Planning Permission or Permits for the MBT Facility);

25.3.7 enforce the provisions of sub-contracts;

25.3.8 procure that immediately upon their appointment each member of the Professional Team provides a warranty to the Contractor, and the Authority substantially in the appropriate form set out in Schedule 5 of this Contract;

25.3.9 ensure immediately upon their appointment that each Specified Sub-Contractor and/or consultant executes and delivers to the Contractor a deed of warranty in favour of the Contractor substantially in the forms set out at Schedule 6 of this Contract;

25.3.10 whenever the Contractor from time to time requires, ensure that the Construction Contractor and/or each Specified Sub-Contractor and/or consultant executes and delivers to the Contractor a deed of warranty in favour of any Funder substantially in the forms set out at Schedule 6 of this Contract;

- 25.3.11 use reasonable endeavours to obtain where appropriate a parent company guarantee from the parent company (to the extent there is one) of each sub-contractor and/or consultant who it appoints and who shall be required to provide a warranty pursuant to Clauses 25.3.8, 25.3.9 and 25.3.10 and shall use reasonable endeavours to see that such parent company guarantee is assignable to the Contractor or the Authority or the Lender upon step-in or novation of the appointment to the Contractor or the Authority or the Lender (as appropriate); and
- 25.3.12 use reasonable endeavours to ensure that each member of the Professional Team is appointed on terms that require the relevant member of the Professional Team to provide a sufficient level of professional indemnity insurance cover, appropriate to the nature and the value of the services and/or works which they are providing to the Construction Contractor.

26. RIGHTS OF ENTRY

- 26.1 The Authority, the Authority's Representative, the Lender, the Lender's Technical Adviser and any person authorised by the Contractor or the Contractor's Representative shall have, at all reasonable times and upon giving reasonable prior notice (except in the case of emergency), the right to enter the areas on the Site on which Works are being undertaken by the Construction Contractor (whose approval shall not be unreasonably withheld or delayed). Such entitlement shall be for the purpose of inspecting the Works and ensuring that the Construction Contractor is observing and performing the provisions of this Contract.
- 26.2 The entitlement set out in Clause 26.1 shall include access to the workshops or other places of the Construction Contractor where work is being prepared for this Contract, and when work is to be so prepared in workshops or other places of a sub-contractor to the Construction Contractor shall by a term of the sub-contract so far as possible secure a similar right of access to those workshops or places for the Contractor and his representatives and shall do all things reasonably necessary to make such right effective.
- 26.3 Access in accordance with Clause 26 may be subject to such reasonable restrictions of the Construction Contractor or of any sub-contractor as are necessary:
- 26.3.1 to protect any proprietary right of the Construction Contractor or of any sub-contractor in the work referred to in Clause 26 (but no such restrictions on access shall apply to the Works); and/or
- 26.3.2 to comply with any health and safety requirements.
- 26.4 The Construction Contractor shall supply to any person visiting the Site pursuant to this Clause 26 such information in respect of the Works as may reasonably be required.
- 26.5 The Contractor shall procure that the parties referred to in Clause 26.1 shall not (whether by act or omission) obstruct, hinder or prevent the Construction Contractor or any Construction Contractor Party from carrying out any of the Construction Contractor's obligations under this Contract.
- 26.6 The Construction Contractor shall procure that satisfactory facilities are made available to the persons entitled to enter the Site pursuant to Clause 26.1 and that reasonable assistance is given to such persons for the purposes of that Clause.

27. **OUTGOINGS**

The Construction Contractor will pay and indemnify the Contractor against all taxes assessments duties charges impositions and outgoings from time to time charged which relate to the Works including any costs of utilities relating to the Works.

28. **AS-BUILT DRAWINGS**

Within 21 Days of Completion the Construction Contractor without further charge to the Contractor shall provide the Contractor and the Authority with a set of As-Built Drawings for the Works and the Construction Contractor acknowledges the provisions of Clause 40 of the Project Agreement.

29. **INSTRUCTIONS**

- 29.1 The Construction Contractor shall constantly keep upon the Site a competent person-in-charge and any instructions, notices and communications given to him by the Contractor and/or the Contractor's Representative shall be deemed to have been issued to the Construction Contractor.
- 29.2 The Construction Contractor shall forthwith comply with all instructions issued by the Contractor and/or the Contractor's Representative relating to any matter in respect of which the Contractor and/or the Contractor's Representative is expressly empowered by this Contract to issue instructions. Such compliance shall be at the Construction Contractor's cost save where and to the extent that it is expressly provided otherwise in this Contract.
- 29.3 The Contractor and the Contractor's Representative shall be deemed conclusively to be empowered expressly by this Contract to issue any instruction which either of them issue by reason of the exercise of any right or entitlement by the Authority in relation to the Works, or which it issues to ensure compliance with the Project Agreement.
- 29.4 If within 7 Business Days after receipt of a written notice from the Contractor requiring compliance with an instruction (or in the case of an instruction referred to in Clause 29.3, within such shorter equivalent period as may be applicable to the Contractor under the Project Agreement or any other Project Document) the Construction Contractor does not comply therewith, the Contractor may itself execute or employ or pay other persons to execute any work or take any other step whatsoever which may be necessary to give effect to such instruction and all additional costs incurred in connection with such work or other steps shall be reimbursed by the Construction Contractor to the Contractor on demand (or may be deducted by the Contractor from any sum due to the Construction Contractor from the Contractor under this Contract).
- 29.5 Upon receipt of an instruction to him from the Contractor and/or the Contractor's Representative, the Construction Contractor may request the Contractor and/or the Contractor's Representative to specify in writing the provision of this Contract (or of the relevant Project Document) which empowers the Contractor and/or the Contractor's Representative to issue that instruction. The Contractor and/or the Contractor's Representative (as appropriate) shall forthwith comply with such request, provided however that the Construction Contractor shall in any event be obliged to comply with any such instruction, and any dispute regarding the Contractor's and/or the Contractor's Representative's power to issue the same shall be resolved in accordance with Clause 46.

- 29.6 All instructions issued by the Contractor shall be issued in writing.
- 29.7 The Contractor may instruct the Construction Contractor to suspend or postpone the carrying out of all or part of the Works and where such suspension or postponement is expressly provided for elsewhere in this Contract or arises in consequence of any breach or default of the Construction Contractor, the Construction Contractor shall itself bear any cost arising from such suspension and shall not be entitled to any extension of time in respect thereof.

30. OPENING UP AND INSPECTIONS

- 30.1 The Contractor may issue instructions requiring the Construction Contractor to open up for inspection any part or parts of the Works or to arrange for or to carry out any test of any materials or goods (whether or not already incorporated in the Works) and the Construction Contractor shall comply with such request.
- 30.2 If, following the issue of instructions by the Contractor pursuant to Clause 30.1, the inspection shows that the relevant part or parts of the Works or any materials or goods are not defective and comply with this Contract, any delay, increased cost, loss or other detriment caused to the Construction Contractor by reason of those instructions shall be treated as if they had arisen due to a Compensation Event.
- 30.3 If, following the issue of instructions by the Contractor pursuant to Clause 30.1, the inspection shows that the relevant part or parts of the Works or any materials or goods is or are defective and/or not compliant with this Contract, the Construction Contractor shall rectify and make good the Works and any additional work required as a consequence of such rectification and/or making good the Works shall be carried out by the Construction Contractor at no cost to the Contractor and the Construction Contractor shall not be entitled to any extension of time in relation to such rectification and making good of the Works.
- 30.4 Without prejudice to the issue of instructions by the Contractor pursuant to this Clause 30 the Parties acknowledge that the exercise of such rights shall not in any way affect the obligations of the Construction Contractor under this Contract save as expressly set out in this Clause 30.
- 30.5 If, following any viewing, visit or inspection made by the Contractor, it is discovered that there are defects in the Works or that the Construction Contractor has materially failed to comply with the Specification or the Construction Contractor's Proposals, the Contractor may (without prejudice to any other right or remedy available to it) by notice to the Construction Contractor increase the level of its monitoring in relation to the Works until such time as the Construction Contractor shall have demonstrated to the reasonable satisfaction of the Contractor that it is capable of performing and will perform all its obligations under this Contract.
- 30.6 If, following the exercise by the Contractor of its rights pursuant to Clause 30.1, the Contractor is of the opinion that the inspection shows that the relevant part or parts of the Works or any materials or goods is or are defective and/or not in compliance with this Contract and the Construction Contractor does not agree with such opinion, the matter shall be determined in accordance with Clause 46.

31. UNFIXED GOODS AND MATERIALS

Site Materials shall not be removed from the Site unless the Contractor has consented in writing to such removal, which consent shall not be unreasonably withheld. Where the value of any Site Materials has been included in any Interim Payment, those Site Materials shall be the property of the Contractor, but the Construction Contractor shall bear the risk of loss and damage to them. The Construction Contractor shall include in all sub-contracts provisions necessary to give effect to this Clause 31 and shall notify all of its sub-contractors of the existence and terms of such provisions. Where the Contractor has paid for any materials or goods stored off the Site, the Construction Contractor must clearly identify (or procure that its sub-contractors identify) the materials or goods as being the property of the Contractor so far as is practical without damaging or defacing those materials or goods.

32. SITE MATTERS

32.1 The Site Conditions shall be the sole responsibility of the Construction Contractor and accordingly (but without prejudice to any other obligation of the Construction Contractor under this Contract) the Construction Contractor shall be deemed to have:-

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

32.1.2 satisfied itself as to the nature of the Site Conditions, the ground and the subsoil, the form and nature of the Site, the load bearing and other relevant properties of the Site, the risk of injury or damage to property affecting the Site, 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;

32.1.3 satisfied itself as to the adequacy of the means and rights of access to and through the Site and any accommodation it may require for the purposes of fulfilling its obligations under this Contract (such as additional land or buildings outside the Site);

32.1.4 satisfied itself as to the possibility of interference by persons of any description whatsoever (other than the Contractor) with access to or use of, or rights in respect of, the Site with particular regard to Adjoining Owners of any; and

32.1.5 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.

32.2 The Construction Contractor accepts full responsibility for all matters referred to in Clause 32.1 and the Construction Contractor shall:-

32.2.1 not be entitled to make any claim against the Contractor or the Authority in relation to Site Conditions without prejudice to Clause 38, on any grounds including the fact that incorrect or insufficient information on any matter relating to the Site was given to it by any person, whether or not a Contractor Party or the Authority or an Authority Related Party; and

32.2.2 be responsible for, and hold the Contractor harmless from, cleaning up and otherwise dealing with all or any existing Contamination discovered at the Site or Contamination released or otherwise caused by the Construction Contractor while performing the Works, so that it shall at all times comply with its obligations under this Contract including complying with, at its own

cost, any applicable Legislation and any Consents, orders, notices or directions of any regulatory body (whether made against the Construction Contractor, the Contractor or the Authority).

33. CHANGES

33.1 The Contractor may, at its discretion and of its own volition, instruct the Construction Contractor to vary the Works or the design thereof or the conditions under which the Works are to be carried out, including:

33.1.1 the addition, omission or substitution of any work;

33.1.2 the alteration of the kind or standard of any of the design, materials or goods to be used in the Works;

33.1.3 the removal from the Site of any work executed or materials or goods brought thereon by the Construction Contractor for the purposes of the Works other than work, materials or goods which are not in accordance with this Contract; or

33.1.4 any other such variation which the Authority is entitled to require in accordance with Clause 107 of the Project Agreement,

(in each case, a "**Contractor Variation**") and no Contractor Variation instructed by the Contractor shall vitiate this Contract.

33.2 Where the Contractor issues an instruction which is not expressed to propose a Contractor Variation but the implementation of which the Construction Contractor reasonably considers should constitute a Contractor Variation, the Construction Contractor shall submit to the Contractor within five (5) Business Days after the date of the relevant instruction and (in any event) before putting into effect such instruction a notice that it considers a Contractor Variation to have been proposed. The Contractor shall within a further five (5) Business Days revoke or confirm the instruction and, where the Contractor confirms the instruction, the Contractor shall either confirm that it is instructing a Contractor Variation or state that in the Contractor's opinion its instruction should not be treated as a Contractor Variation. Where the Contractor confirms that it is instructing a Contractor Variation, the relevant provisions of this Clause 33 shall apply thereto. Where the Contractor states that in its opinion its instruction should not be treated as a Contractor Variation, the Construction Contractor shall promptly comply with such confirmed instruction, and any dispute as to whether the instruction should be treated as a Contractor Variation shall be determined in accordance with Clause 46.

33.3 Not used.

33.4 The Construction Contractor shall, if requested by the Contractor, give to the Contractor in good faith within eight (8) Business Days of receipt of an instruction for a Contractor Variation, a preliminary non-binding indication of any expected delay in the completion of the Works and the estimated cost (together with a cost breakdown) of implementing the Contractor Variation together with such other information as the Contractor may reasonably require. Following receipt of any such indication the Contractor may instruct the Construction Contractor that he does not wish to proceed with the relevant Contractor Variation.

33.5 The Construction Contractor shall, within 14 Days of receiving the Contractor's instruction for the Contractor Variation, respond to the Contractor with a written notice stating:

- 33.5.1 the steps which the Construction Contractor proposes to take to implement the Contractor Variation giving such level of detail as is reasonable and appropriate in all the circumstances;
- 33.5.2 any additional payment, or reduction in payment, which the Construction Contractor considers should be made under this Contract in respect of implementing the Contractor Variation, calculated in accordance with Clause 33.6;
- 33.5.3 whether in the view of the Construction Contractor implementing the Contractor Variation would be likely to cause:
- (a) Completion to occur after the Works Completion Date and/or the relevant Longstop Date; and/or
 - (b) RT Completion to occur after the RT Completion Date and/or the RT Completion Longstop Date,
- and giving an estimate of the extension of time likely to be required (subject to any further time required to obtain or amend any Consents); and
- 33.5.4 any of the Consents which must be obtained or amended for the Contractor Variation to be implemented and the latest date by which any such Consent must be obtained or modified for the matters set out in Clauses 33.5.1 to 33.5.3 above (inclusive) to remain valid, such date being a reasonable period of time after service of the notice by the Construction Contractor under this Clause 33.5.
- 33.6 The additional or reduced payment to be made in respect of implementing a Contractor Variation shall be calculated having reference to the following provisions:
- 33.6.1 the valuation of additional or substituted work shall be consistent with the values of work of a similar character set out in the Contract Sum Analysis making due allowance for any change in the conditions under which the Work is carried out and/or any significant change in the quantity of work so set out. Where there is no work of a similar character set out in the Contract Sum Analysis a fair valuation shall be made;
- 33.6.2 the valuation of the omission of work shall be in accordance with the values in the Contract Sum Analysis;
- 33.6.3 any valuation of work shall (where appropriate) include allowance for any necessary addition to or reduction in the provision of site administration, site facilities and temporary works;
- 33.6.4 where an appropriate basis of a fair and reasonable valuation of additional or substituted work is day work, the valuation shall comprise:
- (a) the prime cost of such work (calculated in accordance with the "Definition of Prime Cost of day work carried out under a Building Contract" issued by the Royal Institution of Chartered Surveyors and the Building Contractor's Confederation (now Construction Confederation) which was current at the date of this Contract) together with percentage additions to each section of the prime cost at the rates set out by the Construction Contractor in the Contract Sum Analysis; or
 - (b) where the work is within the province of any specialist trade and the said institution and the appropriate body representing the

contractors in that trade have agreed and issued a definition of prime cost of day work, the prime cost of such work calculated in accordance with that definition which was current at the date of this Contract together with percentage additions to the prime cost at the rates set out by the Construction Contractor in the Contract Sum Analysis; and

- 33.6.5 to the extent that the valuation does not relate to the execution of additional or substituted work or the omission of work or to the extent that the valuation of any work or liabilities directly associated with a Contractor Variation cannot reasonably be reflected in the valuation by the application of Clauses 33.6.1 to 33.6.4 (inclusive), a fair and reasonable valuation thereof shall be made;

provided that no allowance shall be made under this Clause 33.6 for cost associated with any delay to the regular progress of the Works, or for any other cost, loss and/or expense associated with the implementation of a Contractor Variation, to the extent that the Construction Contractor would be reimbursed for the same under any other provision in this Contract.

- 33.7 If the Parties agree upon the matters stated in the Construction Contractor's notice as aforesaid (including any agreed modifications thereto) then the Contractor Variation shall be implemented by the Construction Contractor on that basis and the Contractor shall make such payments and grant such extensions of time as are agreed. Following such agreement, the Construction Contractor shall not be entitled to any further or other payments or extensions of time in respect of implementing that Contractor Variation.
- 33.8 If the Parties fail to agree upon any of the matters stated in the Construction Contractor's notice given, in respect of a Contractor Variation, under Clause 33.5, the Contractor may nevertheless instruct the Construction Contractor to proceed with implementing that Contractor Variation. The Construction Contractor shall forthwith comply with such instruction and the matters not agreed shall be determined in accordance with Clause 46.
- 33.9 The Contractor may withdraw an instruction for a Contractor Variation upon receiving the Construction Contractor's notice in respect thereof, given under Clause 33.5, or at any time while a Consent or amendment to a Consent is awaited which is necessary in order for the Contractor Variation to be implemented.
- 33.10 Where the Contractor issues a Contractor Variation pursuant to the issue of an Authority Notice of Change the Construction Contractor shall:
- 33.10.1 provide to the Contractor all information requested by the Contractor which the Contractor is required to give to the Authority pursuant to Clauses 107.3 and 107.4 of the Project Agreement;
- 33.10.2 ensure that all information which the Contractor is required to provide in respect of an Authority Notice of Change, is provided to the Contractor at a time which will enable the Contractor to comply with any time constraints in the Project Agreement, taking account of any further work which the Contractor may have to do in relation to such information before it is in an appropriate form for submission to the Authority; and
- 33.10.3 assist the Contractor if and to the extent required in any discussions with the Authority pursuant to Clause 107.4 of the Project Agreement.

- 33.11 Where the Contractor wishes to propose a variation to the Contractor's Works Proposals and such proposed variation would be subject to the Review Procedure, the Construction Contractor shall provide all such documents and other assistance as the Contractor shall require to enable the Contractor to comply with its obligations under such Review Procedure and Clause 28 of the Project Agreement.
- 33.12 If it shall be necessary to obtain or amend any of the Consents in respect of any Contractor Variation then the Construction Contractor shall use all reasonable endeavours to obtain any such Consent. The Contractor shall (where its co-operation is required) use all reasonable endeavours to assist and co-operate in obtaining any such Consent, and (where the co-operation and assistance of the Authority is required) the Contractor shall use all reasonable endeavours to obtain such co-operation and assistance.
- 33.13 If it shall not be possible to obtain any such Consent as is referred to in Clause 33.12 by the latest date specified by the Construction Contractor under Clause 33.5.4 or such later date as may be agreed between the Parties the instruction for the Contractor Variation shall be deemed to be withdrawn.
- 33.14 Notwithstanding any other provision of this Contract, where a Contractor Variation is instructed by the Contractor pursuant to a confirmation of the Estimate ("**Change Confirmation**") by the Authority pursuant to Clause 107.7 of the Project Agreement the Construction Contractor's entitlement to an extension of time and to an addition to Contract Sum in respect of such Contractor Variation shall be calculated on the basis of an Authority Derived Benefit and subject to Clause 6. The Contractor shall notify the Construction Contractor at the time that he issues an instruction for a Contractor Variation whether such instruction is issued pursuant to an Authority Notice of Change issued by the Authority's Representative and shall promptly copy to the Construction Contractor any corresponding Change Confirmation.
- 33.15 Where the Contractor instructs a Contractor Variation pursuant to a Authority Notice of Change issued by the Authority and such corresponding Authority Notice of Change is subsequently withdrawn or deemed to be withdrawn, the Construction Contractor shall be entitled as an Authority Derived Benefit and subject to Clause 6 to reimbursement of its out of pocket expenses reasonably and properly incurred by the Construction Contractor in relation to the corresponding Change.
- 33.16 The Contractor shall, within five (5) Business Days after becoming aware of the position, inform the Construction Contractor if the Authority requires or the Contractor requires a Change pursuant to the Project Agreement and provide a copy of any Authority Notice of Change and/or Change Confirmation issued by the Authority pursuant to the Project Agreement forthwith to the Construction Contractor.
- 33.17 The Construction Contractor agrees to provide the Contractor with all necessary information, advice and assistance required to ensure that the Contractor is able to fully comply with the provisions of Clause 107 of the Project Agreement and to protect its interests thereunder.
- 33.18 Subject to the ascertainment of any consequential amendment to the Contract Sum pursuant to Clause 6 the Construction Contractor agrees to be bound by any decisions (including but not limited to decisions relating to Changes under the Project Agreement or implementation of the Change) made between the Contractor and the Authority or any decision finally determined under Clause 107 of the Project Agreement. The Construction

Contractor shall provide the Contractor with all necessary advice information and assistance required so that resulting changes to the Works can be agreed between the Authority and the Contractor.

34. **CHANGE IN LAW**

- 34.1 The Construction Contractor must comply with all relevant Legislation applicable to it or to any Construction Contractor Party in relation to the provision of the Works.
- 34.2 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:
 - 34.2.1 any necessary change in the Works;
 - 34.2.2 whether any changes are required to the terms of this Contract to deal with the Qualifying Change in Law;
 - 34.2.3 whether relief from compliance with obligations is required including the obligation of the Construction Contractor to achieve the Works Completion Date, the RT Completion Date, the Longstop Date and/or the RT Completion Longstop Date; and
 - 34.2.4 any estimated increase or decrease in the Contract Sum that would directly result from the relevant Qualifying Change in Law;

in each case giving in full detail the procedure for implementing the change in the Site or the Works. Responsibility for the costs of implementation shall be dealt with in accordance with Clause 34.3 below.

- 34.3 As soon as practicable after receipt of any notice from either Party under Clause 34.2 above the Parties shall discuss and agree the issues referred to in Clause 34.2 above and any ways in which the Construction Contractor can mitigate the effect of the Qualifying Change of Law including:
 - 34.3.1 providing evidence that the Construction Contractor has used or will use 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; and
 - 34.3.2 demonstrating how any increase or decrease in the Contract Sum to be incurred is being measured in a cost effective manner, including showing that when such increase or decrease in the Contract Sum is incurred or would have been incurred, that foreseeable Changes in Law at that time have been taken into account by the Construction Contractor.
- 34.4 If the Parties agree or it is determined under Clause 46, that the Construction Contractor is required to incur additional time to complete the Works or an increase in the Contract Sum due to a Qualifying Change in Law then any increase in the Contract Sum or any extension of time/relief from the Construction Contractor's obligations under this Contract as a result of a Qualifying Change in Law shall be dealt with as a "**Compensation Event**" in accordance with the provisions of Clause 37, subject always to the provisions of Clause 6.
- 34.5 Any increase in the cost of providing the Works deriving from a General Change in Law shall be the responsibility of the Construction Contractor, except where otherwise provided in this Contract.

35. **PAYMENTS**

35.1 The Contractor shall pay to the Construction Contractor the Contract Sum or such other sum as shall become payable under and in accordance with this Contract at the times and in the manner specified in this Contract. The Contract Sum shall not be adjusted or altered in any way whatsoever, and the Construction Contractor shall not be entitled to receive any payment in addition to the Contract Sum, otherwise than in accordance with the express provisions of this Contract. Where in this Contract it is provided that an amount is to be added to or deducted from the Contract Sum or dealt with by adjustment of the Contract Sum, then as soon as such amount is due and ascertained in whole or in part and to the extent that such amount relates to work already executed or costs already incurred such amount shall be taken into account in the computation of the next application for Interim Payment pursuant to this Clause 35 subject always to the other express provisions of this Contract.

35.1A The Construction Contractor shall forthwith upon entering into this Contract execute in favour of the Contractor a Retention Bond in the form annexed at Schedule 9 to the Contract from a bondsman to be approved by the Contractor and deliver the same to the Contractor.

35.2 The amount due as an Interim Payment shall be the gross valuation as referred to in Clause 35.3 less:

35.2.1 Not used.

35.2.2 the sum of the amounts paid in previous Interim Payments.

35.3 The gross valuation for the purposes of Interim Payments is the total of the amounts referred to in Clause 35.3.1 and of the amount referred to in Clause 35.3.2 less the amount referred to in Clause 35.3.3.

35.3.1 There shall be included the following:

- (a) the total value of work properly executed including any design work carried out by the Construction Contractor and any work so executed pursuant to a Contractor Variation; and
- (b) the total value of the materials and goods delivered to or adjacent to the Works for incorporation therein by the Construction Contractor but not so incorporated, provided that the value of such materials and goods shall only be included as and from such times as they are reasonably, properly and not prematurely so delivered and are adequately protected against weather and other casualties; and
- (c) the value of materials not delivered to the Site to the extent allowed in accordance with Clause 35.13; and
- (d) the amount of the valuation of work executed by, or the amount of any disbursements by, the Construction Contractor in accordance with instructions of the Contractor as to the expenditure of Provisional Sums to the extent not otherwise covered in this Clause 35.3.1.

35.3.2

- (a) any other sum which is due from the Contractor to the Construction Contractor in accordance with an express provision of this Contract.

35.3.3

- (a) any amount due from the Construction Contractor to the Contractor under this Contract or which this Contract allows or requires to be deducted from any amount due to the Construction Contractor.

35.4 The Construction Contractor shall submit applications for Interim Payment to the Contractor (copied to the Contractor's Representative) and shall make applications for Interim Payment up to and including the end of the period during which the Works Completion Date occurs. Thereafter applications for Interim Payment shall be made as and when further amounts are due to the Construction Contractor and after the expiration of the Defects Liability Period or on the issue of the Final Acceptance Certificate (whichever is the later). The Contractor shall not be required to make any Interim Payment within one (1) calendar month of having made a previous Interim Payment.

35.5 Each application for Interim Payment shall be accompanied by full and itemised details of the items set out in Clause 35.3 including evidence that the same have been properly calculated together with such details as may be requested by the Contractor or the Lender. Each application for Interim Payment shall be copied to the Lender, the Lender's Technical Adviser and the Construction Contractor shall provide such information and evidence in relation to amounts claimed in the application as the Lender's Technical Adviser and/or the Contractor's Representative may reasonably require.

35.6 Notwithstanding any other provision of this Clause 35 or the state or progress of the Works, unless and to the extent that an increase in the Contract Sum has been agreed or otherwise determined in accordance with this Contract and the amount of such increase is due to the Construction Contractor in accordance with this Contract, in no month shall the gross valuation for an Interim Payment referred to in Clause 35.3 in respect of work executed (including any design work) or materials and goods supplied exceed the maximum cumulative amount for that month, as set out in the Cash Flow Forecast. The Construction Contractor shall not include in any application for Interim Payment any amount which exceeds his entitlement as referred in this Clause 35.6.

35.7 Within nine (9) Days of receipt of an application for Interim Payment the Contractor shall review and assess in conjunction with the Lender's Technical Adviser such application. Not later than nine (9) Days after the receipt of an application for Interim Payment (such ninth day being the "due date for payment") the Contractor shall give a written notice specifying the amount of payment proposed to be made in respect of that application, the basis on which such amount is calculated and to what the amount relates and, subject to Clause 35.8, shall pay the amount proposed no later than the final date for payment.

35.8 Not later than five (5) Days before the final date for payment of an amount due pursuant to Clause 35.7 the Contractor may give a written notice to the Construction Contractor 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 each ground.

35.9 Not used.

- 35.10 The final date for payment of an amount due in an Interim Payment shall be twenty eight (28) Days from the date of receipt by the Contractor of the Construction Contractor's application for Interim Payment.
- 35.11 If the Contractor fails properly to pay the amount, or any part thereof, due to the Construction Contractor by the final date for its payment the Contractor shall pay to the Construction Contractor in addition to the amount not properly paid simple interest thereon for the period until such payment is made. Payment of such simple interest shall be treated as a debt due to the Construction Contractor by the Contractor. The rate of interest payable shall be two (2) per cent over the Base Rate of the Bank of England which is current at the date the payment by the Contractor became overdue. Any payment of simple interest under this Clause 35.11 shall not in any circumstances be construed as a waiver by the Construction Contractor of his right to proper payment of the principal amount due from the Contractor to the Construction Contractor in accordance with, and within the time stated in, this Contract or of the rights of the Construction Contractor in regard to suspension of the performance of his obligations under this Contract to the Contractor pursuant to Clause 35.12 or to determination of his employment pursuant to the default referred to in Clause 40.
- 35.12 Without prejudice to any other rights and remedies which the Construction Contractor may possess, if the Contractor shall, subject to any notice issued pursuant to Clause 35.8, fail to pay the Construction Contractor in full by the final date for payment as required by this Contract and such failure shall continue for 7 Days after the Construction Contractor has given to the Contractor written notice of his intention to suspend performance of his obligations under this Contract to the Contractor and the ground or grounds on which it is intended to suspend performance, then the Construction Contractor may suspend such performance of his obligations under the Contract to the Contractor until payment in full occurs. Such suspension shall not be treated as an abandonment of the works to which Clause 40.1.2 refers or as a suspension to which Clause 40.1.3 refers or a failure to proceed regularly and diligently with the Works to which Clause 40.1.4 refers.
- 35.13
- 35.13.1 Where the Construction Contractor wishes to be paid for Materials and equipment not on the Site, the Construction Contractor shall:
- (a) notify the Contractor and the Lender in advance of the application for Interim Payment in respect of such Materials and equipment;
 - (b) provide to the Contractor documentary evidence that the property in the said Materials and equipment has vested in the Construction Contractor;
 - (c) provide to the Contractor documentary evidence that said Materials and equipment are insured against loss or damage for their full value under a policy of insurance protecting the interests of the Contractor and the Construction Contractor in respect of the Specified Perils, theft and accidental damage during the period commencing with the transfer of property in said Materials and goods to the Construction Contractor until they are delivered to, or adjacent to, the Works;

- (d) suitably mark or otherwise plainly identify the Materials and equipment so as to show that their destination is the Site, that they are the property of the Contractor and (where they are not stored at the premises of the Construction Contractor) to whose order they are held;
- (e) send to the Contractor a schedule listing and giving the value of every item of such Materials and equipment not on the Site and inviting the Contractor and/or the Lender to inspect them. The reasonable costs of any such inspection shall be borne by the Construction Contractor.

35.13.2 Following compliance by the Construction Contractor with the provisions of Clause 35.13.1 above the Contractor shall decide whether it is prepared to approve payment for any items of Materials and equipment not on the Site provided that:

- (a) the Contractor shall be under no obligation to approve such payment; and
- (b) the Contractor shall not approve such payment unless and until the Construction Contractor delivers or has delivered a bond or bonds in the form attached at Schedule 14 in favour of the Contractor that:
 - (i) covers the value of any payments made and to be made under Clause 35.13.3;
 - (ii) also covers the value of any part of the Advance Payment that has not been reimbursed pursuant to Clause 35.16; and
 - (iii) includes (in Appendix 1 to such bond), description of any materials and equipment for which payment is to be made.

35.13.3 Subject to Clause 35.17, the Construction Contractor shall be entitled to include in the next application for Interim Payment to the Contractor the value of Materials and equipment requested by the Construction Contractor in respect of which it has complied with the requirements of Clause 35.13.1 and for which the Contractor has notified the Construction Contractor pursuant to Clause 35.13.2 that the Contractor is prepared to approve payment.

35.14 The obligation of the Contractor to make payment under this Contract is subject to the provisions of the CIS and the Construction Contractor agrees to comply, and where necessary to procure the compliance of any sub-contractor or supplier, with the provisions of the CIS.

35.15

[REDACTED]

35.16

[REDACTED]

<u>MBT Plant element</u>	<u>Percentage of Advance Payment to be repaid</u>
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]

- 35.17 Prior to the Advance Payment and any payment pursuant to Clause 35.13 being due and/or payable, the Construction Contractor shall deliver to the Contractor a bond in the form attached at Schedule 14 in favour of the Contractor from a surety approved by the Contractor.
- 35.18 Prior to the date of this Contract the Construction Contractor has been appointed to perform certain preliminary works under a letter of intent dated 26 July 2007 (the "Letter of Intent"). Under the Letter of Intent, the Construction Contractor has been paid the sum of £482,490 (four hundred and eighty two thousand, four hundred and ninety pounds) for preliminary works (the "Preliminary Works Payment").
- 35.19 The Preliminary Works Payment shall be reimbursed by the Construction Contractor to the Contractor by deduction from the first Interim Payment made in respect of applications submitted by the Construction Contractor pursuant to Clause 35.4. Should the first Interim Payment be less than the Preliminary Works Payment, the remainder of the Preliminary Works Payment shall be deducted from the second Interim Payment and any subsequent Interim Payments as applicable.
- 35.20 The Contractor shall issue instructions to the Construction Contractor in regard to the expenditure of Provisional Sums.
- 35.21 Upon receipt of an instruction under Clause 35.20, the Construction Contractor shall at all times take all reasonable steps to minimise and mitigate any costs arising out of such instruction.
- 35.22 Subject to Clause 35.23 the value of all work executed by the Construction Contractor in accordance with instructions of the Contractor as to the expenditure of Provisional Sums shall be such amount as is agreed by the

Contractor and the Construction Contractor or, where not agreed, shall, unless otherwise agreed by the Contractor and the Construction Contractor, be valued in accordance with Clauses 33.6.1 to 33.6.5 (excluding the last paragraph of Clause 33.6.5).

- 35.23 The Parties acknowledge and agree that instructions in regard to the expenditure of Provisional Sums shall not entitle the Construction Contractor to any adjustment to the Works Completion Date, the RT Completion Date, the Longstop Date and/or the RT Completion Longstop Date or to any cost associated with any delay to the regular progress of the Works, or to any cost, loss and/or expense associated with the implementation of any instructions with regard to the expenditure of Provisional Sums.
- 35.24 The Construction Contractor acknowledges that in agreeing the Works Completion Date, the RT Completion Date, the Longstop Date, the RT Completion Longstop Date and the Works Programme that he has taken into account the Provisional Sums and the fact that the Contractor may issue instructions pursuant to Clause 35.20.
- 35.25 Notwithstanding any other provision of this Clause 35, it shall be a condition precedent to any entitlement of the Construction Contractor to payment of any amounts included in an application for an Interim Payment that the Construction Contractor has produced a revised forecast spend profile (as referred to in Schedule 11, page 25 under the heading "Financial Management") which has been approved by each of the Contractor's Representative and the Lender's Technical Adviser, and no payment shall become due to the Construction Contractor under this Contract until such approval has been obtained provided that this Clause 35.25 shall not restrict the payment of the Advance Payment in accordance with Clause 35.15.

36. FINAL ACCOUNT

- 36.1 Within three (3) months after RT Completion the Construction Contractor shall submit the Final Account and the Final Statement referred to in Clauses 36.2 and 36.4 respectively for agreement by the Contractor and the Lender and the Construction Contractor shall supply the Contractor and the Lender with such supporting documents as either may reasonably require.
- 36.2 The Contract Sum shall be adjusted in accordance with this Contract including any agreement by the Construction Contractor and the Contractor pursuant to Clause 33.7 and the "**Final Account**" shall set out the Contract Sum together with the adjustments set out in Clause 36.3.
- 36.3 There shall be deducted from the Contract Sum:
- 36.3.1 any reduction in payment in respect of an Contractor Variation;
- 36.3.2 any other amount which is required by this Contract to be deducted from the Contract Sum or which is due or has become due from the Construction Contractor to the Contractor; and
- 36.3.3 all Provisional Sums included in the Contract Sum Analysis.
- There shall be added to the Contract Sum:
- 36.3.4 any additional payment entitlement of the Construction Contractor in respect of an Contractor Variation pursuant to Clause 33;

- 36.3.5 any additional payment entitlement of the Construction Contractor properly arising under Clause 37 (subject to Clause 6, if applicable);
- 36.3.6 any other amount which is required by this Contract to be added to the Contract Sum;
- 36.3.7 any other sums in addition to the Contract Sum which the Construction Contractor is, or has become, entitled to be paid under this Contract; and
- 36.3.8 the amount of the valuation of work executed by, or the amount of any disbursements by, the Construction Contractor in accordance with the instructions of the Contractor as to the expenditure of Provisional Sums.

36.4 The **"Final Statement"** shall set out:

- 36.4.1 the amount resulting from the operation of Clauses 36.2 and 36.3; and
- 36.4.2 the sum of amounts already paid by the Contractor to the Construction Contractor;

and the difference (if any) between the two sums shall be expressed as a balance due to the Construction Contractor from the Contractor or to the Contractor from the Construction Contractor as the case may be;

and the Final Statement shall state to what the balance relates and the basis on which the balance has been calculated.

36.5 The Final Account and the Final Statement as submitted by the Construction Contractor in accordance with Clause 36.1 shall within one (1) month from whichever of the following is the latest date:

- 36.5.1 the end of the Defects Liability Period;
- 36.5.2 the end of any extended Defects Liability Period;
- 36.5.3 the date of issue of the Final Acceptance Certificate; or
- 36.5.4 the date of submission of the Final Account and the Final Statement to the Contractor by the Construction Contractor;

be conclusive as to the balance due between the Parties in accordance with the Final Statement, except to the extent that the Contractor disputes anything in that Final Account or Final Statement before the date on which, but for the disputed matters, the balance would be conclusive.

36.6 If the Construction Contractor does not submit the Final Account and the Final Statement within the three (3) months referred to in Clause 36.1 the Contractor may on the expiry of the said three (3) months give notice in writing to the Construction Contractor that if the Final Statement and Final Account are not submitted by the Construction Contractor within two (2) months from the date of the written notice the Contractor may himself prepare (or have prepared) and send to the Construction Contractor a Final Account and Final Statement ("**Contractor's Final Account**" and "**Contractor's Final Statement**").

36.7 The Contractor's Final Account shall set out the Contract Sum together with such adjustments as are referred to in Clause 36.3 and such other adjustments which are in accordance with this Contract as the Contractor, on the information in his possession, can make. The Contractor's Final Statement shall set out:

36.7.1 the amount stated in the Contractor's Final Account; and

36.7.2 the sum of amounts already paid by the Contractor to the Construction Contractor,

and the difference (if any) between the two sums shall be expressed as a balance due to the Construction Contractor from the Contractor or to the Contractor from the Construction Contractor as the case may be, and the Contractor's Final Statement shall state to what the balance relates and the basis on which the balance has been calculated.

36.8 The Contractor's Final Account and the Contractor's Final Statement as sent to the Construction Contractor by the Contractor in accordance with Clause 36.6 shall within one (1) month from whichever of the following is the latest date:

36.8.1 the end of the Defects Liability Period;

36.8.2 the end of any extended Defects Liability Period;

36.8.3 the date of issue of the Final Acceptance Certificate; or

36.8.4 the date of submission of the Contractor's Final Account and the Final Statement to the Construction Contractor by the Contractor;

be conclusive as to the balance due between the Parties in accordance with the Contractor's Final Statement except to the extent that the Construction Contractor disputes anything in that Contractor's Final Account or Final Statement before the date on which, but for the disputed matters, the balance would be conclusive.

36.9 Not later than five (5) Days after the Final Statement becomes conclusive as to the balance due between the Parties in accordance with Clause 36.5 or after the Contractor's Final Statement becomes conclusive as to the balance due between the Parties in accordance with Clause 36.8 the Contractor shall give a written notice to the Construction Contractor which shall specify the amount of the payment proposed to be made in respect of any balance stated as due to the Construction Contractor from the Contractor in the Final Statement or in the Contractor's Final Statement.

36.10 The final date for payment of the said balance payable by the Contractor to the Construction Contractor or by the Construction Contractor to the Contractor as the case may be shall be twenty eight (28) Days from the date the Final Statement becomes conclusive as to the balance due between the Parties in accordance with Clause 36.5 or after the Contractor's Final Statement becomes conclusive as to the balance due between the Parties in accordance with Clause 36.8. Not later than five (5) Days before the final date for payment of any balance to the Construction Contractor the Contractor may give a written notice to the Construction Contractor which shall specify any amount proposed to be withheld and/or deducted from such balance due to the Construction Contractor, the ground or grounds for such withholding and/or deduction and the amount of withholding and/or deduction attributable to each ground.

36.11 Not used.

36.12 If the Contractor or the Construction Contractor fails properly to pay the said balance, or any part thereof, by the final date for its payment the Contractor or the Construction Contractor as the case may be shall pay to the other, in addition to the balance not properly paid, simple interest thereon for the period until such payment is made. The rate of interest payable shall be

over the Base Rate of the Bank of England which is current at the date the payment by the Contractor or by the Construction Contractor as the case may be became overdue. Any payment of simple interest under this Clause 36.12 shall not in any circumstances be construed as a waiver by the Construction Contractor or by the Contractor as the case may be of his right to proper payment of the aforesaid balance due from the Contractor to the Construction Contractor or from the Construction Contractor to the Contractor in accordance with this Clause 36.

- 36.13 Liability for payment of the balance pursuant to Clause 36.10 and of any interest pursuant to Clause 36.12 shall be treated as a debt due to the Construction Contractor by the Contractor or to the Contractor by the Construction Contractor as the case may be.
- 36.14 The Final Statement, when it becomes conclusive as to the balance due between the Parties in accordance with Clause 36.5 or the Contractor's Final Statement when it becomes conclusive as to the balance due between the Parties in accordance with Clause 36.8, shall, except as provided in Clauses 36.15 and 36.16 (and save in respect of fraud), have effect in any proceedings under or arising out of or in connection with this Contract as:
- 36.14.1 conclusive evidence that all and only such extensions of time, if any, as are due under Clause 37 or Clause 38 have been given, and
- 36.14.2 conclusive evidence that the reimbursement of direct loss and/or expense, if any, to the Construction Contractor pursuant to Clause 37 is in final settlement of all and any claims which the Construction Contractor has or may have arising out of the occurrence of any breach of contract by the Contractor.
- 36.15 The Final Statement or the Contractor's Final Statement (either such statement being referred to below as the "Statement") shall not have effect as provided in Clause 36.14:
- 36.15.1 in any legal proceedings or adjudication commenced before or on or within twenty eight (28) Days after the date of issue of the Statement, if commenced for the purpose of contesting any such issue as is mentioned in Clause 36.14; nor
- 36.15.2 in any legal proceedings begun within twenty eight (28) Days after any adjudicator's decision in an adjudication commenced in accordance with Clause 36.15.1, if the purpose of such legal proceedings is to contest such decision or the dispute or differences to which such decision relates.
- 36.16 After the final conclusion of such adjudication and/or legal proceedings as are referred to in Clause 36.15 the Statement shall be subject to the final outcome of such adjudication and/or legal proceedings.
- 36.17 The powers of the court or any adjudicator to open up and review any certificate shall not extend to the Statement, to the extent that the Statement is given conclusive effect pursuant to Clause 36.14 and Clause 46 shall be construed accordingly.
- 36.18 No payment by the Contractor shall of itself be conclusive evidence that any design, works, materials or goods to which it relates are in accordance with this Contract.
- 36.19 The issue of the Final Statement, the Final Account, the Contractor's Final Account and/or the Contractor's Final Statement shall not in any way affect the liabilities of the Construction Contractor to the Contractor arising out of

or in any way connected with the performance of its obligations under this Contract.

37. COMPENSATION EVENTS

37.1 If on or before the Works Completion Date or RT Completion Date (as appropriate), as a direct result of the occurrence of a Compensation Event:

37.1.1 the Construction Contractor is unable to achieve:

(a) Completion on or before the Works Completion Date and/or the Longstop Date; and/or

(b) RT Completion on or before the RT Completion Date and/or the RT Completion Longstop Date; and/or

37.1.2 the Construction Contractor is unable or is likely to be unable to comply with its obligations under this Contract; and/or

37.1.3 the Construction Contractor incurs direct loss and/or expense;

then the Construction Contractor is entitled to apply for relief (as an Authority Derived Benefit and subject to Clause 6) from its obligations and/or claim compensation and/or an extension to the Works Completion Date and/or the RT Completion Date and/or the Longstop Date and/or the RT Completion Longstop Date under this Contract provided always that the provisions of Clause 6 shall not apply in relation to any application for relief and/or compensation where the event falls into limb "(b)" of the definition of "**Compensation Event**" or where an instruction issued pursuant to Clause 30 was not issued as a result of the Authority exercising its rights under Clause 34 of the Project Agreement and the consequent inspection shows that the relevant part or parts of the Works or goods comply with this Contract.

37.2 Subject to Clause 37.4 below, to obtain relief and/or claim compensation the Construction Contractor must:

37.2.1 as soon as practicable and in any event within 10 Business Days after it became aware that the Compensation Event has caused or is likely to cause delay and/or breach of an obligation under this Contract and/or cause the Construction Contractor to incur costs give to the Contractor a notice of its claim for an extension of time to the Works Completion Date (including any relating Longstop Date) payment of compensation and/or relief from its obligations under this Contract; and

37.2.2 within 14 Business Days of receipt by the Contractor of the notice referred to in Clause 37.2.1 above, provide to the Contractor full details of the Compensation Event, the required extension of time, relief and/or details of and any loss and/or expense claimed; and

37.2.3 demonstrate to the reasonable satisfaction of the Contractor and where relevant the Authority that:

(a) the Compensation Event was or will be the direct cause of:-

(i) the loss and expense; and/or

(ii) any delay in the completion of the Works; and/or

(iii) breach of the Construction Contractor's obligations under this Contract; and

- (b) the loss and expense, time lost and/or relief from the obligations under this Contract claimed could not reasonably be expected to be mitigated or recovered by the Construction Contractor acting in accordance with Good Industry Practice.

37.3 In the event that the Construction Contractor has complied with its obligations under Clause 37.2 above then:

37.3.1 the Works Completion Date and/or the RT Completion Date (as appropriate) and the related Longstop Date shall be postponed on the basis of an Authority Derived Benefit and subject to Clause 6 except where the Compensation Event arises from a breach of this Contract by the Contractor in which case the relevant date or dates shall be postponed by such time as the Contractor decides is reasonable for such a Compensation Event taking into account the likely effect of delay;

37.3.2 in the case of any additional cost being incurred by the Construction Contractor on the basis of an Authority Derived Benefit and subject to Clause 6, the Contractor shall pay to the Construction Contractor compensation in respect of that Compensation Event which is attributable to the loss and/or expense suffered by the Construction Contractor as would place Contractor in a no better or worse position than it would have been had the Compensation Event not occurred; and

37.3.3 in the case of any additional cost being incurred by the Construction Contractor as a result of a breach of this Contract by the Contractor and where the Compensation Event falls into limb "(b)" of the definition of "**Compensation Event**", the Construction Contractor shall be entitled to claim any direct loss and/or expense it incurs or is likely to incur as a result of the breach, provided that the Construction Contractor's entitlement to time relief and/or cost under this Clause 37 shall be subject to the application of the common law rules on remoteness and causation (in the case of additional cost) and the Construction Contractor shall use best endeavours to mitigate any Compensation Event and the effect of any Compensation Event.

37.4 In the event that information is provided after the dates referred to in Clause 37.2 above then the Construction 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.

37.5 If the Parties cannot agree the extent of any compensation, delay incurred or relief from the Construction Contractor's obligations under this Contract, the Construction Contractor disagrees with a decision of the Contractor in relation to this Clause 37, or the Contractor disagrees that a Compensation Event has occurred (or as to its consequences) or that the Construction Contractor is entitled to any other relief under this Clause, the Parties shall resolve the matter in accordance with Clause 46.

38. RELIEF EVENTS

38.1 If and to the extent that a Relief Event is the direct cause of a delay in the achievement of Completion by the Works Completion Date and/or RT Completion by the RT Completion Date; then

38.1.1 the Construction Contractor is entitled to apply for relief as an Authority Derived Benefit and subject to Clause 6 from any rights of the Contractor arising under Clause 40 (Construction Contractor Event of Default) and its obligations under this Contract except that the Construction Contractor shall not receive any extension of time to the Works Completion Date or the RT

Completion Date in respect of a delay which arises from or is due to the occurrence of a Relief Event; and

- 38.1.2 if the Relief Event entitles the Contractor to make a claim under its ALOP policy as referred to at Schedule 36 of the Project Agreement, then the Contractor shall deduct from any liquidated damages owed to the Contractor by the Construction Contractor in accordance with Clause 21 as a result of such delay, up to the amount which the Contractor receives under the ALOP policy in respect of such Relief Event.
- 38.2 To obtain relief the Construction Contractor must:
- 38.2.1 as soon as practicable and in any event within 10 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 Construction Contractor to perform its other obligations, give the Contractor notice of its claim for relief from its obligations under this Contract including full details of the nature of the Relief Event, the date of occurrence and its likely duration;
- 38.2.2 within 7 Days of receipt by the Contractor of the notice referred to in Clause 38.2.1 above provide the Contractor with full details of the relief claimed; and
- 38.2.3 demonstrate to the reasonable satisfaction of the Contractor that:
- (a) the Construction Contractor and its sub-contractors could not have avoided the occurrence or consequences of the relevant Relief Event by steps which they might reasonably be expected to have taken without incurring material expenditure;
 - (b) the Relief Event directly caused the delay to the Works Completion Date;
 - (c) the time lost and/or relief from the obligations under this Contract claimed could not reasonably be expected to be mitigated or recovered by the Construction Contractor acting in accordance with Good Industry Practice without incurring material expenditure; and
 - (d) the Construction Contractor is using all reasonable endeavours to prevent delay in the progress of the Works.
- 38.3 Subject always to Clause 38.1, in the event that the Construction Contractor has complied with its obligations under Clause 38.2 above then the Longstop Date and/or the RT Completion Longstop Date shall be postponed by such time as the Contractor's Representative shall determine is reasonable for such a Relief Event taking into account the likely effect of delay subject always to the provisions of Clause 6 of this Contract.
- 38.4 In the event that information required by Clause 38.2 above is provided after the dates referred to in that Clause then the Construction Contractor shall not be entitled to any relief in respect of the period for which the information is delayed.
- 38.5 The Construction Contractor shall notify the Contractor 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.

- 38.6 If the Parties cannot agree the extent of the relief required or the Contractor disagrees that a Relief Event has occurred or that the Construction Contractor is entitled to any extension of the Works Completion Date, the RT Completion Date, the Longstop Date and/or the RT Completion Longstop Date, the Parties shall resolve the matter in accordance with Clause 46.

39. **VAT**

The Contractor shall pay to the Construction Contractor at the same time as making any relevant payment the total amount of VAT properly chargeable by the Construction Contractor on the supply to the Contractor of any goods or services under this Contract, provided that the Construction Contractor has first presented to the Contractor a tax invoice in accordance with all applicable Legislation.

40. **TERMINATION ON CONSTRUCTION CONTRACTOR DEFAULT**

- 40.1 For the purposes of this Contract, a "**Construction Contractor Event of Default**" means one of the following events or circumstances (save to the extent relief is provided by Clause 37 (Compensation Event), Clause 38 Relief Event, Clause 43 Force Majeure Event or a wilful or negligent act or omission of the Contractor or any Contractor Party):
- 40.1.1 a failure to achieve Completion by the Longstop Date and/or a failure to achieve RT Completion by the RT Completion Longstop Date;
 - 40.1.2 the Construction Contractor abandoning all or a material part of the Works;
 - 40.1.3 the Construction Contractor without reasonable cause wholly or substantially suspending the carrying out of the design or construction of the Works for a continuous period of fifteen (15) Days or more;
 - 40.1.4 the Construction Contractor failing to proceed regularly and diligently with the performance of its obligations under this Contract;
 - 40.1.5 the Construction Contractor refusing or neglecting to comply with a written notice or instruction from the Contractor requiring it to remove or rectify any work, materials or goods not in accordance with this Contract, if by such refusal or neglect the Works are materially affected;
 - 40.1.6 the Construction Contractor failing to comply with the CDM Regulations;
 - 40.1.7 the Construction Contractor otherwise committing a material or persistent breach of this Contract and for these purposes the non payment by the Construction Contractor of sums due and owing to the Contractor in excess of [REDACTED] shall be a material breach provided that the entitlement of the Contractor to such sums is not the subject of a bona fide dispute for which proceedings have been commenced in accordance with Clause 46;
 - 40.1.8 the occurrence of any of the following events:
 - (a) the Construction Contractor or the Guarantor becomes the subject of a voluntary arrangement under Part 1 of the Insolvency Act 1986 (excluding a situation where such demand has been dealt with under Section 123(1)(a)) or a scheme or arrangement approved under the Insolvency Act 1986 or the Companies Act 1985;
 - (b) the Construction Contractor or the Guarantor has a receiver, manager, administrator or administrative receiver appointed over all or any part of its undertakings, assets or income (including any

equipment supplied by the Construction Contractor referred to in the Contract Sum Analysis);

- (c) the court makes an order that the Construction Contractor or the Guarantor be wound up;
- (d) the Construction Contractor or the Guarantor has passed a resolution for its winding up (save in the case of a voluntary winding-up solely for the purpose of amalgamation or reconstruction the terms of which have been notified to and approved in writing by the Contractor); or
- (e) the Construction Contractor or the Guarantor has anything similar or analogous to the events set out in Clauses 40.1.8(a) to 40.1.8(c) inclusive happen in relation to it in any jurisdiction outside England and Wales;

40.1.9 the Construction Contractor breaches Clause 66 (Assignment);

40.1.10 the termination of the Project Agreement and/or the Credit Agreement consequent upon any act, omission or default by the Construction Contractor, the Guarantor and/or any Construction Contractor Party;

40.1.11 any act, omission or default by the Construction Contractor which has caused or materially contributed to the occurrence of a Contractor Default under and as defined in the Project Agreement;

40.1.12 the Construction Contractor's liability to pay liquidated damages pursuant to Clause 21 exceeds the amount being equal to ten percent of the Contract Sum;

40.1.13 the Construction Contractor's aggregate liability to the Contractor under this Contract reaches or exceeds [REDACTED] of the Contract Sum; or

40.1.14 there being no reasonable likelihood, in the opinion of the Lender's Technical Adviser (acting reasonably and impartially), of the Construction Contractor being able to complete the Works to the standard required by this Contract so as to achieve Completion by the Longstop Date, and/or to achieve RT Completion by the RT Completion Longstop Date; or

40.1.15 the occurrence of an "Event of Default" (as defined in the Credit Agreement) consequent upon any act, omission or default by the Construction Contractor, the Guarantor and/or a Construction Contractor Party.

40.2 The Construction Contractor shall notify the Contractor of the occurrence, and details, of any Construction Contractor Event of Default and of any event or circumstance which is likely, with the passage of time or otherwise, to constitute or give rise to a Construction Contractor Event of Default, in either case promptly on the Construction Contractor becoming aware of its occurrence.

40.3 Within a reasonable time of the occurrence of a Construction Contractor Event of Default, or (if later) of the time the Contractor becomes aware of the same, and while the same is subsisting, the Contractor may:

40.3.1 in relation to the Construction Contractor Events of Default set out in Clauses 40.1.2, 40.1.3, 40.1.4, 40.1.5, 40.1.6, 40.1.7, 40.1.11 and 40.1.14 serve a notice on the Construction Contractor stating that if such Construction Contractor Event of Default is not remedied within fifteen (15) Days of the Construction Contractor's receipt of such notice or is repeated in

such fifteen (15) day period, the Construction Contractor's employment under this Contract shall be terminated upon further notice from the Contractor (and if such Construction Contractor Event of Default is not so remedied or is so repeated, the Contractor may by such further notice terminate the Construction Contractor's employment under this Contract with immediate effect upon the Construction Contractor's actual or deemed receipt of such further notice); or

- 40.3.2 in relation to the Construction Contractor Events of Default set out in Clauses 40.1.1, 40.1.8, 40.1.9, 40.1.10, 40.1.12 40.1.13 and 40.1.15 serve a notice on the Construction Contractor terminating the Construction Contractor's employment under this Contract with immediate effect upon the Construction Contractor's actual or deemed receipt of such notice.
- 40.4 If the Construction Contractor Event of Default set out in Clause 40.1.6 occurs, the Contractor may by notice to the Construction Contractor terminate the Construction Contractor's appointment as Principal Contractor for the Works, for the purposes of the CDM Regulations, without prejudice to any other aspect of the Construction Contractor's continued employment under this Contract.
- 40.5 Where a Construction Contractor Event of Default has caused or contributed to a Contractor Default under the Project Agreement, the Construction Contractor shall provide all assistance and information reasonably required by the Contractor to enable the Contractor to comply with its obligations to the Authority under Clause 84 of the Project Agreement (including by producing an acceptable Rectification Programme).

41. TERMINATION ON CONTRACTOR DEFAULT

- 41.1 Each and any of the following events shall constitute "Contractor Events of Default":
 - 41.1.1 failure by the Contractor to pay to the Construction Contractor by the final date for payment therefore any amount properly due pursuant to this Contract (where such amount is not in dispute under Clause 46) in excess of [REDACTED]
 - 41.1.2 the occurrence of any of the following events (except where such an event occurs due to the termination of the Project Agreement):
 - (a) the Contractor becomes the subject of a voluntary arrangement under Part 1 of the Insolvency Act 1986 (excluding a situation where such demand has been dealt with under Section 123(1)(a)) or a scheme or arrangement approved under the Insolvency Act 1986 or the Companies Act 1985;
 - (b) the Contractor has a receiver, manager, administrator or administrative receiver appointed over all or any part of its undertakings, assets or income;
 - (c) the court makes an order that the Contractor be wound up;
 - (d) the Contractor has passed a resolution for its winding-up (save in the case of a voluntary winding-up solely for the purposes of amalgamation or reconstruction the terms of which have been notified to and approved in writing by the Construction Contractor); or

- (e) the Contractor has anything similar or analogous to the events set out in Clauses 41.1.2(a) to 41.1.2(c) inclusive happen in relation to it in any jurisdiction outside England and Wales.

41.2 The Contractor shall give notice to the Construction Contractor of the occurrence of and details of any Contractor Event of Default of the kinds set out in Clause 41.1.

41.3 Upon receipt of a notice pursuant to Clause 41.2 or the occurrence of a Contractor Event of Default the Construction Contractor may:

41.3.1 in relation to the Contractor Events of Default set out in Clause 41.1.2, give fifteen (15) Days' notice to the Contractor to terminate the Construction Contractor's employment under this Contract (subject to the Construction Contractor's Collateral Warranty and the Construction Contractor's Lender Warranty). Such termination shall (subject as aforesaid) take effect on the date of receipt by the Contractor of such notice provided that after the occurrence of any of the Contractor Events of Default set out in Clause 41.1.2 and before the taking effect of any notice of termination served by the Construction Contractor pursuant to this Clause 41.3, the obligation of the Construction Contractor to carry out and complete the design and construction of the Works shall be suspended; or

41.3.2 in relation to the Contractor Event of Default set out in Clause 41.1.1, give notice to the Contractor that if the relevant Contractor Event of Default is not remedied within ninety (90) Days from the date of such notice, then the Construction Contractor may terminate his employment under this Contract (and if such Contractor Event of Default is not so remedied), the Construction Contractor may by such further notice (and subject to the Construction Contractor's Collateral Warranty and the Construction Contractor's Lender Warranty) terminate the Construction Contractor's employment under this Contract with immediate effect (subject as aforesaid) upon the Contractor's actual or deemed receipt of the Construction Contractor's further notice).

42. **TERMINATION ON TERMINATION OF PROJECT AGREEMENT OR THE CREDIT AGREEMENT**

42.1 Where the Project Agreement and/or the Credit Agreement is terminated, the Construction Contractor's employment under this Contract shall (subject to the terms of the Construction Contractor's Collateral Warranty and the Construction Contractor's Lender Warranty) terminate immediately on the giving of a written notice from one Party to the other.

42.2 If this Contract is terminated pursuant to Clause 42.1 and such termination was not consequent upon any act, omission or default by the Construction Contractor, the Guarantor and/or any Construction Contractor Party, then the provisions of Clause 45.7 shall apply otherwise the provisions of Clauses 40.1.10 and 45.6 shall apply.

42.3 If the Project Agreement and/or the Credit Agreement is terminated for whatever reason the Construction Contractor shall provide such assistance as the Contractor may reasonably require to fulfil its obligations under the Project Agreement and/or the Credit Agreement in those circumstances.

43. **TERMINATION ON FORCE MAJEURE**

43.1 No Party shall be entitled to bring a claim for a breach of obligations under this Contract by the other Party (the "**Affected 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.

- 43.2 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.
- 43.3 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.
- 43.4 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 substantially all of its obligations under this Contract for a period of more than 180 Days then subject to Clause 43.5 either Party may terminate the Construction Contractor's employment under this Contract by giving 30 Days' written notice to the other Party.
- 43.5 If the Contractor gives the Construction Contractor notice requiring this Contract to continue, the Construction Contractor's right to terminate its employment under this Contract pursuant to Clause 43.4 shall cease.
- 43.6 If the Construction Contractor's employment is terminated pursuant to Clause 43.4 then the provisions of Clause 45.7 shall apply.
- 43.7 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 Construction Contractor shall at all times during which a Force Majeure Event is subsisting take all steps in accordance with Good Industry Practice to overcome or minimise the consequences of the Force Majeure Event.
- 43.8 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 this Contract shall, subject to Clause 43.1, continue to be performed on the terms existing immediately prior to the occurrence of the Force Majeure Event.

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

- 44.1 The Construction Contractor warrants that in entering into this Contract it has not committed any Prohibited Act.
- 44.2 If the Construction Contractor or any of its sub-contractors (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 Contractor shall be entitled to act in accordance with Clauses 44.3 to 44.8 below.
- 44.3 If a Prohibited Act is committed by the Construction Contractor or by an employee not acting independently of the Construction Contractor then the Contractor may terminate the Construction Contractor's employment under this Contract by giving notice to the Construction Contractor and such termination shall take effect from the dates specified in the notice.

- 44.4 If the Prohibited Act is committed by an employee of the Construction Contractor acting independently of the Construction Contractor then the Contractor may give notice to the Construction Contractor of termination of its employment under this Contract and the Construction Contractor's employment will terminate unless within 25 Days of receipt of such notice the Construction Contractor terminates the employee's employment and (if necessary) procures the performance of such part of the Works by another person.
- 44.5 If the Prohibited Act is committed by a sub-contractor of the Construction Contractor or by an employee of that sub-contractor not acting independently of that sub-contractor then the Contractor may give notice to the Construction Contractor of termination of its employment and the Construction Contractor's employment under this Contract will terminate unless within 25 Days of receipt of such notice the Construction Contractor terminates the sub-contract and procures the performance of such part of the Works by another person.
- 44.6 If the Prohibited Act is committed by an employee of a sub-contractor of the Construction Contractor acting independently of that sub-contractor then the Contractor may give notice to the Construction Contractor of termination of its employment and the Construction Contractor's employment under this Contract will terminate unless within 25 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 by another person.
- 44.7 If the Prohibited Act is committed by any other person not specified in Clauses 44.2 to 44.6 above then the Contractor may give notice to the Construction Contractor of termination of its employment and the Construction Contractor's employment will terminate unless within 25 Days of receipt of such notice the Construction Contractor procures the termination of such person's employment and of the appointment of their employer (where not employed by the Construction Contractor) and (if necessary) procures the performance of such part of the Works by another person.
- 44.8 Any notice of termination under this Clause 44 shall specify:
- 44.8.1 the nature of the Prohibited Act;
- 44.8.2 the identity of the Party whom the Contractor believes has committed the Prohibited Act; and
- 44.8.3 the date on which this Contract will terminate in accordance with the applicable provision of this Clause.
- 44.9 If this Contract is terminated pursuant to Clause 44.3 to 44.7 (inclusive) then the provisions of Clause 45 shall apply.

45. **CONSEQUENCES OF TERMINATION**

- 45.1 Subject to Clauses 41.3.1 and 42.1, the Parties shall continue to perform their obligations under this Contract, notwithstanding the service by either Party of a notice of termination or indicating that that Party may terminate this Contract, until such time as such termination becomes effective.
- 45.2 Notwithstanding any breach of this Contract by either Party and without prejudice to any other rights which the other Party may have in relation thereto, the other Party may elect to continue to treat this Contract as in full force and effect and to enforce its rights under this Contract.

- 45.3 The failure of either Party to exercise any right under or in respect of this Contract including any right to terminate the employment of the Contractor hereunder and any right to claim damages shall not be deemed to be a waiver of such right for any continuing or subsequent breach.
- 45.4 Upon a termination of the Construction Contractor's employment under this Contract howsoever arising:
- 45.4.1 such part of the Works as has been constructed and/or formed part of an application for Interim Payment pursuant to Clause 35 and/or been paid for by the Contractor (including pursuant to Clauses 45.7 and/or 45.8) shall vest in the Contractor;
- 45.4.2 all plant and all materials on or near to the Site shall remain available free of charge to the Contractor for the purposes of completing the Works;
- 45.4.3 all construction plant shall remain available to the Contractor for the purposes of completing the Works, subject to payment of the Construction Contractor's reasonable charges;
- 45.4.4 the Construction Contractor shall deliver to the Contractor As Built Drawings showing all work carried out since commencement of the Works, and copies of all maintenance, health and safety, operation and training manuals for the Works (or drafts of them) which are in existence at the date of termination;
- 45.4.5 the Construction Contractor shall where so requested by the Contractor assign or novate to the Contractor, or to such other person as the Contractor may elect, with effect from the date of termination of this Contract, any sub-contract or appointment of a consultant, as well as any related bond or guarantee in favour of the Construction Contractor (and the Construction Contractor shall take all necessary steps and execute such documents as are necessary to give effect to such assignment or novation);
- 45.4.6 the Construction Contractor shall use reasonable endeavours to procure that the benefit of manufacturers' warranties in respect of mechanical and electrical plant and equipment which are incorporated in that part of the Works which has been completed, or are at or near the Site, or which will otherwise vest in the Contractor pursuant to this Clause 45, is assigned, or otherwise transferred, to the Contractor;
- 45.4.7 the Construction Contractor shall promptly and in an orderly manner and with all reasonable speed and economy deliver to the Contractor all documents relating to the Works which are for the time being under the control of the Construction Contractor;
- 45.4.8 the Construction Contractor shall as soon as practicable remove from the Site all property of the Construction Contractor and its sub-contractors which is not required to remain on the Site pursuant to the preceding provisions of this Clause 45; and
- 45.4.9 the Construction Contractor shall as soon as practicable vacate the Site and shall leave the Site in a safe, clean and orderly condition.
- 45.5 Save as otherwise expressly provided by this Contract termination of the Construction Contractor's employment under this Contract shall be without prejudice to any accrued rights and obligations under this Contract as at the date of termination.
- 45.6 If the Contractor terminates the Construction Contractor's employment under this Contract in accordance with Clause 40 or Clause 44:

- 45.6.1 the Construction Contractor shall indemnify the Contractor and keep the Contractor fully and effectively indemnified against all expense, loss, damage and liabilities suffered or incurred by the Contractor associated with the termination including any additional expense incurred by the Contractor in completing the Works (if applicable); and
- 45.6.2 the Construction Contractor shall be entitled to be paid for work undertaken since the end of the last calendar month in respect of which payment has not been made to the Construction Contractor provided that the Construction Contractor shall have no rights to any such payment unless and until the Contractor has caused the Works to be completed (which the Contractor shall be under no obligation to do).
- 45.7 Subject to Clause 45.9, if the Construction Contractor's employment under this Contract is terminated pursuant to Clauses 42 or 43 the Construction Contractor shall be entitled on the basis of an Authority Derived Benefit subject to Clause 6 (provided always that the Construction Contractor has not contributed to such termination by any act, omission or default of the Construction Contractor and/or a Construction Contractor Party) to be paid:
- 45.7.1 the total value of work properly executed at, and of any design work properly carried out before, the date of termination, such value to be ascertained in accordance with this Contract as if the employment of the Construction Contractor had not been determined, together with any amounts due to the Construction Contractor under this Contract at the date of such termination and not included in such total value;
- 45.7.2 the reasonable cost of removal of the Construction Contractor's property from the Site; and
- 45.7.3 the cost of materials or goods properly ordered for the Works for which the Construction Contractor shall have paid or for which the Construction Contractor is legally bound to pay, and on such payment in full by the Contractor such materials or goods shall become the property of the Contractor;

less any amounts previously paid to the Construction Contractor under this Contract.

- 45.8 If the Construction Contractor's employment under this Contract is terminated pursuant to Clause 41 the Construction Contractor shall be entitled to be paid:
- 45.8.1 the total value of work properly executed at, and of any design work properly carried out before, the date of termination, such value to be ascertained in accordance with this Contract as if the employment of the Construction Contractor had not been determined, together with any amounts due to the Construction Contractor under this Contract at the date of such termination not included in such total value;
- 45.8.2 any loss and/or expense caused to the Construction Contractor by the termination (whether ascertained before or after the date of termination, provided such loss and/or expense was suffered or incurred before the date of termination);
- 45.8.3 the reasonable cost of removal of the Construction Contractor's property from the Site; and
- 45.8.4 the cost of materials or goods properly ordered for the Works for which the Construction Contractor shall have paid or for which the Construction Contractor is legally bound to pay, and on such payment in full by the

Contractor such materials or goods shall become the property of the Contractor;

less any amounts previously paid to the Construction Contractor under this Contract.

- 45.9 The making of those payments following a termination which are required to be made by Clauses 45.7 and 45.8 shall be in full satisfaction of any claim in respect of the determination of and the circumstances leading to the determination of the Construction Contractor's employment under this Contract and the Construction Contractor shall be excluded from all other rights and remedies in respect thereof.

46. DISPUTE RESOLUTION PROCEDURE

- 46.1 Either Party may by notice to the other refer a Dispute to the adjudication procedure contained within this Clause 46 ("**Adjudication Procedure**").

- 46.2 Either Party may give notice (a "**Dispute Notice**") at any time of its intention to refer a Dispute to the Adjudication Procedure. The Dispute Notice shall include a brief statement of the issue to be referred and the redress sought. Subject to Clause 46.3, the Adjudication Procedure shall be conducted by an adjudicator:

- 46.2.1 chosen by the agreement of the Parties; or

- 46.2.2 in default of an agreement pursuant to Clause 46.2.1 within two days of the Dispute Notice, from the "Construction Panel" established pursuant to Clause 113 of the Project Agreement, who shall be selected on a strictly rotational basis in alphabetical order by surname unless that adjudicator is unable or unwilling to accept the appointment, in which case the next adjudicator in alphabetical order from the Construction Panel who is able and willing to be appointed shall be appointed; or

- 46.2.3 in default of an agreement pursuant to Clause 46.2.1, and if all of the adjudicators on the Construction Panel are unable or unwilling to be appointed or if the Construction Panel has not yet been constituted, on application by either party to the president for the time being of the Technology and Construction Solicitors Association;

provided always that a Party serving a Dispute Notice shall apply for or agree the appointment of the adjudicator in accordance with this Clause 46.2 with the object of securing the appointment of the adjudicator and the referral of the Dispute to him, within 7 Days of the service of the Dispute Notice.

- 46.3 This Clause 46.3 applies where:-

- 46.3.1 a Dispute arises between the Contractor and the Construction Contractor; and

- 46.3.2 an adjudicator has already been appointed, pursuant to the Project Agreement or pursuant to the Operating Contract (as the case may be) in respect of a Related Dispute, before any adjudicator is appointed in respect of the Dispute.

- 46.4 Where Clause 46.3 applies, either Party may require that the adjudicator for the Dispute shall be the person appointed as adjudicator for the Related Dispute (the "**Related Dispute Adjudicator**") pursuant to the Project Agreement or the Operating Contract (as the case may be), unless:-

- 46.4.1 the Related Dispute Adjudicator is unable or unwilling to act as such; or

- 46.4.2 either Party asserts (acting reasonably) that the Related Dispute Adjudicator is not appropriately qualified to determine the Dispute, and the Related Dispute Adjudicator or the other party agrees (acting reasonably) with such assertion.

If either of the exceptions at 46.4.1 or 46.4.2 apply then the adjudicator shall be appointed in accordance with 46.2 (and Clause 46.3 shall be treated as inapplicable to the Dispute).

- 46.5 The Construction Contractor acknowledges that the Operating Contract contains provisions similar to Clauses 46.3 and 46.4. Where an adjudicator has been appointed in relation to a Dispute, that adjudicator may become the Related Dispute Adjudicator of a Related Dispute (subject to the provisions of the Operating Contract) and that Related Dispute Adjudicator shall have the powers set out in Clauses 46.7.1 and 46.7.3 in relation to the Dispute and the Related Dispute and the Construction Contractor consents to this.
- 46.6 In the event of any disagreement between the Parties as to whether there exists a Related Dispute related to the Dispute:-
- 46.6.1 where either Party asserts that Clause 46.3 applies, the Parties agree to accept the ruling of the Related Dispute Adjudicator for the (asserted) Related Dispute as to whether or not there is a Related Dispute; and
- 46.6.2 where either Party or the Operating Contractor asserts that Clause 46.5 applies, the Parties agree to accept the ruling of the adjudicator appointed in relation to the Dispute as to whether or not there is a Related Dispute.
- 46.7 Where one person is appointed as adjudicator for a Dispute and as a Related Dispute Adjudicator:-
- 46.7.1 subject as follows, in the case only of a Related Dispute under the Operating Contract, that person shall have power to make directions and all necessary awards in the same way as if the procedure of the High Court as to joining one or more actions or other proceedings or the Parties thereto was available to that person and to the Parties;
- 46.7.2 that person may not impose procedures, or a timetable, for the relevant dispute and/or Related Dispute which would be contrary to the requirements of the Housing Grants, Construction and Regeneration Act 1996; and
- 46.7.3 in the case only of a Related Dispute under the Operating Contract, if, having regard to the constraint referred to at Clause 46.7.2 it would be impracticable or unjust for the Dispute and the Related Dispute to be adjudicated on a consolidated basis then the dispute and the Related Dispute shall be adjudicated as separate proceedings.
- 46.8 The person identified in accordance with Clauses 46.2 or 46.4 shall be referred to in this Clause 46 as the "**Adjudicator**". The Adjudicator shall act in accordance with the procedure set out in this Clause 46 and the Adjudicator's appointment shall contain provisions confirming that obligation.
- 46.9 The Adjudication Procedure shall commence when the Party who served the Dispute Notice (the "**Referring Party**") gives notice to the other (the "**Recipient Party**") in writing requiring the referral of any Dispute to the Adjudication Procedure (the "**Adjudication Notice**"). Such Adjudication Notice shall:

- 46.9.1 be given within 7 Days of the date that the Dispute Notice is given to the other Party;
- 46.9.2 be addressed to the Recipient Party;
- 46.9.3 refer to this Clause;
- 46.9.4 include a statement of the Referring Party's case including a summary of the nature, background and extent of the Dispute and the issues arising;
- 46.9.5 include copies of documents which the Referring Party considers have an important and direct bearing on the Dispute and are referred to in the Referring Party's statement of case and are necessary by way of supplementation of the statement; and
- 46.9.6 set out the relief, remedy or recourse the Referring Party seeks and the reasons why it considers that it is entitled to such relief, remedy or recourse.
- 46.10 The Adjudication Notice and the documents accompanying it shall be copied to the Adjudicator at the same time as it is served on the Recipient Party, or where the Adjudicator has not been identified at that date, forthwith upon the identification of the Adjudicator. The Referring Party shall notify the Recipient Party forthwith of the date of service of the Adjudication Notice on the Adjudicator.
- 46.10A The Recipient 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 Adjudication Notice and any evidence on which the Recipient Party relies.
- 46.11 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 the period(s) set out in Clause 46.12.
- 46.12 The Adjudicator shall deliver a written reasoned decision (the "**Adjudication Decision**") on the Dispute and any Connected Dispute to be dealt with under Clause 46.17:-
 - 46.12.1 within twenty eight (28) Days of the date of service of the Referral to Adjudication Procedure Notice on the Adjudicator; or
 - 46.12.2 up to forty two (42) Days after the date of service of the Referral to Adjudication Procedure Notice on the Adjudicator, if the Referring Party so consents; or
 - 46.12.3 within such period exceeding twenty eight (28) Days after the date of service of the Referral to Adjudication Procedure Notice on the Adjudicator as the Parties may, after such date, agree.
- 46.13 The Adjudication Decision shall be binding until finally determined by legal proceedings or until the Parties determine the Dispute by agreement. Without prejudice to this, either Party may within ninety (90) Days of receipt of the Adjudication Decision, following notice to the other Party of its intention to do so, refer the Dispute to the Courts of England and Wales for final determination. If no such notice is given within this time period then the Adjudication Decision will become final and binding on the Parties.
- 46.14 The Parties shall each bear their own costs of the Adjudication Procedure.

46.15 The Adjudicator's costs, fees and expenses shall be borne as the Adjudicator shall specify or, in default, equally between the Parties.

46.16 A "**Connected Dispute**" for the purposes of this Clause 46, is a Dispute between the Parties which relates to the same or to similar subject matter as is raised by the Dispute referred to in the Referral to Adjudication Procedure Notice.

46.17 The Adjudicator may, on the application of either Party, adjudicate on or determine a Connected Dispute at the same time as the Dispute identified in the Referral to Adjudication Procedure Notice provided that the Adjudicator is satisfied that an Adjudication Decision in relation to the Dispute identified in the Referral to Adjudication Procedure Notice and in relation to the Connected Dispute can be made:

46.17.1 in accordance with the Adjudicator's duty to act fairly and impartially; and

46.17.2 within the time periods required in relation the Dispute by the Adjudication Procedure.

Where the Adjudicator is so satisfied, then the Adjudicator shall be entitled to make directions as to the referral of the Connected Dispute and the making of written submissions as it sees fit and this Clause 46 shall apply to the Connected Dispute as it applies to the Dispute identified in the Referral to Adjudication Procedure Notice.

46.18 In relation to the Adjudication Procedure the Adjudicator shall conduct its determination in such manner as it shall in its sole and unfettered discretion see fit, provided that it acts fairly and impartially and all written communications to and from it and any Party shall be copied to the other Party. The Adjudicator shall not, without giving that other Party an opportunity to attend on not less than two (2) Days notice, conduct any oral hearing or otherwise discuss the issues in Dispute with a Party other than in the presence of the other without giving that other Party an opportunity to attend on not less than two (2) Days notice. The Adjudicator may act inquisitorially and may take the initiative in ascertaining the facts and the law relevant to the Dispute.

46.19 In relation to the Adjudication Procedure, neither the Adjudicator nor its employees or agents shall be liable for anything done or omitted in the discharge or purported discharge of its functions unless the act or omission is in bad faith.

46.20 Where any dispute arises under or in connection with the Project Agreement which is in whole or in part:

46.20.1 a Related Dispute; and/or

46.20.2 otherwise affects the relationship, rights, obligations, liabilities or entitlements of the Construction Contractor under this Contract;

(such whole or part being a "**PA Linked Dispute**"),

and provided always that the Construction Contractor:

46.20.3 has operated or has had a reasonable opportunity to operate the provisions of Clause 7.2; and/or

46.20.4 has operated or has had a reasonable opportunity to operate Clause 49.10; and/or

46.20.5 has had a reasonable opportunity to participate in the PA Linked Dispute;

then the Parties agree that any decision of an adjudicator and/or the courts of England and Wales in relation to the PA Linked Dispute shall be binding on the Parties under this Contract (unless or until the PA Linked Decision is no longer binding on the Authority and the Contractor under the Project Agreement) and the relationship, rights, obligations, liabilities and/or entitlements of the Parties under this Contract shall be determined in accordance with any such decision (*mutatis mutandis*).

46.21 The Construction Contractor acknowledges and agrees that it shall not be allowed access to any document relevant to issues in dispute between the Authority and the Contractor save where:

46.21.1 the document is relevant to a PA Linked Dispute; and

46.21.2 the Construction Contractor has first delivered to the Contractor a written undertaking addressed to the Authority and the Contractor that the Construction Contractor shall not:

- (a) use any such document otherwise than for the purpose of the dispute resolution procedure under this Contract; and
- (b) 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 Contractor to advise in connection with the dispute.

47. **INTELLECTUAL PROPERTY RIGHTS AND IT SYSTEMS LICENCES**

47.1 In relation to any computer software that is provided by the Construction Contractor in connection with the Works the Contractor acknowledges that the use of same by the Contractor may be prohibited or restricted (for example by the terms of the software licence between the Construction Contractor and a third party). In such circumstances, the Construction Contractor shall use its reasonable endeavours at its own expense to enable the Contractor and the Authority and any relevant third party to use the software for any purpose relating to the Works including, where permissible, novating, assigning, sub-licensing or otherwise transferring to the Contractor the right to use the software for the said purpose.

47.2 Nothing in this Clause 47:

47.2.1 imposes any obligation on the Contractor to do anything which might prejudice or restrict its right to use the software in question for any other purpose; nor

47.2.2 constitutes a warranty or representation that the Construction Contractor has the right to permit the Contractor to use the software and/or the right to novate, assign or sub-license the right to use the software to the Contractor.

47.3 The Construction Contractor shall, without charge, make available to the Contractor (to the extent it is required to do so having used reasonable endeavours):

47.3.1 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 Construction Contractor or any third-party contractors for the purposes of the Works and which might reasonably be required by the Contractor for the purposes of exercising its rights or carrying

on its duties under the Project Agreement or carrying out any statutory duty;
and

47.3.2 all such data, materials and documents acquired or brought into existence by third parties as may reasonably be required for the purposes referred to in Clause 47.3.1.

47.4 The Construction Contractor:

47.4.1 hereby grants to the Contractor a perpetual, transferable, irrevocable, non-exclusive, royalty-free licence (carrying the right to grant sub-licences) to use the Intellectual Property Rights which are or become vested in the Construction Contractor for any purpose (whether during or after the Contract Period) relating to the design, construction, extension, 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 Contractor of any statutory duties in respect of the Facilities; and

47.4.2 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 Contractor for any purpose referred to in Clause 47.4.1.

47.5 With respect to Intellectual Property Rights arising during the carrying out of the Works, the licence granted pursuant to Clause 47.4.1 above shall take effect immediately upon the coming into existence of such Intellectual Property Rights.

47.6 The Construction Contractor shall indemnify the Contractor from and against all claims, penalties, fines, loss, expense and awards successfully made or brought by any person for or on account of infringement of any Intellectual Property Rights used in connection with the Works.

47.7 The Construction 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 47.

48. **INSURANCE**

48.1 The Contractor shall comply with its insurance obligations under Clause 118 and Schedule 36 of the Project Agreement insofar as they relate to the carrying out of the Works provided always that the application of this Clause 48.1 shall not affect any responsibility the Construction Contractor might otherwise have under this Contract or at common law (if any) for any loss or damage covered by the policies of insurance referred to in this Clause 48.1 as to be taken out by the Contractor.

48.2 Neither the Contractor nor the Construction Contractor shall fail to take any reasonable action (in so far as it is reasonably within its power) or permit or allow others to take any action (including failing to disclose any fact) or otherwise do anything which may render the insurance to be taken out by the Contractor and referred to in Clause 49.1 void, voidable, unenforceable or suspended or impaired in whole or in part or which may otherwise render any sum paid out under any relevant policy repayable in whole or in part. Further, the Construction Contractor shall require its sub-contractors and each of them not to do anything which may render the aforementioned insurance void voidable unenforceable or suspended or impaired as aforesaid.

48.3 Not used.

- 48.4 If any loss or damage affecting the Works or any part thereof or any site materials is occasioned by any one or more of the risks covered by the insurance policy referred to in Clause 48.1 then, upon discovering the said loss or damage, the Construction Contractor shall forthwith give notice in writing to the Contractor of the extent, nature and location thereof. The Construction Contractor shall use all reasonable endeavours to assist the Contractor in the preparation and pursuit of any claim under the insurance policy taken out under Clause 48.1 hereof and shall make available all information in its possession reasonably required by insurers for the purpose of any such claim.
- 48.5 The occurrence of such loss or damage referred to in Clause 48.4 shall be disregarded in computing any amounts payable to the Construction Contractor under or by virtue of this Contract.
- 48.6 Where insurance proceeds are to be used to reinstate, repair or replace the whole or any part of the Works following a decision or determination pursuant to Clause 119 of the Project Agreement the Construction Contractor shall on being requested to do so by the Contractor carry out the reinstatement, repair or replacement works (as appropriate) in accordance with the Reinstatement Plan and Good Industry Practice so that on completion of the said works the provisions of this Contract of the Project Agreement are complied with.
- 48.7 The Construction Contractor, for himself and for all sub-contractors who are recognised as an insured under the insurance policy referred to in Clause 48.1 shall to the extent that the same is required by the Contractor authorise the insurers to pay all monies from such insurance in respect of the loss or damage referred to in Clause 48.1 to the Contractor.
- 48.8 The reinstatement, restoration, replacement or repair of such loss or damage and (when required) the removal and disposal of debris shall be treated as if they were a Contractor Variation provided that any increase in the Contract Sum arising from such a Contractor Variation shall not exceed the amount paid by insurers in respect of the relevant claim (or the amount which should have been paid but for any breach of Clause 48.6).
- 48.9 The excesses and deductibles under the insurances referred to in Clause 48.1 shall be the responsibility of the Construction Contractor.
- 48.10 Notwithstanding Clauses 48.1 to 48.9 of this Contract the Construction Contractor shall provide all the assistance and information reasonably required by the Contractor to comply with its obligations to the Authority under Clauses 118 and 119 of the Project Agreement (including preparation of any Reinstatement Plan).
- 48.11 The Construction Contractor shall maintain professional indemnity insurance covering (inter alia) all its liability hereunder in respect of defects or insufficiency in design upon customary and usual terms and conditions prevailing for the time being in the insurance market, and with reputable insurers lawfully carrying on such insurance business in the United Kingdom, in an amount of not less than [REDACTED] in the aggregate for any and all claims notified in any one year of insurance for a period beginning now and ending 12 (twelve) years after the date of Completion of the Works, provided always that such insurance is available at commercially reasonable rates. The said terms and conditions shall not include any term or condition to the effect that the Construction Contractor must discharge any liability before being entitled to recover from the insurers, or any other term or condition which might adversely affect the rights of any person to recover from the insurers

pursuant to the Third Parties (Rights Against Insurers) Act 1930, or any amendment or re-enactment thereof. The Construction Contractor shall not, without the prior approval in writing of the Contractor, settle or compromise with the insurers any claim which the Construction Contractor may have against the insurers and which relates to a claim by the Contractor against the Construction Contractor, or by any act or omission lose or prejudice the Construction Contractor's right to make or proceed with such a claim against the insurers.

- 48.12 Any increased or additional premium required by insurers by reason of the Construction Contractor's own claims record or other acts, omissions, matters or things particular to the Construction Contractor shall be deemed to be within commercially reasonable rates.
- 48.13 The Construction Contractor shall immediately inform the Contractor if such insurance ceases to be available at commercially reasonable rates in order that the Construction Contractor and the Contractor can discuss means of best protecting the respective positions of the Contractor and the Construction Contractor in respect of the Works in the absence of such insurance.
- 48.14 The Construction Contractor shall fully co-operate with any measures reasonably required by the Contractor, including (without limitation) completing any proposals for insurance and associated documents, maintaining such insurance at rates above commercially reasonable rates if the Contractor undertakes in writing to reimburse the Construction Contractor in respect of the net cost of such insurance to the Construction Contractor above commercially reasonable rates or, if the Contractor effects such insurance at rates at or above commercially reasonable rates, reimbursing the Contractor in respect of what the net cost of such insurance to the Contractor would have been at commercially reasonable rates.
- 48.15 As and when reasonably required to do so by the Contractor, the Construction Contractor shall produce for inspection documentary evidence that its professional indemnity insurance is being maintained.
- 48.16 The Construction Contractor shall take out and maintain all other insurances required by Legislation.

49. **INDEMNITIES**

- 49.1 The Construction Contractor shall subject to Clauses 49.2 and 49.4 be responsible for and shall release and indemnify the Contractor its employees agents and contractors on demand from and against all liability for:
 - 49.1.1 death or personal injury;
 - 49.1.2 loss of or damage to property (including property belonging to the Contractor and/or the Authority or for which they are responsible) but excluding the Works;
 - 49.1.3 breach of statutory duty;
 - 49.1.4 third party actions, claims, demands and any costs, fines, penalties, charges and expenses (including legal expenses on an indemnity basis) arising out of and/or associated with such third party actions, claims or demands; and
 - 49.1.5 any other liability of the Contractor arising out of its indemnity to the Authority under Clause 115 of the Project Agreement;

which may arise out of or in consequence of:-

- 49.1.6 in the case of Clauses 49.1.1, 49.1.2, 49.1.4 and 49.1.5, the design construction operation or maintenance of the Works or the performance or non-performance by the Construction Contractor of its obligations under this Contract or the presence on the Site of the Construction Contractor or any Construction Contractor Parties; and
- 49.1.7 in the case of Clause 49.1.3, the failure by the Construction Contractor to comply with its obligations under this Contract; and
- 49.1.8 Contamination.
- 49.2 The Construction Contractor shall not be responsible or be obliged to indemnify the Contractor for:
 - 49.2.1 any matters referred to in Clause 49.1 above which arises as a direct result of the Construction Contractor acting on the written instruction of the Contractor;
 - 49.2.2 any injury, loss, damage, cost and expense caused by the negligence or wilful misconduct of the Contractor its employees agents or contractors or by the breach by the Contractor of its obligations under this Contract.
 - 49.2.3 Not Used
 - 49.2.4 losses arising from a Force Majeure Event which shall be borne by the Contractor and the Construction Contractor each as to its own losses.
- 49.3 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.
- 49.4 The Contractor shall, subject to Clause 49.5, be responsible for, and shall indemnify the Construction Contractor, its employees, agents and contractors on demand from and against all liability for:
 - 49.4.1 death or personal injury; and
 - 49.4.2 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 wilful act or default or negligence of the Contractor or Contractor Party or a breach by the Contractor of its obligations under this Contract.

- 49.5 The Contractor shall not be responsible or be obliged to indemnify the Construction Contractor for:
 - 49.5.1 any injury, loss, damage, cost and expense caused by the negligence or wilful misconduct of the Construction Contractor or any Construction Contractor Party or by the breach by the Construction Contractor of its obligations under this Contract;
 - 49.5.2 losses arising from a Force Majeure Event which shall be borne by the Contractor and the Construction Contractor each as to its own losses; or
 - 49.5.3 any losses which could be compensated or recovered by the Construction Contractor through another mechanism of this Contract.

49.6

- (a) Subject to Clause 49.6(b), Clause 70.2 and Clause 70.4, but without prejudice to the Contractor's other rights and remedies under this Contract, the Construction Contractor shall indemnify the Contractor against all claims, proceedings, deductions from the Annual Unitary Charge, loss, damage, costs and expense (including legal costs) arising out of or in connection with a failure of the MBT Facility to achieve any or all of the performance requirements set out in the Specification, and/or the Construction Contractor's Proposals provided always that the claims, proceedings, deductions from the Annual Unitary Charge, loss, damage, costs and expense (including legal costs) have occurred after Completion and provided further that the Contractor has not been compensated for such failure of the MBT Facility under Clause 22.26.1(b) or Clause 22.26.2(c).
- (b) The Construction Contractor shall not be liable to the Contractor under Clause 49.6(a) to the extent that the Construction Contractor can demonstrate that:
 - (i) the Contract Waste was not (at the relevant time) Acceptable Waste and/or the Works were not (at the relevant time) materially maintained and operated in accordance with the manuals provided for such purpose by the Construction Contractor; and
 - (ii) the circumstances described in 49.6(b)(i) caused the relevant failure of the MBT Facility to achieve any or all of the performance requirements set out in the Specification and/or the Construction Contractor's Proposals,

provided always that the Contractor shall provide copies of all records of the constitution of the Contract Waste and of the maintenance and operation of the Works as may be reasonably required by the Construction Contractor for such demonstration.

49.7 The Construction Contractor shall be responsible as against the Contractor for the acts or omissions of the Construction Contractor Parties as if they were the acts or omissions of the Construction Contractor and the Contractor shall be responsible as against the Construction Contractor for the acts or omissions of the Contractor Parties as if they were the acts or omissions of the Contractor.

49.8 Clauses 49.8 to 49.15 (inclusive) shall apply to the conduct, by a party from whom an indemnity is sought under this Contract (the "**Indemnifier**"), of claims made by a third person against a party having (or claiming to have) the benefit of the indemnity (the "**Beneficiary**"). The Indemnifier shall be subject at all times to the requirements of the relevant insurer.

49.9 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.

49.10 Subject to:-

49.10.1 Clauses 49.11, 49.12 and 49.13; and

49.10.2 on the giving of a notice by the Beneficiary pursuant to Clause 49.9;

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.

49.11 With respect to any claim conducted by the Indemnifier pursuant to Clause 49.10:

49.11.1 the Indemnifier shall keep the Beneficiary fully informed and consult with it about material elements of the conduct of the claim;

49.11.2 the Indemnifier shall not bring the name of the Beneficiary into disrepute; and

49.11.3 the Indemnifier shall not pay or settle such claims without the prior written consent of the Beneficiary, such consent not to be unreasonably withheld or delayed.

49.12 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:

49.12.1 the Indemnifier is not entitled to take conduct of the claim in accordance with Clause 49.10; or

49.12.2 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 49.8 or notifies the Beneficiary that it does not intend to take conduct of the claim; or

49.12.3 the Indemnifier fails to comply in any material respect with the provisions of Clause 49.11.

49.13 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 49.10 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 49.13, then the Indemnifier shall be released from any liability under its indemnity under Clause 49.1 or Clause 49.4 (as the case may be) and, without prejudice to any accrued liabilities, any liability under its indemnity given pursuant to Clause 49.10 in respect of such claim.

49.14 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, 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:

- 49.14.1 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
- 49.14.2 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).

- 49.15 Any person taking any of the steps contemplated by Clauses 49.9 to 49.14 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.
- 49.16 Each of the Contractor and the Construction 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.

50. DATA PROTECTION

The Construction Contractor shall insofar as they relate to the Works perform and fulfil and comply with the obligations of the Contractor contained in Clause 125 of the Project Agreement as if the same were expressly referred to herein as obligations and liabilities of the Construction Contractor mutatis mutandis.

51. INFORMATION AND CONFIDENTIALITY

The Construction Contractor shall insofar as they relate to the Works perform and fulfil and comply with the obligations of the Contractor contained in Clause 121 of the Project Agreement as if the same were expressly referred to herein as obligations and liabilities of the Construction Contractor mutatis mutandis provided that:

- 51.1 any notice to be provided pursuant to Clause 125.3 of the Project Agreement and information to be provided pursuant to Clause 125.5 of the Project Agreement shall be given to the Contractor; and
- 51.2 the Construction Contractor shall indemnify and keep indemnified the Contractor against all losses claims damages liabilities costs and expense (including reasonable legal costs) incurred by the Contractor, including any liability of the Contractor to the Authority pursuant to Clause 125.6 of the Project Agreement, in each case caused by any act or omission of the Construction Contractor which causes a breach of this Clause 51.

52. WAIVER

- 52.1 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.
- 52.2 No waiver under Clause 52.1 shall be a waiver of a past 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.

53. **VARIATIONS**

No deletion from addition to or alteration of the Contract shall be valid or of any effect unless evidenced by a supplementary deed entered into by the Parties.

54. **SEVERABILITY**

54.1 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.

54.2 If any provision of this Contract is so found to be invalid, unlawful or unenforceable but would be valid, lawful or enforceable if some part of the provision were deleted, the provision in question will apply with such modification(s) as may be necessary to make it valid.

54.3 The Parties agree, in the circumstances referred to in Clause 54.1 and if Clause 54.2 does not apply, to attempt to substitute for any invalid, unlawful or unenforceable provision a valid, lawful or enforceable provision which achieves to the greatest extent possible the same effect as would have been achieved by the invalid, unlawful or unenforceable provision.

55. **COUNTERPARTS**

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

56. **NOT USED**

57. **CONTRACTOR'S RECORDS**

57.1 The Construction Contractor shall provide all the assistance and information reasonably required by the Contractor to enable the Contractor to comply with its obligations to the Authority under Clause 122 of the Project Agreement.

57.2 The Construction Contractor shall co-operate with the Lender and the Lender's Technical Adviser and provide all information, documents, communications and/or records in connection with the Works and in connection with the financial condition, assets and operations of the Construction Contractor and/or the Guarantor, that the Contractor and/or the Lender may reasonably request.

57.3 The Construction Contractor shall, as soon as they become available (and within the period required for filing by statute) deliver to the Contractor and the Lender a copy of the audited financial statements of the Construction Contractor and the Guarantor.

57.4 The Construction Contractor shall promptly notify the Contractor and the Lender if it believes it to be reasonably likely that it will be unable to comply with its obligations under Clause 57.3.

57.5 The Construction Contractor shall at any time provide all reasonable assistance to the Lender in carrying out any syndication in relation to the Credit Agreement including by providing such information in relation to the Construction Contractor and the Guarantor as may reasonably be required by the Lender for the purposes of primary syndication and updating the preliminary information memorandum.

58. **CONTRACTS (RIGHTS OF THIRD PARTIES) ACT 1999**

This Contract is enforceable by the original Parties to it, by their successors in title and permitted assigns. The Parties agree and declare that nothing in this Contract either expressly or purportedly confers any rights upon any third parties within the meaning of or for the purposes of the Contracts (Rights of Third Parties) Act 1999.

59. **DISCRIMINATION**

The Construction 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 Equal Opportunities Policy as amended from time to time and shall take all reasonable steps to ensure compliance by Construction Contractor Parties.

60. **NO PARTNERSHIP**

Nothing in this Contract shall be construed as creating a partnership, a joint venture, a contract of Contractor or a relationship of principal and agent between the Contractor and the Construction Contractor.

61. **NOTICES**

61.1 Any notice or communication given or made in accordance with this Contract (a "**Notice**") shall be in writing and shall be addressed to the address of the recipient Party shown at the head of this Contract or such other address as either Party may from time to time notify to the other. A Notice may be delivered by hand, sent by recorded delivery mail, or fax confirmed by letter.

61.2 A Notice delivered by hand shall be deemed to have been received when delivered. A Notice sent by mail shall be deemed to have been received 48 hours after posting, provided that it is not returned through the post office undelivered. A Notice sent by fax shall be deemed to have been received on the first day after it is sent.

62. **ENTIRE AGREEMENT**

This Contract constitutes the whole contract and understanding of the Parties as to the subject matter of this Contract, and it supersedes all prior representations (other than fraudulent representations), communications, negotiations and understandings concerning the subject matter of this Contract or the other contract documents and there are no prior or contemporaneous contracts between the Parties in respect of this Contract. No Party has relied on any representation or warranty except as expressly set out in this Contract.

63. **ACCRUED RIGHTS AND REMEDIES**

63.1 Any termination of the Construction Contractor's employment under this Contract shall be without prejudice to any claim by either Party or any rights or remedies which may have accrued to either Party in respect of any antecedent breach of the obligations contained in this Contract including the breach giving rise to the determination.

63.2 Termination of the Construction Contractor's employment this Contract shall not affect the continuing rights, duties and liabilities of the Contractor and the Construction Contractor under any provision of this Contract.

64. **QUALITY ASSURANCE AND INTEGRATED MANAGEMENT SYSTEMS**

64.1 The Construction Contractor shall procure that all aspects of the Works are carried out in accordance with Integrated Management Systems.

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

64.2.1 BS EN 150 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

64.2.2 Good Industry Practice;

64.2.3 The Construction Contractor shall prepare, implement and comply with the Quality Manuals;

64.2.4 **Additional Information**

Notwithstanding any other provision of this Clause 64, the Construction Contractor shall provide, in response to a written request from the Contractor to the Construction Contractor such information as they may reasonably require to demonstrate compliance with this Clause 64.

65. **PUBLIC RELATIONS AND PUBLICITY**

The Construction Contractor shall insofar as they relate to the Works perform and fulfil the obligations of the Contractor contained in Clause 126 of the Project Agreement as if the same were expressly referred to herein as obligations and liabilities of the Construction Contractor mutatis mutandis.

66. **ASSIGNMENT**

The Construction Contractor shall not without the prior written consent of the Contractor, assign this Contract. The Contractor may, without any further consent of the Construction Contractor being required, by written notice to the Construction Contractor, assign its rights and benefits under this Contract at any time.

67. **FURTHER ASSURANCE**

Each Party to do all things and to execute all further documents to give full effect to this Contract.

68. Not used.

69. **REPRESENTATIVES**

69.1 The Construction Contractor shall only appoint a replacement Construction Contractor's Representative with the Contractor's consent (such consent not to be unreasonably withheld).

69.2 Not used.

69.3 The Construction Contractor's Representative shall be the duly authorised representative of the Construction Contractor and the Contractor's Representative shall be the duly authorised representative of the Contractor for the purposes identified in this Contract and such other purposes connected with this Contract as shall be notified to the Construction Contractor. Any notice, information, instruction or other communication given or made to the Construction Contractor's Representative or to the

Contractor's Representative shall be deemed to have been given or made to the Construction Contractor or the Contractor (as the case may be) provided that it has been given, made or subsequently recorded in writing.

69.4 The Parties shall forthwith give notice in writing to each other of the identity or identifies of the persons appointed as their respective representatives and the limits of each such person's authority and similar notice in respect of any subsequent appointment. Until notice of a subsequent appointment shall have been given the Parties shall be entitled to treat as representatives the persons last notified as being the representatives.

69.5 The Parties shall respectively ensure that:-

69.5.1 their representatives or a competent deputy are available at all times when the Works are being provided; and

69.5.2 their representatives shall carry out their duties in accordance with the terms of this Contract.

69.6 Any notice, information, instruction or other communication given or made by the Construction Contractor to the Contractor and/or the Lender shall be copied, at the same time, to the Contractor's Representative and the Lender's Technical Adviser.

70. LIMITATIONS ON LIABILITY

70.1

[REDACTED]

70.2

[REDACTED]

70.3

70.3.1

[REDACTED]

[REDACTED]

70.3.2

[REDACTED]

70.3.3

[REDACTED]

70.3.4

[REDACTED]

70.3.5

[REDACTED]

[REDACTED]

70.3.6

70.3.7

70.3.8

70.4

70.4.1

70.4.2

70.4.3

provided always that:

70.4.4 the Construction Contractor shall be allowed the opportunity to adjust the MBT Plant in order to rectify the failure in order to mitigate the cost, loss or damage that may be suffered by the Contractor; and

70.4.5 the Contractor shall not be entitled to claim compensation from the Construction Contractor in respect of a failure for which the Contractor has already been compensated pursuant to Clauses 22.26.1, 22.26.2 or 22.26.3.

71. **NOT USED.**

72. **GOVERNING LAW**

The Contract shall be governed and construed in all respects in accordance with the laws of England and Wales and subject to Clause 46 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.

EXECUTED AS A DEED by the Parties on the date which first appears in this Deed.

SCHEDULE 1

DOCUMENTS TO BE PROVIDED BY THE CONTRACT AWARD DATE

The documents referred to in Clause 2.2 that the Construction Contractor must execute and deliver and (where applicable), must procure the execution and delivery by the relevant third parties, are as follows:-

1. Parent company guarantee of the Construction Contractor's obligations under this Contract in the form set out in Schedule 3 (the "**Guarantee**").
2. A collateral warranty from the Construction Contractor in favour of the Authority in the form set out in Schedule 4, Part A.
3. A collateral warranty from the Construction Contractor in favour of the Lender in the form set out in Schedule 4, Part B.
4. A collateral warranty from the Professional Team in favour of the Authority in the form set out in Schedule 5, Part A.
5. A collateral warranty from the Professional Team in favour of the Contractor set out in Schedule 5, Part B.
6. A Performance Bond in an amount equal to 10 per cent of the Contract Sum in the form set out in Schedule 7 executed as a deed and delivered by a bank or insurance company previously approved by the Contractor.
7. A Retention Bond in the form set out in Schedule 9.
8. An Advance Payment/Off-Site Materials bond in the form set out in Schedule 14.
9. The Interface Agreement between the Contractor, the Construction Contractor and the Operating Contractor.
10. The warranty from Kelag Umwelttechnik GMBH & Co KG in favour of the Contractor.

SCHEDULE 2
CONTRACT SUM ANALYSIS

SCHEDULE 3
FORM OF PARENT COMPANY GUARANTEE

DATED **200**

(1) KONINKLIJKE BAM GROEP NV

(2) DONARBON WASTE MANAGEMENT LIMITED

**PARENT COMPANY GUARANTEE OF CONTRACTOR'S
OBLIGATIONS
relating to
the provision of waste management facilities**

BETWEEN:-

- (1) **KONINKLIJKE BAM GROEP NV** (Trade Register No 30058019) whose principal office is at Runnenburg 9, 3981 AZ Bunnik, the Netherlands (the "**Guarantor**"); and
- (2) **DONARBON WASTE MANAGEMENT LIMITED** (No 6054499) whose registered office is at Ely Road, Waterbeach, Cambridge, CB5 9PG (the "**Employer**").

WHEREAS:-

- (A) By an agreement in writing (the "**Building Contract**") dated _____ and made between (1) the Employer and (2) Edmund Nuttall Limited (No 00305189) (the "**Contractor**") the Contractor has inter alia agreed to design and to construct the works more particularly defined therein.
- (B) The Guarantor (being a parent company of the Contractor) has agreed to guarantee the due performance by the Contractor of its obligations under the Building Contract.

IT IS AGREED as follows:-**1. INTERPRETATION**

- 1.1 In this Deed "**person**" includes any firm and any entity having legal capacity.
- 1.2 The definitions given in the recitals to this Deed apply to this Deed.
- 1.3 Clause headings do not form part of this Deed.

2. PROMISE TO PAY

If the Contractor in any respect fails to observe or perform any of its duties or obligations to the Employer under or in connection with the Building Contract, or if the Contractor fails to pay any debt, damages, interest or costs due from the Contractor to the Employer under or in connection with the Building Contract, or if the employment of the Contractor under the Building Contract shall determine by operation of or notice given under Clauses 40 and/or 44 of the Building Contract, then the Guarantor shall indemnify the Employer against all losses, damages, costs and expenses incurred by the Employer by reason of such failure or non-payment or termination and shall itself pay to the Employer without any deduction, or set-off or withholding the amount of such debt, damages, interest or costs, as the case shall require.

3. AMENDMENTS TO BUILDING CONTRACT

The Building Contract may be varied, modified, amended or supplemented in any manner whatsoever without the consent of the Guarantor, and no such variation, modification, amendment or supplement shall release or impair the liability of the Guarantor under this Deed, which shall extend to the duties, obligations and liabilities of the Contractor under the Building Contract as so varied, modified, amended or supplemented. No invalidity in the Building Contract or its avoidance or termination shall affect or impair the liability of the Guarantor under this Deed. No waiver or concession or allowance of time or compromise or forbearance given to or made with the Contractor shall release, affect or impair the liability of the Guarantor under this Deed, and the terms of this Deed shall apply to the terms of such waiver, concession, allowance of time, compromise or forbearance as they apply to the Building Contract.

4. EXTRANEIOUS RIGHT

The Employer shall not be required to pursue any remedy against the Contractor before proceeding against the Guarantor under this Deed.

5. INSOLVENCY OF THE CONTRACTOR

The liquidation, receivership, insolvency, reorganisation, winding-up, dissolution or change in status control, function or ownership of the Contractor shall not affect or reduce the liability of the Guarantor under this Deed.

6. PRIORITY OF CLAIMS AGAINST THE CONTRACTOR

So long as any liability incurred by the Contractor to the Employer under or in connection with the Building Contract remains unsatisfied, the Guarantor shall not, in respect of any payment made or liability arising pursuant to this Deed, effect or seek to effect any recovery from the Contractor, whether by receipt of money or set-off or proof of debt or enforcement of security or otherwise.

7. LIMIT OF LIABILITY

The Employer shall be entitled to recover no more under this Deed in respect of any matter than the Employer would be entitled to recover from the Contractor in respect of that matter, and the Employer shall not be entitled to commence proceedings against the Guarantor under this Deed in respect of any claim once any proceedings against the Contractor in respect of such claim would be statute-barred.

8. ASSIGNMENT

8.1 The Employer may without the consent of the Guarantor assign or charge the benefit of this Deed to any person to whom the Employer lawfully assigns or charges the benefit of the Building Contract. The Employer will give notice to the Guarantor, as soon as practicable, of any such assignment.

8.2 The Guarantor shall not be entitled to contend that any person to whom this Deed is assigned is precluded from recovering under this Deed any loss incurred by such assignee resulting from any breach of this Deed by reason that such person is an assignee and not a named promisee hereunder.

9. ILLEGALITY/UNENFORCEABILITY OF GUARANTEE

If at any time any provision hereof is or becomes illegal, invalid or unenforceable in any respect under the law of any jurisdiction, neither the legality, validity or enforceability of the remaining provisions hereof nor the legality, validity or enforceability of such provision under the law of any other jurisdiction shall in any way be affected or impaired thereby.

10. CONTINUING DEED

This Deed is a continuing Deed and accordingly shall remain in full force and effect until all obligations, duties and undertakings now or hereafter to be carried out or performed by the Contractor under the Building Contract shall have been satisfied or performed in full and this Deed is in addition to and not in substitution for any other security which the Employer may at any time hold for the performance of such obligations and may be enforced by the Employer without first having recourse to any such security.

11. REPRESENTATIONS AND WARRANTIES

The Guarantor hereby warrants and represents that:

- 11.1.1 it is a company incorporated in the Netherlands with power and authority to enter into this Deed and to exercise its rights and perform its obligations hereunder;
- 11.1.2 the obligations expressed to be assumed by it in this Deed are legal and valid obligations binding on it in accordance with the terms hereof; and
- 11.1.3 it has taken all action required to enter into this Deed and to authorise the execution and delivery of this Deed and the performance of its obligation under this Deed.

12. SERVICE OF NOTICE

- 12.1 Any notice or demand to be served under this Deed must be in writing and must be served by hand or by registered post or recorded delivery, and, subject to clause 12.3 in the case of a corporation must be served at its registered office for the time being. In any other case notice may be served at any address for the time being of the person to be served. Service shall take effect, if given by hand, on the date of delivery. If given by post, it shall take effect two days after posting, excluding Saturdays, Sundays and statutory holidays.
- 12.2 Each notice, demand, request, statement, instrument, certificate, or other communication under or in connection with this Deed shall be in English or if not in English, accompanied by an English translation made by a translator and certified by an officer of the party giving notice to be accurate.
- 12.3 The Guarantor appoints HBG UK Limited of Merit House, Edgware Road, Colindale, London, NW9 5AF, [REDACTED] for service of process in relation to any proceedings arising out of or connected with this Deed. Service of such person (or substitute) shall be deemed to be service on the Guarantor. Except upon a substitution, the Guarantor shall not revoke any such authority or appointment and if such agent ceases for any reason to be an agent, the Guarantor shall forthwith appoint another agent and advise the Employer accordingly. If the Guarantor fails to do so (and such failure continues for a period of not less than 7 days) the Employer shall be entitled to appoint an agent by notice to the Guarantor.

13. INTEREST ON LATE PAYMENTS

Any party, which fails to pay any sum payable by it under this Deed on the due date for payment, shall pay interest on that sum. The interest may, without limiting the rights of the non-defaulting party to whom the sum is payable, be claimed as a debt or liquidated demand, for the period from and including the due date up to the date of actual payment (after as well as before judgment).

14. PAYMENTS HELD ON TRUST

If the Guarantor receives any sums from the Contractor in respect of any payment of the Guarantor hereunder, the Guarantor shall hold such monies in trust for the Employer.

15. EMPLOYER RIGHTS AND REMEDIES

No delay or omission of the Employer in exercising any right, power or privilege under this agreement shall impair or be construed as a waiver of such right, power or privilege nor shall any single or partial exercise of any such right, power or privilege preclude any further exercise of such right, power or privilege or the exercise of any other right, power or privilege. The rights and remedies of the Employer provided for in this agreement are cumulative and not exclusive of any rights or remedies provided by law.

16. WAIVERS

- 16.1 A waiver given or consent granted by the Employer under this agreement will be effective only if given in writing and then only in the instance and for the purpose for which it is given.
- 16.2 A waiver by the Employer shall not constitute a continuing waiver and shall not prevent the Employer from subsequently enforcing any of the provisions of this agreement.

17. CONTRACTS (RIGHTS OF THIRD PARTIES) ACT 1999

The Contracts (Rights of Third Parties) Act 1999 shall not apply to this Deed and no person other than the parties to this Deed or any permitted assignee of the Employer shall have any rights under it, nor shall it be enforceable by virtue of that Act by any person other than the parties to it.

18. **GOVERNING LAW**

The law of this Deed is English law and the English Courts shall have jurisdiction with regard to all matters arising from it.

EXECUTED AS A DEED by the parties on the date which first appears in this Deed.

EXECUTED (but not delivered
until the date hereof)
AS A DEED by
KONINKLIJKE BAM GROEP NV
acting by:-

)
)
)
)
)

Director

Name (in capitals)

Director/Secretary

Name (in capitals)

EXECUTED (but not delivered
until the date hereof)
AS A DEED by
DONARBON WASTE MANAGEMENT LIMITED
acting by:-

)
)
)
)
)

Director

Director/Secretary

SCHEDULE 4

PART A

CONSTRUCTION CONTRACTOR COLLATERAL WARRANTY IN FAVOUR OF AUTHORITY

THIS DEED is made on

2007

BETWEEN

- (1) **EDMUND NUTTALL LIMITED** a company incorporated in England and Wales under company number 00305189 and whose registered office is at St James House, Knoll Road, Camberley, Surrey GU15 3XW ("the Contractor");
- (2) **CAMBRIDGESHIRE COUNTY COUNCIL** of Cambridgeshire Shire Hall, Cambridge, CB3 0AP ("the Beneficiary", which expression includes its permitted successors in title and assigns); and
- (3) **DONARBON WASTE MANAGEMENT LIMITED** a company incorporated in England and Wales under company number 06054499 and whose registered office is at Ely Road, Waterbeach, Cambridge, CB25 9PG ("the Employer").

BACKGROUND

- (A) By a contract dated ("the Project Agreement"), the Beneficiary has appointed the Employer to carry out in relation to the site therein described as "the Sites" the design and construction of the works therein defined as "the Works", which expression has the same meaning in this Deed.
- (B) By a contract dated [] ("the Contract"), the Employer has appointed the Contractor to carry out in relation to the Sites the design and construction of the Works.
- (C) The Contractor is obliged under the Contract to give a warranty in this form in favour of the Beneficiary.

OPERATIVE PROVISIONS

In consideration of the payment of one pound (£1.00) by the Beneficiary to the Contractor, receipt of which the Contractor acknowledges:

1. CONTRACTOR'S WARRANTY AND LIABILITY

- 1.1 The Contractor warrants to the Beneficiary that it has carried out and will continue to carry out and complete its duties and obligations under the Contract in accordance with the Contract and (without qualification to or derogation from the foregoing) has exercised and will exercise all the reasonable skill care and diligence to be expected of suitably skilled qualified and experienced professional building contractors performing services and works of similar nature to those undertaken by the Contractor under the Contract.
- 1.2 Without derogation from clause 1.1 and to the extent that under the Contract the Contractor takes responsibility for the design of the Works or the selection of goods, materials, plant or equipment for incorporation in the Works the Contractor warrants that the same have been and/or will be designed or selected with reasonable skill and care.
- 1.3 The Contractor has no liability hereunder which is greater or of a longer duration than it would have had if the Beneficiary had been a party to the

Contract as joint employer. The Contractor shall be entitled in any action or proceedings by the Beneficiary to rely on any limitation in the Contract and to raise the equivalent rights in defence of liability as it would have had if the Beneficiary had been named as a joint employer under the Contract but shall not be entitled to set-off against any liability to the Beneficiary under this Deed any sum of money or other entitlement due to it from the Employer howsoever arising under the terms of the Contract or in equity or at common law.

- 1.4 Upon the expiration of 12 years from the date of Practical Completion (or its equivalent) under the Contract the liability of the Contractor under this Deed shall cease and determine, save in relation to any claims made by the Beneficiary against the Contractor and notified by the Beneficiary to the Contractor in writing prior thereto.

2 DOCUMENTS

- 2.1 In relation to all drawings, reports, calculations, details, plans, models, specifications, photographs, schedules, bills of quantities, and other documents and information of any nature whatsoever (including any computer software used to generate them and any designs and inventions contained in them) which have been or are hereafter provided by the Contractor in the course of performing its obligations under the Contract ("Documents") the Contractor hereby grants (or, if such grant cannot legally take place until a later date, agrees to grant) to the Beneficiary with effect from the date of this Deed or in the case of Documents not yet in existence with effect from the creation thereof, an irrevocable royalty-free non-exclusive licence (such licence to remain in full force and effect notwithstanding the termination of the Contract or determination of the employment of the Contractor under the Contract or the abandonment or completion of the Works or of its obligations under the Contract or any dispute thereunder or hereunder) to use and to reproduce all Documents for any purpose whatsoever connected with the Works including, but without limitation, the execution, completion, maintenance, letting, advertisement, modification, extension, reinstatement, refurbishment and repair of the Works. The Beneficiary shall have a licence to copy and use the Documents for any extension of the Works but such licence shall not include the right to reproduce the designs contained in them for any extension of the Works. Such licence will carry the right to grant sub-licences and will be transferable to third parties
- 2.2 The Beneficiary will not hold the Contractor liable for any use it may make of the Documents for any purpose other than that for which they were originally provided by it unless the Contractor authorises such use and confirms that the Documents are suitable for it.
- 2.3 The Contractor will not grant to any third party the right to use any of the Documents save under any warranty it is obliged to give under the Contract or hereunder or as otherwise required to enable it to fulfil its obligations under the Contract.

- 2.4 The Contractor agrees on reasonable request at any time and following reasonable written prior notice to give the Beneficiary or those authorised by it access to the Documents and to provide copies (including copy negatives and CAD disks) thereof at the Beneficiary's expense. The Contractor hereby warrants that it will preserve all such Documents in a safe and accessible place throughout the currency of this Deed.
- 2.5 The Contractor warrants to the Beneficiary that the Documents (save to the extent duly appointed sub-consultants and sub-contractors have been used to prepare the same) are its own original work and that in any event their use in connection with the Works, including use by the Beneficiary in accordance with the licence granted by this clause 2, will not infringe the rights of any third party.

3 INSURANCE

- 3.1 The Contractor hereby covenants with the Beneficiary that it has effected a policy of Professional Indemnity and such other insurance covering the liabilities of the Contractor under the Contract and under this Deed for negligence, with a limit of indemnity of not less than [REDACTED] in the aggregate and that it will maintain such insurance with reputable insurers carrying on business in the European Union from the date hereof until 12 years after practical completion of the Works provided that such insurance is generally available in the market to design and build Contractors at commercially reasonable rates and (for the avoidance of doubt) provided further that payment of any increased or additional premiums required by insurers by reason of the Contractor's own claims record or other acts omissions matters or things peculiar to the Contractor will be deemed to be within the reasonable rates.
- 3.2 The Contractor shall immediately inform the Beneficiary if for any period such insurance is not or ceases to be available on commercially reasonable terms and shall obtain in respect of such period such reduced level of insurance as is available and would be fair and reasonable in the circumstances for the Contractor to obtain. The Contractor shall co-operate with the Beneficiary to ensure that all reasonable steps are taken to obtain such insurance at reasonable rates.
- 3.3 As and when reasonably required by the Beneficiary the Contractor will produce for inspection documentary evidence that the insurance referred to in clause 3.1 and 3.2 is being properly maintained and that payment has been made in respect of the premiums due thereunder.

4 NOTICES

- 4.1 Any notice to be given by any party hereunder will be sufficiently served if sent by hand, by facsimile transmission or by post to the registered office or if there is none the last known address of the party to be served. Any notice sent by hand will be deemed to be served on the date of delivery and any notice sent by facsimile transmission will be deemed to be served in full at the time recorded on the facsimile report sheet provided that if any notice sent by hand or facsimile is sent after 4.45 pm on any day it will be

deemed to be served on the next working day. Any notice sent by post will be deemed to have been duly served at the expiration of 48 hours after the time of posting if the end of that period falls before 4.45pm on a working day and otherwise on the next working day.

5 ASSIGNMENT

- 5.1 The benefit of and the rights of the Beneficiary under this Deed may be assigned without the consent of the Contractor on two occasions only to any person acquiring the whole or substantial part of the Beneficiary's interest in the Project.
- 5.2 In calculating the number of assignments for the purposes of clause 5.1 no account will be taken of assignments to a successor authority assuming the functions of the Beneficiary or assignments by way of security or by way of re-assignment on redemption.
- 5.3 The Beneficiary will notify the Contractor in writing following any assignment specifying the name and address of the assignee and the date of the assignment.
- 5.4 The Contractor will not contend that any such assignee is precluded from recovering any loss resulting from any breach of this Deed (whatever the date of such breach) by reason only that that person is an assignee and not the original Beneficiary hereunder or by reason that the original Beneficiary or any intermediate Beneficiary escaped any loss resulting from such breach by reason of the disposal of any interest in the Site or that the original Beneficiary or any intermediate Beneficiary has not suffered any or as much loss.

6 BENEFICIARY'S REMEDIES

- 6.1 The rights and benefits conferred upon the Beneficiary by this Deed are in addition to any other rights and remedies it may have against the Contractor including without prejudice to the generality of the foregoing any remedies in negligence.

7 INSPECTION OF DOCUMENTS

- 7.1 The Contractor's liabilities under this Deed will not be in any way reduced or extinguished by reason of any inspection or approval of the Documents, or attendance at site meetings or other enquiry or inspection which the Beneficiary may make or procure be made for its benefit or on its behalf.

8 STANDARDS OF PRODUCTS AND MATERIALS

- 8.1 Without prejudice to the generality of clause 1.1 and 1.2 of this Deed, the Contractor warrants that it has exercised and will exercise reasonable skill, care and diligence in accordance with this Deed to see that it has not specified or used and it will not specify or use, and (as appropriate) it has not authorised or approved and it will not authorise or approve the specification or use by others, of any [products or] materials not in conformity with relevant British or European Union Standards or Codes of Practice or 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 and 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.

- 8.2 If in the performance of its duties under the Contract the Contractor becomes aware that it or any other person has specified or used, or authorised or approved the specification or use by others of any such products or materials the Contractor will notify the Beneficiary in writing forthwith. This clause does not create any additional duty for the Contractor to inspect or check the work of others which is not required by the Contract.

9 STEP-IN RIGHTS

- 9.1 The Contractor warrants to the Beneficiary that it shall not terminate nor treat as terminated its employment under the Contract, nor discontinue the construction of the Works without first giving to the Beneficiary not less than 7 Business Days' prior notice of the Contractor's intention to do so, specifying the grounds for so doing.
- 9.2 If the Beneficiary serves on the Contractor a notice in accordance with clause 9.3, the Contractor shall not terminate nor treat as terminated its employment under the Contract, nor discontinue the construction of the Works but service of such notice shall not prejudice any other right or remedy the Contractor may have under or in connection with the Contract.
- 9.3 Unless the employment of the Contractor under the Contract shall have terminated previously (and whether or not the Contractor shall have served notice on the Beneficiary pursuant to clause 9.1) if the Beneficiary serves upon the Contractor a notice to do so, the Contractor shall thereafter accept the instructions of the Beneficiary or its appointee to the exclusion of the Employer under and in connection with the Contract.
- 9.4 As against the Employer and the Beneficiary the Contractor shall be entitled and obliged to rely upon and to comply with such notice served by the Beneficiary under clause 9.3 and shall not make any enquiry into the entitlement of the Beneficiary as against the Employer to serve such notice.
- 9.5 As from the date of service of notice under clause 9.3, the Beneficiary or its appointee shall assume all the rights and perform all the obligations of the Employer under the Contract, provided that this shall not affect or derogate from any right of action the Employer may have against the Contractor in respect of any breach of duty of the Contractor under or in connection with the Contract happening prior to the date of service of notice by the Beneficiary under clause 9.3.
- 9.6 Within 21 days after serving notice under clause 9.3 or clause 9.9 the Beneficiary shall pay to the Contractor an amount equal to the sum then owing to the Contractor under the Contract for work done and materials delivered.
- 9.7 If the employment of the Contractor under the Contract is terminated before service of any notice under clause 9.3, then if required to do so by notice served by the Beneficiary not later than 8 weeks after the date of such

termination, the Contractor shall enter into a new contract with the Beneficiary or its appointee on the same terms as the Contract but with such revisions as the Beneficiary shall reasonably require to reflect the altered circumstances. Forthwith upon the execution of such new contract, the Beneficiary shall pay to the Contractor an amount equal to the sum which, immediately before termination of the Contractor's employment, was owing to the Contractor by the Employer under the Contract for work done and materials delivered and which remains unpaid.

- 9.8 Upon payment by the Beneficiary in accordance with clause 9.6 and 9.7 of an amount equal to the relevant sum owing from the Employer, the Contractor shall assign to the Beneficiary all the Contractor's rights against the Employer in respect of such unpaid sum, and shall pay to the Beneficiary any of the same subsequently received by it from the Employer.
- 9.9 The Contractor further covenants with the Beneficiary that if the Project Agreement is terminated by the Beneficiary, the Contractor, if requested by the Beneficiary by notice in writing received within 7 days of the Project Agreement being terminated and subject to clause 9.6, will accept the instructions of the Beneficiary or its appointee to the exclusion of the Employer in respect of the Works upon the terms and conditions of the Contract and will if so requested enter into a novation agreement whereby the Beneficiary is substituted for the Employer under the Contract.
- 9.10 The Beneficiary guarantees to the Contractor the performance of the obligations of any appointee of the Beneficiary nominated under clause 9.3 or 9.7 or 9.9.
- 9.11 Where the Contractor has given rights in relation to the Contract similar to those contained in this clause 9 to any other person then if both the Beneficiary and any such other person serve notice under clause 9.3 or clause 9.7 or clause 9.9 or its equivalent the notice served by the Beneficiary will not prevail over any notice served by the Senior Lender but will prevail over any notice served by any other person.
- 9.12 The Employer agrees to the foregoing provisions of this clause 9 and agrees to be bound by them.

10 OTHER COLLATERAL WARRANTIES

- 10.1 Following a written request from the Beneficiary the Contractor will (unless it has already done so) execute and/or procure that its sub-Contractors and/or professional consultants or any of them each execute a deed of collateral warranty in the relevant form specified in the Contract in favour of any person in whose favour the Contract obliged the Contractor to give or procure the giving of such a warranty.

11. APPLICABLE LAW AND JURISDICTION

- 11.1 This Deed will be construed in accordance with English law and be in all respects subject to the exclusive jurisdiction of the English courts.

12. THIRD PARTY RIGHTS

12.1 This Deed is enforceable by the original parties to it and by their successors in title and permitted assignees. Any rights of any person to enforce the terms of this Deed pursuant to the Contracts (Rights of Third Parties) Act 1999 are excluded.

IN WITNESS of which this document is executed as a Deed and is delivered on the date first stated above.

EXECUTED (but not delivered)
 until the date hereof)
AS A DEED by)
EDMUND NUTTALL LIMITED)
 acting by:-)
)

Director

Director/Secretary

THE COMMON SEAL OF)
CAMBRIDGESHIRE **COUNTY**)
COUNCIL was hereunto affixed by order)

Authorised Signatory

EXECUTED (but not delivered)
until the date hereof))
AS A DEED by)
DONARBON WASTE MANAGEMENT)
LIMITED)
acting by:-

Director

Director/Secretary

SCHEDULE 4

PART B

**CONSTRUCTION CONTRACTOR COLLATERAL WARRANTY IN FAVOUR OF THE
LENDER**



Construction Direct Agreement

Donarbon Waste Management Limited

and

Edmund Nuttall Limited

and

Bank of Ireland

[] 2008

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THIS AGREEMENT is made on [] 2008

BETWEEN:

- (1) **DONARBON WASTE MANAGEMENT LIMITED** (Company Number 6054499) whose registered office is at Ely Road, Waterbeach, Cambridge CB25 9PG ("**Project Co**");
- (2) **EDMUND NUTTALL LIMITED** (Company Number 00305189) whose registered office is at St. James House, Knoll Road, Camberley, Surrey GU15 3XW (the "**Contractor**");
- (3) **THE GOVERNOR AND THE COMPANY OF THE BANK OF IRELAND** in its capacity as facility agent and security trustee for the Finance Parties under the Credit Agreement (the "**Agent**").

RECITALS:

- (A) Project Co and Cambridgeshire County Council (the "**Authority**") have entered into the Project Agreement.
- (B) In order to enable Project Co to perform its obligations under the Project Agreement Project Co has entered into the Construction Contract with the Contractor.
- (C) Under the Credit Agreement the Senior Lenders have agreed to make certain credit facilities available to Project Co for the purposes of the Project.
- (D) It is a condition of the Credit Agreement that the Contractor enters into this Agreement in favour of the Agent.

NOW IT IS HEREBY AGREED as follows:

1. **INTERPRETATION**

1.1 **Definitions**

In this Agreement:

"Affiliate" means, in relation to any person, another person that controls, is controlled by or is under common control with such person;

"Appointed Representative" means any representative appointed by the Agent under clause 6.1 provided that such representative is:

- (a) the Agent, any Secured Finance Party and/or any of their Affiliates;
- (b) a person directly or indirectly owned or controlled by the Agent and/or any of the Secured Finance Parties;
- (c) an administrator, administrative receiver, receiver or receiver and manager of Project Co appointed under the Security Documents; or
- (d) any other person approved by the Contractor (such approval not to be unreasonably withheld or delayed);

"Construction Contract" means the construction contract entered into on or about the date of this Agreement between Project Co and the Contractor;

"Credit Agreement" means the credit agreement entered into on or about the date of this Agreement between Project Co, Donarbon Services Limited, the Financial Institutions

named therein as arrangers the financial institutions named therein as lender and the Agent;

"Cure Period" means the period from the Step-In Date up to and including the earlier of:

- (a) the Step-Out Date;
- (b) the date of any transfer under clause 9 (*Novation*);
- (c) the date of any termination of the Construction Contract for breach under clause 7.2 (*Cure Period*);
- (d) the Discharge Date; and
- (e) the date of expiry of the Construction Contract;

"Discharge Date" has the meaning given to it in clause 11.2(a) (*Miscellaneous*);

"Event of Default" has the meaning given to it in the Credit Agreement;

"Enforcement Action" means any action whatsoever to petition for (or take any other steps or action which may lead to) an order being made for the winding up of Project Co or any other insolvency proceedings in respect of Project Co;

"Financing Agreement" has the meaning given to it in the Project Agreement;

"Finance Party" has the meaning given to it in the Credit Agreement;

"Hedging Bank" has the meaning given to it in the Credit Agreement;

"Liabilities" means all present and future sums, liabilities and other obligations payable or owing by Project Co (whether actual or contingent, jointly or severally or otherwise);

"Notice of Liabilities" means the notice issued to the Agent by the Contractor in accordance with the provisions of clause 5.2 (*Notice of Termination and Existing Liabilities*);

"Project" has the meaning given in the Project Agreement;

"Project Agreement" means the project agreement entered into by the Authority and Project Co on or about the date of this Agreement pursuant to which Project Co will provide waste management services to the Authority;

"Required Period" means the period starting on the date of the Termination Notice and ending 30 days later;

"Relevant Liabilities" means the liabilities of Project Co to the Contractor as notified under clauses 5.1 or 5.3 (*Notice of Termination and Existing Liabilities*) as the case may be;

"Secured Finance Party" means each Finance Party and each Hedging Bank;

"Security Document" means any document evidencing or creating any Security Interest over any asset to secure any obligations of Project Co to the Agent or the other Secured Finance Parties under or in respect of the Financing Agreements;

"Security Interest" means any mortgage, pledge, lien, charge, assignment of hypothecation or security interest or any other agreement or arrangement having a similar effect;

"Senior Lenders" has the meaning given to it in the Credit Agreement;

"Senior Liabilities" means all Liabilities to the Secured Finance Parties arising under or in connection with the Financing Agreements;

"Step-In" means the exercise by the Agent of its rights under clause 6.1 (*Appointed Representative*);

"Step-In Date" means the date on which an Appointed Representative becomes jointly and severally liable for the rights and obligations of Project Co under the Sub-Contract Documents in accordance with clause 6.1 (*Appointed Representative*);

"Step-In Notice" means a notice delivered by the Agent under clause 6.2 (*Appointed Representative*);

"Step-Out Date" means the date specified by the Appointed Representative or the Agent in the notice given under clause 8.1 (*Expiry of Cure Period*);

"Construction Contract" means the agreement dated on or about the date of this Agreement pursuant to which the Contractor will carry out the Works;

"Sub-Contract Documents" means the Construction Contract, the Interface Agreement and the Guarantee.

"Suitable Substitute Employer" means a person approved by the Contractor (such approval not to be unreasonably withheld or delayed) as:

- (f) having the legal capacity, power and authority to become a party to and perform the obligations of Project Co under the Construction Contract;
- (g) employing persons having the appropriate qualifications, experience and technical competence and having the resources available to it (including committed financial resources and subcontracts) which are sufficient to enable it to perform the obligations of Project Co under the Construction Contract;
- (h) not directly engaged in any material legal proceedings with the Contractor at the time of the proposed novation;

"Termination Event" means any of the events or circumstances set out in clause 41 of the Construction Contract entitling the Contractor to terminate the Construction Contract;

"Termination Notice" means a notice given by the Contractor to the Agent under clause 5.1;

"Works" has the meaning given in the Construction Contract.

1.2 Other References

In this Agreement, unless a contrary intention appears:

- (a) capitalised terms defined in the Construction Contract have the same meaning in this Agreement;
- (b) a reference to any person is, where relevant, deemed to be a reference to or to include, as appropriate, that person's successors and permitted assignees or transferees;

- (c) any reference to a public organisation shall be deemed to include a reference to any successor to such public organisation or any organisation or entity which has taken over the functions or responsibilities of such public organisation;
- (d) references to clauses and schedules are references to, respectively, clauses of and schedules to this Agreement;
- (e) a reference to (or to any specified provision of) any agreement or document is to be construed as a reference to that agreement or document (or that provision) as it may be amended from time to time; excluding for this purpose any amendment which is contrary to any provision of any Financing Agreement unless such amendment has been agreed in writing by the Agent;
- (f) a reference to a statute, statutory instrument or accounting standard or any provision thereof is to be construed as a reference to that statute, statutory instrument or accounting standard or such provision thereof, as it may be amended or re-enacted from time to time;
- (g) a reference to an Event of Default being "outstanding" means that it has not been remedied or waived;
- (h) a time of day is a reference to London time;
- (i) the index to and the headings in this Agreement are inserted for convenience only and are to be ignored in construing this Agreement;
- (j) words importing the plural shall include the singular and vice versa; and

2. CONSENTS AND ACKNOWLEDGEMENTS

- 2.1 The Contractor acknowledges notice of, and consents to, the Security Interest granted over all of Project Co's rights under the Sub-Contract Documents effected by Project Co in favour of the Secured Finance Parties under the Security Documents.
- 2.2 The Contractor confirms that, as at the date of this Agreement, it has not received notice of any other Security Interest granted over Project Co's rights under the Sub-Contract Documents.
- 2.3 The Contractor confirms that until it is notified to the contrary by the Agent it will pay all amounts, if any, payable by it under the Sub-Contract Documents to the proceeds account [REDACTED] until otherwise directed in writing by the Agent.

3. RESTRICTIONS ON ENFORCEMENT

Prior to the Discharge Date the Contractor shall not take any Enforcement Action in relation to Project Co without first giving the Agent 30 days notice of its intention to take such action.

4. UNDERTAKINGS

4.1 Copies of Notices to be Delivered to Agent

The Contractor shall deliver to the Agent, at the same time as it delivers or provides to Project Co, a copy of:

- (a) any notice of termination or non-payment served under the Sub-Contract and;

- (b) any other notification, information or other communication delivered by it to Project Co in relation to the Construction Contract that the Agent may reasonably require.

4.2 **Contractor Undertakings**

The Contractor undertakes to the Agent that:

- (a) on receipt from the Agent of a Step-In Notice, it shall accept as validly given by Project Co any notices or demands given by the Appointed Representative under the Sub-Contract Documents if the same would have been validly given had it been given by Project Co;
- (b) it shall not, without the prior written consent of the Agent (such consent not to be unreasonably withheld or delayed), agree with Project Co to amend, modify, waive, cancel, suspend or surrender any provision of the Sub-Contract Documents;
- (c) it shall not, without the prior written consent of the Agent (such consent not to be unreasonably withheld or delayed), assign or otherwise dispose of any right, title, benefit or interest in or to the Sub-Contract Documents (or any part thereof);
- (d) it shall notify the Agent if any event or circumstance occurs which constitutes a Termination Event or which would, with the lapse of time, the giving of notice or the fulfilment of any other condition, constitute a termination event;
- (e) it shall not, without the prior consent of the Agent (such consent not to be unreasonably withheld or delayed), enter into any document in respect of the Project with any person which gives such other person step-in rights or similar rights against the Contractor;
- (f) it shall not terminate, purport to terminate or take any other action to terminate any of the Sub-Contract Documents otherwise than in accordance with the express rights of termination in the Sub-Contract Documents; and
- (g) without prejudice to any obligation of the Agent or Appointed Representative pursuant to this agreement, none of the Agent or the Appointed Representative or the Senior Lenders shall have any obligations under the Sub-Contract Documents.

5. **NOTICE OF TERMINATION AND EXISTING LIABILITIES**

5.1 The Contractor shall not terminate the Construction Contract without giving to the Agent at least the Required Period of prior written notice ("**Termination Notice**") stating:

- (a) the proposed termination date;
- (b) the grounds for termination in reasonable detail;
- (c) details of any amount owed by Project Co to the Contractor under the Sub-Contract Documents (having made all reasonable enquiry) which:
 - (i) are accrued and outstanding at the date of the Termination Notice; and/or
 - (ii) will fall due on or prior to the end of the Required Period; and
- (d) details of any unperformed obligations of Project Co of which the Contractor is aware (having made reasonable enquiry) under the Sub-Contract Documents.

5.2 The Contractor may not issue a Termination Notice until the expiry of any applicable grace period available to Project Co under the Construction Contract.

5.3 At any time after the Agent notifies the Contractor that an Event of Default has occurred, the Contractor shall not later than the date falling 15 days after receipt of written notice from the Agent, provide to the Agent a notice ("**Notice of Liabilities**") stating:

- (a) details of any amount owed by Project Co to the Contractor under the Sub-Contract Documents (having made reasonable enquiry) which:
 - (i) are accrued and outstanding at the date of the Agent's written request; and/or
 - (ii) will fall due on or prior to the date falling 30 days after the date of the Agent's written request; and
- (b) details of any unperformed obligations of Project Co of which the Contractor is aware (having made reasonable enquiry) under the Sub-Contract Documents.

6. **APPOINTED REPRESENTATIVE**

6.1 Without prejudice to the Agent's rights under the Security Documents:

- (a) if an Event of Default is outstanding (whether or not a Termination Notice has been served); or
- (b) at any time during the Required Period,

the Agent may procure that an Appointed Representative assumes, jointly and severally with Project Co, all of Project Co's rights and obligations under the Sub-Contract Documents.

6.2 The Agent shall give the Contractor at least 6 days prior notice of any action to be taken by it referred to in this clause 6 (a "**Step-In Notice**"), and shall in that notice give details of the proposed Appointed Representative.

7. **CURE PERIOD**

7.1 Without prejudice to clause 5 (*Notice of Termination and Existing Liabilities*), but subject to clause 7.2, the Contractor shall not terminate the Sub-Contract Documents during the Cure Period on grounds:

- (a) that the Agent has taken any action referred to in clause 6 (*Appointed Representative*) or enforced any Security Document; or
- (b) arising prior to the Step-In Date of which the Contractor is aware (having made reasonable enquiry) unless neither the Appointed Representative nor Project Co is using reasonable endeavours (including implementation of any remedial plan) to remedy any breach of the Sub-Contract Documents which:
 - (i) arose prior to the Step-In Date; and
 - (ii) is continuing (and capable of remedy); and
 - (iii) would otherwise have entitled the Contractor to terminate the Sub-Contract Documents; or
- (c) which arose solely in relation to Project Co.

7.2 The Contractor shall be entitled to terminate the Sub-Contract Documents by written notice to Project Co and the Appointed Representative:

- (a) if any amount referred to in clause 5.1(c) and (d) above has not been paid to the Contractor on or before the date falling 65 days after the date of the Termination Notice or if any amount referred to in clauses 5.3(a) and (b) above has not been paid to the Contractor on or before the date falling 35 days after receipt by the Agent of the Notice of Liabilities;
 - (b) if amounts, of which the Contractor was not aware (having made reasonable enquiry) at the time of either the Termination Notice or the Notice of Liabilities, subsequently become payable by Project Co to the Contractor under the Sub-Contract Documents and are not discharged on or before the later of the date falling 65 days after the date of the Termination Notice and the date falling 21 days after the date on which the liability for these amounts is notified in writing to the Agent;
 - (c) on grounds arising after the Step-In Date in accordance with the terms of the Sub-Contract Document.
- 7.3 Unless otherwise instructed in writing by the Agent at any time during the Cure Period, the Contractor shall deal with the Appointed Representative and not Project Co during the Cure Period. Performance of the Contractor's obligations pursuant to any instructions given by the Appointed Representative shall constitute a valid discharge of the Contractor's obligations under the Sub-Contract Documents.
- 8. EXPIRY OF CURE PERIOD**
- 8.1 The Appointed Representative or the Agent may at any time during the Cure Period deliver to the Contractor a Step-Out Notice. A Step-Out Notice shall specify the Step-Out Date, which shall be a date not less than 30 days after delivery of the Step-Out Notice.
- 8.2 On expiry of the Cure Period for a reason listed in paragraph (c) of the definition thereof:
- (a) the rights of the Appointed Representative under the Sub-Contract Documents against the Contractor shall be cancelled and the Appointed Representative shall remain jointly and severally liable with Project Co for the Relevant Liabilities and any other obligations of Project Co which have accrued during the Step-In Period; and
 - (b) subject to the terms of the Construction Contractor's Collateral Warranty, the Sub-Contract Documents shall automatically terminate.
- 8.3 On expiry of the Cure Period for a reason listed in paragraphs (a), (b), (d) and (e) of the definition thereof:
- (a) the rights of the Appointed Representative under the Sub-Contract Documents against the Contractor shall be cancelled and the Appointed Representative shall remain jointly and severally liable with Project Co for the Relevant Liabilities and any other obligations of Project Co which have accrued during the Step-In Period;
 - (b) the Contractor shall no longer deal with the Appointed Representative and shall deal with Project Co; and
 - (c) Project Co shall continue to be bound by the terms of the Sub-Contract Documents, notwithstanding the occurrence of the Step-Out Date.

9. NOVATION

9.1 Subject to clause 9.2, at any time:

- (a) during which Event of Default is outstanding; or

(b) during the Cure Period,

the Agent may, on 21 days' prior written notice to the Contractor and any Appointed Representative, procure the transfer of Project Co's rights and liabilities under the Sub-Contract Documents to a Suitable Substitute Employer in accordance with the provisions of this clause 9. The Agent shall in such notice give details of the proposed Suitable Substitute Employer.

- 9.2 The Contractor shall notify the Agent as to whether any person to whom the Agent proposes to transfer Project Co's rights and liabilities under the Sub-Contract Documents is a Suitable Substitute Employer, on or before the date falling 21 days after receipt of the notice referred to in clause 9.1 or, if later, the date of receipt of all information reasonably required by the Contractor to decide whether the proposed transferee is a Suitable Substitute Employer.
- 9.3 The Contractor shall not unreasonably withhold or delay its decision on whether the proposed transferee is a Suitable Substitute Employer.
- 9.4 If the Contractor fails to respond to the notice given pursuant to clause 9.1 stating that it does not approve the proposed Suitable Substitutive Employer and setting out its reasons within the required period, it shall be deemed to have given its consent to the proposed transferee.
- 9.5 On any transfer referred to in clause 9.1 becoming effective:
- (a) the Contractor shall not be entitled to terminate the Construction Contract by reason of any Termination Event or any other act or omission occurring prior to the date of transfer;
 - (b) subject to (c) and (e) below Project Co and the Contractor shall be released from their obligations under the Sub-Contract Documents to each other (the **"discharged obligations"**);
 - (c) the Suitable Substitute Employer and the Contractor shall assume obligations towards each other (whether they have arisen before, on or after the transfer) which differ from the discharged obligations only insofar as they are owed to or assumed by the Suitable Substitute Employer instead of Project Co and for the avoidance of doubt the Suitable Substitute Employer shall cure any failure of Project Co to perform or pay any amounts owed under the Sub-Contract Documents;
 - (d) the rights of Project Co against the Contractor under the Sub-Contract Documents and vice versa (the **"discharged rights"**) shall be cancelled;
 - (e) the Suitable Substitute Employer and the Contractor shall acquire rights against each other (whether they have arisen before, on or after the transfer) which differ from the discharged rights only insofar as they are exercisable by or against the Suitable Substitute Employer instead of Project Co and for the avoidance of doubt the Suitable Substitute Employer shall cure any failure of Project Co to perform or pay any amounts owed under the Sub-Contract Documents;
 - (f) the Agent and the Appointed Representative shall cease to have the benefit of any rights arising directly under or in connection with the Sub-Contract Documents and the Contractor shall be entitled to deal with the Suitable Substitute Employer alone;
 - (g) the Contractor shall enter into a direct agreement with the agent to the persons providing senior debt facilities to the Suitable Substitute Employer on substantially the same terms as this Agreement.

10. REPRESENTATIONS

On the date of this Agreement each of the entities which constitutes the Contractor makes the representations and warranties as to itself set out in clauses 10.1 (*Incorporation*) to 10.3 (*Authorisation*) (inclusive) to Project Co and the Agent.

10.1 Incorporation

It is duly incorporated and validly existing with limited liability under the laws of its place of incorporation and has the corporate power to own its assets and to carry on its business.

10.2 Power and Capacity

It has the power and capacity to enter into and comply with its obligations under this agreement and the Sub-Contract Documents.

10.3 Authorisation

It has taken all necessary corporate and other action as necessary:

- (a) to authorise the entry into and compliance with its obligations under this agreement and the Sub-Contract Documents;
- (b) to ensure that its obligations under this agreement and the Sub-Contract Documents are valid, legally binding and enforceable in accordance with their terms; and
- (c) to make this agreement and the Sub-Contract Documents admissible in evidence in the courts of England.

11. MISCELLANEOUS

11.1 The Contractor shall, at Project Co's expense, take whatever action the Agent, an Appointed Representative or a Suitable Substitute Employer taking a transfer in accordance with clause 9.1 may reasonably require for perfecting any transfer or release under clause 9 (*Appointed Representative*), clause 8 (*Expiry of Cure Period*) and clause 6 (*Novation*), including the execution of any transfer or assignment, the giving of any notice, order or direction and the making of any registration which, in each case, the Agent, Appointed Representative or Suitable Substitute Employer reasonably requires.

11.2 This Agreement shall remain in effect until the earlier of:

- (a) the date on which all amounts which may be or become owing by Project Co to the Secured Finance Parties under the Financing Agreements have been irrevocably paid in full (the "**Discharge Date**"); and
- (b) the date of transfer of Project Co's rights and liabilities under the Sub-Contract Documents to a Suitable Substitute Employer pursuant to clause 7 (*Novation*).

11.3 The Agent shall immediately notify the Contractor of any Event of Default.

11.4 Project Co joins in this Agreement to acknowledge and consent to the arrangements set out herein and agrees not knowingly to do or omit to do anything that may prevent any party from enforcing its rights under this Agreement.

11.5 For the avoidance of doubt, if there is any conflict or inconsistency between the provisions of this Agreement and the Construction Contract, the provisions of this Agreement shall prevail.

- 11.6 The Agent agrees and agrees on behalf of the Secured Finance Parties that the provisions of clause 83 (*Notices*) of the Construction Contract shall apply *mutatis mutandis* to this Agreement and for this purpose the address and facsimile number of the Agent is as follows:

THE GOVERNOR AND THE BANK OF IRELAND

Address: 11 Philpot Lane
East Cheap Court
EC3M 8BA



Fax: +44(0)207 626 2405

or any other address or facsimile number as may be notified in writing.

12. ASSIGNMENT

- 12.1 No party to this Agreement may assign or transfer any part of its rights or obligations under this Agreement, save that:

- (a) the Agent may assign or transfer its rights and obligations under this Agreement to a successor security trustee and agent appointed in accordance with the Credit Agreement without the consent of the Contractor;
- (b) any Secured Finance Party may assign or transfer its rights under the Financing Agreements in accordance with the terms of the Financing Agreements; and
- (c) the Contractor may assign or otherwise transfer its rights and/or obligations under this Agreement to any permitted assignee or transferee in accordance with the terms of the Sub-Contract Documents.

- 12.2 If clause 12.1(a) applies then the Contractor shall enter into a direct agreement with the new security trustee and agent on substantially the same terms as this Agreement. If clause 12.1(c) applies, the Contractor shall procure that the assignee or transferee shall enter into a direct agreement with the Agent on substantially the same terms as this Agreement.

13. ENTIRE AGREEMENT

This Agreement constitutes the entire agreement between the parties hereto in connection with the subject matter of this Agreement. No party has relied upon any representation save for any representation expressly set out in this Agreement.

14. ADDITIONAL PROVISIONS

14.1 Counterparts

This Agreement may be executed in any number of counterparts and all of those counterparts taken together shall be deemed to constitute one and the same instrument.

14.2 Remedies and Waivers

- (a) No failure or delay on the part of any party in exercising any right, power or privilege under this Agreement shall operate as a waiver thereof, nor shall any

single or partial exercise of any such right, power or privilege preclude any other or further exercise of any other right, power or privilege.

- (b) The rights and remedies provided in this Agreement are cumulative and not exclusive of any rights and remedies provided by law.
- (c) A waiver given or other consent granted by any party under this Agreement shall be effective only if given in writing and then only in the instance and for the purposes for which it is given.

14.3 **Partial Invalidity**

If, at any time, any provision hereof is or becomes illegal, invalid or unenforceable in any respect under the law of any jurisdiction, neither the legality, validity or enforceability of the remaining provisions hereof nor the legality, validity or enforceability of such provision under the law of any other jurisdiction shall in any way be affected or impaired thereby.

15. **THIRD PARTY RIGHTS**

- 15.1 Any person (other than the parties to this Agreement) who is given any rights or benefits under clause 7 (*Cure Period*), clause 8 (*Expiry of Cure Period*), clause 9 (*Novation*) or clause 11 (*Miscellaneous*) (a "**Third Party**") shall be entitled to enforce those rights or benefits against the parties in accordance with the Contracts (Rights of Third Parties) Act 1999.
- 15.2 Save as provided in clause 15.1 above the operation of the Contracts (Rights of Third Parties) Act 1999 is hereby excluded.
- 15.3 The parties may amend, vary or terminate this Agreement in such a way as may affect any rights or benefits of any Third Party which are directly enforceable against the parties under the Contracts (Rights of Third Parties) Act 1999 without the consent of such Third Party.
- 15.4 Any Third Party entitled pursuant to the Contracts (Rights of Third Parties) Act 1999 to enforce any rights or benefits conferred on it by this Agreement may not veto any amendment, variation or termination of this Agreement which is proposed by the parties.

16. **GOVERNING LAW AND JURISDICTION**

- 16.1 This Agreement and any dispute, controversy, proceedings or claim of whatever nature arising out of in any way relating to this Agreement or its formation shall be governed by and construed in accordance with English Law.
- 16.2 The English courts shall have exclusive jurisdiction to settle any dispute, claim or controversy arising out of, under or in connection with this Agreement and the parties submit to the exclusive jurisdiction of the English courts.

IN WITNESS whereof this Agreement has been executed and delivered on the date first above written.

SIGNATORIES

Project Co

Executed as a deed by **DONARBON**)
WASTE MANAGEMENT LIMITED)
acting by a director and its)
secretary/two directors:)

Director

Director/Secretary

Contractor

Executed as a deed by **EDMUND**)
NUTTALL LIMITED)
acting by a director and its)
secretary/two directors:)

Director

Director/Secretary

The Agent

Executed as a deed by)
as attorney for **THE GOVERNOR AND**)
COMPANY OF THE BANK OF IRELAND)
in the presence of:)

.....
(as attorney for Governor and Company of
the Bank of Ireland)

Witness's signature:

Name:

Address:

Occupation:

SCHEDULE 5

PART A

PROFESSIONAL TEAM WARRANTY IN FAVOUR OF THE AUTHORITY

Schedule 18 (RPS Planning & Development Limited warranty in favour of the Authority)

THIS DEED is made on

2007

BETWEEN

- (1) **RPS PLANNING & DEVELOPMENT LIMITED** a company incorporated in England and Wales under company number 02393644 whose registered office is at Centurion Court, 85 Milton Park, Abingdon, Oxfordshire OX14 4RY ("the Consultant");
- (2) **CAMBRIDGESHIRE COUNTY COUNCIL** of Cambridgeshire Shire Hall, Cambridge, CB3 0AP ("the Beneficiary", which expression includes its permitted successors in title and assigns); and
- (3) **EDMUND NUTTALL LIMITED** a company incorporated in England and Wales under company number 00305189 and whose registered office is at St James House, Knoll Road, Camberley, Surrey GU15 3XW ("the Contractor").

BACKGROUND

- (A) The Consultant is in practice as an architect.
- (B) By a contract dated 2007 ("the Project Agreement"), the Beneficiary has appointed Donarbon Waste Management Limited ("the Employer") to carry out in relation to the site therein described as "the Sites" the design and construction of the works therein defined as "the Works", which expression has the same meaning in this Deed.
- (C) By a contract dated 2007 ("the Contract") the Employer has appointed the Contractor to carry out in relation to the Sites the design and construction of the Works.
- (D) The Consultant has been appointed by the Contractor under a deed of appointment dated ("the Appointment") to provide services in relation to the Works.
- (E) The Consultant is obliged under the Appointment to give a warranty in this form in favour of the Beneficiary.

OPERATIVE PROVISIONS

In consideration of the payment of one pound (£1.00) by the Beneficiary to the Consultant, receipt of which the Consultant acknowledges:

1 CONSULTANT'S WARRANTY AND LIABILITY

- 1.1 The Consultant warrants to the Beneficiary that it has carried out and will continue to carry out its duties and obligations under and in connection with the Appointment in accordance with the Appointment and that it has exercised and will continue to exercise in the performance of those duties and obligations the reasonable skill care and diligence to be expected of a properly qualified member of its profession experienced in carrying out duties such as its duties under the Appointment in relation to works of similar scope, nature and complexity to the Works.
- 1.2 Subject to clause 1.3 below
 - 1.2.1 The Consultant has no duty or obligation hereunder which is greater or of longer duration than it would have had if the Beneficiary had been a party to the Appointment as joint employer.
 - 1.2.2 The Consultant shall be entitled in any action or proceedings by the Beneficiary to rely on any limitation in the Appointment and to raise the equivalent rights in defence of liability as it would have against the Contractor under the Appointment .
- 1.3 The Consultant shall not be entitled to set-off against any liability to the Beneficiary under this Deed any sum of money or other entitlement due to it from the Contractor howsoever arising under the terms of the Appointment or in equity or at common law.
- 1.4 No actions or proceedings under or in respect of this Deed whether in contract or in tort in negligence or for the breach of statutory duty or otherwise shall be commenced against the Consultant after the expiry of the period of 12 years from practical completion or such earlier date as may be prescribed in law. .

2 DOCUMENTS

- 2.1 In relation to all drawings, reports, calculations, details, plans, models, specifications, photographs, schedules, bills of quantities, and other documents and information of any nature whatsoever (including any computer software used to generate them and any designs and inventions contained in them), which have been or are hereafter provided by the Consultant in the course of performing its obligations under the Appointment ("Documents"), the Consultant hereby grants (or, if such grant cannot legally take place until a later date, agrees to grant) to the Beneficiary with effect from the date of this Deed or in the case of Documents not yet in existence with effect from the creation thereof, a royalty-free non-exclusive licence (such licence to remain in full force and effect notwithstanding completion of the Consultant's obligations under the Appointment or the termination of the Appointment or the determination of the Consultant's engagement under it or any dispute thereunder or hereunder) to use and to

reproduce all Documents for any purpose whatsoever connected with the Works and such other purposes as are reasonably foreseeable including, but without limitation, the execution, completion, maintenance, letting, advertisement, modification, extension, reinstatement, refurbishment and repair of the Works. Such licence will carry the right to grant sub-licences and will be transferable to third parties.

- 2.2 The licence referred to in Clause 2.1 above shall be irrevocable save where the Appointment or the Consultant's employment pursuant to the Appointment has expired or has been terminated and the Consultant notifies the Beneficiary in writing that any undisputed or determined fees or disbursements owing to the Consultant have not been paid by the Contractor and the Authority has not paid such fees or disbursements with 21 days (whether pursuant to step in, clause 10.6 or otherwise).
- 2.3 The Beneficiary will not hold the Consultant liable for any use it may make of the Documents for any purpose other than that for which they were originally provided by it unless the Consultant authorises such use and confirms the Documents are suitable for it.
- 2.4 The Consultant will not grant to any third party the right to use any of the Documents save under any warranty it is obliged to give under the Appointment or hereunder or as otherwise required to enable it to fulfil its obligations under the Appointment.
- 2.5 The Consultant agrees on reasonable request at any time and following reasonable written prior notice to give the Beneficiary or those authorised by it access to the Documents and to provide copies (including copy negatives and CAD disks) thereof at the Beneficiary's expense. The Consultant hereby warrants that it will preserve all such Documents in a safe and accessible place throughout the currency of this Deed.
- 2.6 The Consultant warrants to the Beneficiary that the Documents (save to the extent duly appointed sub-consultants and sub-contractors have been used to prepare the same) are its own original work and that in any event their use in connection with the Works, including use by the Beneficiary in accordance with the licence granted by this Clause 2, will not infringe the rights of any third party.

3 INSURANCE

- 3.1 The Consultant hereby covenants with the Beneficiary that it has effected a policy of Professional Indemnity and such other insurance covering the liabilities of the Consultant under the Appointment and under this Deed for negligence, with a limit of indemnity of not less than £10,000,000 (ten million pounds) for any occurrence or series of occurrences arising out of any each and every event and that it will maintain such insurance with reputable insurers carrying on business

in the European Union from the date hereof until 12 years after practical completion of the Works, provided that such insurance is generally available in the market to members of the Consultant's profession at commercially reasonable rates and (for the avoidance of doubt) provided further that payment of any increased or additional premiums required by insurers by reason of the Consultant's own claims record or other acts, omissions, matters or things peculiar to the Consultant will be deemed to be within the reasonable rates.

- 3.2 The Consultant shall immediately inform the Beneficiary if for any period such insurance is not or ceases to be available on commercially reasonable terms and shall obtain in respect of such period such reduced level of insurance as is available and would be fair and reasonable in the circumstances for the Consultant to obtain. The Consultant shall co-operate with the Beneficiary to ensure that all reasonable steps are taken to obtain such insurance at reasonable rates.
- 3.3 As and when reasonably required by the Beneficiary the Consultant will produce for inspection documentary evidence in the form of a broker's letter that the insurance referred to in clause 3.1 and 3.2 is being properly maintained and that payment has been made in respect of the premiums due thereunder.

4 LIABILITY OF PARTNERS

- 4.1 Where the Consultant is a partnership, references in this Deed to "the Consultant" will be deemed to include reference to each and every present and future partner of such partnership and the liability of each and every such partner under this Deed will be deemed to be joint and several.

5 NOTICES

- 5.1 Any notice to be given by any party hereunder will be sufficiently served if sent by hand, by facsimile transmission or by post to the registered office or if there is none the last known address of the party to be served. Any notice sent by hand will be deemed to be served on the date of delivery and any notice sent by facsimile transmission will be deemed to be served in full at the time recorded on the facsimile report sheet, provided that if any notice sent by hand or facsimile is sent after 4.45 pm on any day it will be deemed to be served on the next working day. Any notice sent by post will be deemed to have been duly served at the expiration of 48 hours after the time of posting if the end of that period falls before 4.45pm on a working day and otherwise on the next working day.

6 ASSIGNMENT

- 6.1 The benefit of and the rights of the Beneficiary under this Deed may be assigned without the consent of the Consultant on two occasions only.

- 6.2 In calculating the number of assignments for the purposes of clause 6.1 no account will be taken of assignments to a successor authority assuming the functions of the Beneficiary or assignments by way of security or by way of re-assignment on redemption.
- 6.3 The Beneficiary will notify the Consultant in writing following any assignment specifying the name and address of the assignee and the date of the assignment.
- 6.4 The Consultant will not contend that any such assignee is precluded from recovering any loss resulting from any breach of this Deed (whatever the date of such breach) by reason only that that person is an assignee and not the original Beneficiary hereunder or by reason that the original Beneficiary or any intermediate Beneficiary escaped any loss resulting from such breach by reason of the disposal of any interest in the Site or that original Beneficiary or any intermediate Beneficiary has not suffered any or as much loss.

7 BENEFICIARY'S REMEDIES

- 7.1 The rights and benefits conferred upon the Beneficiary by this Deed are in addition to any other rights and remedies it may have against the Consultant including without prejudice to the generality of the foregoing any remedies in negligence.

8 INSPECTION OF DOCUMENTS

- 8.1 The Consultant's liabilities under this Deed will not be in any way reduced or extinguished by reason of any inspection or approval of the Documents or attendance at site meetings or other enquiry or inspection which the Beneficiary may make or procure to be made for its benefit or on its behalf.

9 STANDARDS OF PRODUCTS AND MATERIALS

- 9.1 Without prejudice to the generality of clause 1.1 of this Deed, the Consultant warrants that it has exercised and will exercise reasonable skill, care and diligence in accordance with this Deed to see that it has not specified for use and it will not specify for use and (as appropriate) it has not authorised or approved and it will not authorise or approve the specification or use by others, of any products or materials not in conformity with relevant British or European Union Standards or Codes of Practice or which at the time of specification are widely known to members of the Consultant's profession within the European Union to be deleterious to health and 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.
- 9.2 If in the performance of its duties under the Appointment the Consultant becomes aware that it or any other person has specified or used, or authorised or approved the specification or use by others of

any such products or materials the Consultant will notify the Beneficiary in writing forthwith. This clause does not create any additional duty for the Consultant to inspect or check the work of others which is not required by the Appointment.

10 STEP-IN RIGHTS

- 10.1 The Consultant warrants to the Beneficiary that it shall not terminate nor treat as terminated the Appointment, nor discontinue the performance of any of its services or obligations under the Appointment without first giving to the Beneficiary not less than 28 days' prior notice of the Consultant's intention to do so, specifying the grounds for so doing.
- 10.2 If the Beneficiary serves on the Consultant a notice in accordance with clause 10.3, the Consultant shall not terminate nor treat as terminated the Appointment, nor discontinue the performance of any of its services or obligations under the Appointment, but service of such notice shall not prejudice any other right or remedy the Consultant may have under or in connection with the Appointment.
- 10.3 Unless the employment of the Consultant shall have terminated previously (and whether or not the Consultant shall have served notice on the Beneficiary pursuant to clause 10.1) if the Beneficiary serves upon the Consultant a notice to do so, the Consultant shall thereafter accept the instructions of the Beneficiary or its appointee to the exclusion of the Contractor under and in connection with the Appointment.
- 10.4 As against the Contractor and the Beneficiary the Consultant shall be entitled and obliged to rely upon and to comply with such notice served by the Beneficiary under clause 10.3 and shall not make any enquiry into the entitlement of the Beneficiary as against the Contractor to serve such notice.
- 10.5 As from the date of service of notice under clause 10.3, the Beneficiary or its appointee shall assume all the rights and perform all the obligations of the Contractor under the Appointment, provided that this shall not affect or derogate from any right of action the Contractor may have against the Consultant in respect of any breach of duty of the Consultant under or in connection with the Appointment happening prior to the date of service of notice by the Beneficiary under clause 10.3.
- 10.6 Within 21 days after serving notice under clause 10.3 or clause 10.9 the Beneficiary shall pay to the Consultant an amount equal to the fees and disbursements then owing to the Consultant under the Appointment.
- 10.7 If the employment of the Consultant under the Appointment is terminated before service of any notice under clause 10.3, then if

required to do so by notice served by the Beneficiary not later than 12 weeks after the date of such termination, the Consultant shall enter into a new agreement with the Beneficiary or its appointee on the same terms as the Appointment but with such revisions as the Beneficiary shall reasonably require to reflect the altered circumstances. Forthwith upon the execution of such new agreement, the Beneficiary shall pay to the Consultant an amount equal to the fees and disbursements (excluding cancellation fees) then owing to the Consultant under the Appointment.

- 10.8 Upon payment by the Beneficiary in accordance with clause 10.6 and 10.7 of an amount equal to the fees and disbursements owed by the Contractor, the Consultant shall assign to the Beneficiary all the Consultant's rights against the Contractor in respect of such unpaid fees and disbursements, and shall pay to the Beneficiary any of the same subsequently received by him from the Contractor.
- 10.9 The Consultant further covenants with the Beneficiary that if the employment of the Contractor under the Contract is determined or if the Contract is terminated the Consultant, if requested by the Beneficiary by notice in writing and subject to clause 10.6, will accept the instructions of the Beneficiary or its appointee to the exclusion of the Contractor in respect of its duties under the Appointment upon the terms and conditions of the Appointment and will if so requested enter into a novation agreement whereby the Beneficiary is substituted for the Contractor under the Agreement.
- 10.10 The Beneficiary guarantees to the Consultant the performance of the obligations of any appointee of the Beneficiary nominated under clause 10.3 or 10.7 or 10.9.
- 10.11 Where the Consultant has given rights in relation to the Appointment similar to those contained in this clause 10 to any other person then if both the Beneficiary and any such other person serve notice under clause 10.3 or clause 10.7 or clause 10.9 or its equivalent the notice served by the Beneficiary will not prevail over any notice served by such other person but will prevail over any notice served by any other person.
- 10.12 The Contractor agrees to the foregoing provisions of this clause 10 and agrees to be bound by them.

11 APPLICABLE LAW AND JURISDICTION

- 11.1 This Deed will be construed in accordance with English law and be in all respects subject to the exclusive jurisdiction of the English courts.

12 THIRD PARTY RIGHTS

- 12.1 This Deed is enforceable by the original parties to it and by their successors in title and permitted assignees. Any rights of any person

to enforce the terms of this Deed pursuant to the Contracts (Rights of Third Parties) Act 1999 are excluded.

IN WITNESS of which this document is executed as a Deed and is delivered on the date first stated above.

EXECUTED (but not delivered)
 until the date hereof)
AS A DEED by)
RPS PLANNING AND DEVELOPMENT)
LIMITED)
 acting by:-)

Director

Director/Secretary

THE COMMON SEAL OF)
CAMBRIDGESHIRE **COUNTY**)
COUNCIL was hereunto affixed by order)

Authorised Signatory

EXECUTED (but not delivered)
 until the date hereof)
AS A DEED by)
EDMUND NUTTALL LIMITED)
 acting by:-)
)

Director

Director/Secretary

SCHEDULE 5

PART B

PROFESSIONAL TEAM WARRANTY IN FAVOUR OF THE CONTRACTOR

DATED 2007

(1) RPS PLANNING & DEVELOPMENT LIMITED

(2) DONARBON WASTE MANAGEMENT LIMITED

(3) EDMUND NUTTALL LIMITED

EMPLOYER WARRANTY
relating to
the design and construction of a Mechanical Biological
Facility and associated works at Waterbeach, Cambridge



Pinsent Masons

THIS DEED is made on

BETWEEN:-

- (1) **RPS PLANNING & DEVELOPMENT LIMITED** (No 02947164) whose registered office is at Centurion Court, 85 Milton Park, Abingdon, Oxfordshire OX14 4RY (the "**Consultant**");
- (2) **DONARBON WASTE MANAGEMENT LIMITED** (No 06054499) whose registered office is at Ely Road, Waterbeach, Cambridge CB25 9PG (the "**Employer**"); and
- (3) **EDMUND NUTTALL LIMITED** (No 00305189) whose registered office is at St James House, Knoll Road, Camberley, Surrey GU15 3XW (the "**Contractor**").

NOW THIS DEED WITNESSES in consideration of the sum of £10.00 paid by the Employer, receipt of which the Consultant acknowledges, as follows:-

1. INTERPRETATION

1.1 In this Deed:-

"Appointment"	means the appointment dated _____ made between (1) the Contractor and (2) the Consultant
"Construction Contract"	means a contract dated _____ to be entered into between (1) the Employer and (2) the Contractor for the design and construction of the Development
"Development"	means the design and construction of a Mechanical Biological Facility and associated works at the Property
"Property"	means Waterbeach Waste Management Park, Ely Road, Waterbeach, Cambridge

1.2 In interpreting this Deed:-

- 1.2.1 if any party to this Deed is a partnership then the provisions of this Deed will bind each and every such partner jointly and severally;
- 1.2.2 references to the singular shall be deemed to include the plural (and vice versa) and reference to a "**person**" shall be deemed to include any individual firm unincorporated association or body corporate;
- 1.2.3 references to the Employer shall be deemed to include its successors in title and assigns;
- 1.2.4 any reference to any enactment includes any consolidation, re-enactment, amendment or replacement of it and any subordinate legislation under it;
- 1.2.5 headings to Clauses shall be disregarded.

2. GENERAL

- 2.1 The Employer has employed the Contractor for the Development.
- 2.2 The Contractor has appointed the Consultant to act in the capacity of architect in relation to the Development.
- 2.3 The Consultant has agreed to enter into this Deed with the Employer.

3. **SKILL AND CARE**

The Consultant undertakes with and warrants to the Employer that:-

- 3.1 in carrying out and performing its duties and obligations under or in connection with the Appointment, the Consultant has exercised and will continue to exercise all the reasonable skill, care and attention to be expected of a competent and fully qualified member of the Consultant's profession experienced in carrying out services the like of those undertaken by the Consultant under the Appointment for works of a similar nature, value, complexity and timescale to the Development;
- 3.2 the Consultant has exercised and will continue to exercise the standard of skill, care and attention referred to in Clause 3.1 not to specify any products or materials for use in the Development which at the time of use:-
 - 3.2.1 do not conform with British and European Standards or Codes of Practice; or
 - 3.2.2 are generally known within the Consultant's profession to be deleterious, in the particular circumstances in which they are specified for use, to health and safety and/or the durability of the building or structure;
- 3.3 it has carried out and will carry out the duties and obligations on its part to be performed under the Appointment.

4. **OBLIGATIONS PRIOR TO TERMINATION OF THE APPOINTMENT BY THE CONSULTANT**

- 4.1 The Consultant covenants with the Employer that it will not exercise nor seek to exercise any right of termination of the Appointment or to discontinue the performance of any of its duties or obligations thereunder for any reason whatsoever (including any breach on the part of the Contractor) without giving not less than 21 days written notice of his intention to do so to the Employer and specifying the grounds for the proposed termination or discontinuance.
- 4.2 Any period stipulated in the Appointment for the exercise by the Consultant of a right of termination or to discontinue the performance of any of its duties or obligations shall, nevertheless be extended as may be necessary, to take account of the period of notice required under Clause 4.1
- 4.3 The right of the Consultant to terminate the Appointment or to discontinue the performance of any of its duties or obligations thereunder shall cease within the period of 21 days referred to in Clause 4.1 if the Employer shall give notice to the Consultant:-
 - 4.3.1 requiring the Consultant to continue its duties and obligations under the Appointment with the Employer or its nominee; and
 - 4.3.2 acknowledging that the Employer or its nominee will assume all the obligations of the Contractor under the Appointment; and
 - 4.3.3 undertaking that the Employer or its nominee will discharge all payments which may subsequently become due to the Consultant under the terms of the Appointment and will pay to the Consultant any sums which have been due and payable to it thereunder but which remain unpaid.
- 4.4 Upon compliance by the Employer or its nominee with the requirements of Clause 4.3 the Appointment will continue in full force and effect as if the Appointment had been entered into between the Consultant and the Employer or its nominee to the exclusion of the Contractor.
- 4.5 Compliance by the Consultant with the provisions of this Clause 4 will not be treated as a waiver of any breach on the part of the Contractor giving rise to the right of termination nor otherwise prevent the Consultant from exercising his rights after the expiration of the notice issued pursuant to Clause 4.1 unless the rights of termination have ceased under the provisions of Clause 4.3.

- 4.6 This Clause 4 shall cease to have effect upon the prior exercise by any third person of any similar rights of substitution contained in any other agreement concerning the Development and entered into between the Consultant and such person at the request of the Employer.

5. **EMPLOYER'S RIGHTS IN RELATION TO THE APPOINTMENT**

- 5.1 Notwithstanding that as between the Contractor and the Consultant the Consultant's right of termination of the Appointment may not have arisen the provisions of Clause 4.4 shall also apply if the Employer gives notice to the Consultant and to the Contractor to the effect that the Employer wishes the provisions of Clause 4.4 to apply and the Employer or its nominee complies with the requirements of Clause 4.3.
- 5.2 The Consultant shall not be concerned, or required to enquire whether, and shall be bound to assume that as between the Contractor and the Employer the circumstances have occurred permitting the Employer to give such notice under Clause 5.1.
- 5.3 This Clause 5 shall cease to have effect upon the prior exercise by any third person of any similar rights of substitution contained in any other agreement concerning the Development and entered into between the Consultant and such person at the request of the Employer.

6. **CONSULTANT'S POSITION**

By acting in accordance with Clauses 4 and 5 the Consultant shall not incur any liability to the Contractor.

7. **COPYRIGHT**

- 7.1 The copyright in all drawings, reports, specifications, bills of quantities, calculations and other similar documents provided by the Consultant in connection with the Development shall remain vested in the Consultant but the Consultant grants to the Employer and its nominees with full title guarantee a non-exclusive irrevocable royalty free licence to copy and use such drawings and other documents and to reproduce the designs contained in them for any purpose related to the Development including (but without limitation) the construction, completion, maintenance, letting, promotion, advertisement, reinstatement, extension and repair of the Development. Such licence shall include a licence to grant sub-licences and to transfer the same to third parties.
- 7.2 The Consultant shall not be liable for any such use by the Employer or its nominees of any drawings and other documents for any purposes other than those for which they were originally prepared by the Consultant.
- 7.3 The Employer shall on written request and upon paying a reasonable copying charge therefor, be entitled to be supplied by the Consultant with copies of the drawings and other items referred to in Clause 7.1.
- 7.4 The Consultant agrees to waive any right to be identified as author of the drawings and other documents referred to in Clause 7.1 in accordance with section 77 of the Copyright Designs and Patents Act 1988 and any right not to have the documents referred to in Clause 7.1 subjected to derogatory treatment in accordance with section 80 of that Act as against the Employer or Contractor or any licensee or assignee of the Employer or Contractor.

8. **INDEMNITY INSURANCE**

- 8.1 The Consultant shall maintain professional indemnity insurance covering (inter alia) all liability hereunder upon customary and usual terms and conditions prevailing for the time being in the insurance market, and with reputable insurers lawfully carrying on such insurance business in the United Kingdom, in an amount of not less than £10,000,000 (ten million pounds) for any one occurrence or series of occurrences arising out of any one event for a period beginning now and ending 12 years after the RT Completion Date (as defined in the Construction Contract) of the Development, provided always that such insurance is available at commercially reasonable rates. The said terms and conditions shall not include any term or condition to the effect that the Consultant must discharge any liability before being entitled to recover from the insurers, or any

other term or condition which might adversely affect the rights of any person to recover from the insurers pursuant to the Third Parties (Rights Against Insurers) Act 1930, or any amendment or re-enactment thereof.

- 8.2 Any increased or additional premium required by insurers by reason of the Consultant's own claims record or other acts, omissions, matters or things particular to the Consultant shall be deemed to be within commercially reasonable rates.
- 8.3 The Consultant shall immediately inform the Employer if such insurance ceases to be available at commercially reasonable rates in order that the Consultant and the Employer can discuss means of best protecting the respective positions of the Employer and the Consultant in respect of the Development in the absence of such insurance.
- 8.4 The Consultant shall fully co-operate with any measures reasonably required by the Employer, including (without limitation) completing any proposals for insurance and associated documents, maintaining such insurance at rates above commercially reasonable rates if the Employer undertakes in writing to reimburse the Consultant in respect of the net cost of such insurance to the Consultant above commercially reasonable rates or, if the Employer effects such insurance at rates at or above commercially reasonable rates, reimbursing the Employer in respect of what the net cost of such insurance to the Employer would have been at commercially reasonable rates.
- 8.5 As and when reasonably requested to do so by the Employer the Consultant shall produce for inspection documentary evidence (including, if required by the Employer, the original of the relevant insurance documents) that his professional indemnity insurance is being maintained.
- 8.6 The above obligations in respect of professional indemnity insurance shall continue notwithstanding termination of this Deed for any reason whatsoever, including (without limitation) breach by the Employer.

9. **LIABILITY**

- 9.1 The obligation of the Consultant under this Deed shall cease 12 years after the date of the RT Completion Date (as defined in the Construction Contract) of the Development save in respect of any cause of action under this Deed where proceedings have been commenced during such 12 year period.
- 9.2 The Consultant shall be entitled in any action or proceedings by the Employer to rely on any limitation in the Appointment and to raise the equivalent rights in defence of liability (excluding set-off and counterclaim) as it would have had against the Employer if the Employer had been named as joint employer under the Appointment.

10. **ASSIGNMENT**

- 10.1 The Consultant consents to the benefit of this Deed being assigned twice only **PROVIDED ALWAYS** that the maximum number of two assignments referred to above shall not be affected by assignments by way of security and assignments to and from subsidiary or other associated companies within the same group of companies as the Employer so long as such assignee company remains within the same group of companies as the Employer.
- 10.2 The Consultant shall not be entitled to contend that any person to whom this Deed is assigned in accordance with Clause 10.1 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.

11. **NOTICES**

Any notice required to be given under this Deed shall be in writing and shall be deemed to be properly given if given in compliance with section 196 of the Law of Property Act 1925 (as amended by the Recorded Delivery Service Act 1962).

12. **EXTRANEOUS RIGHTS**

- 12.1 This Deed shall not negate or diminish any duty or liability otherwise owed by the Consultant to the Employer.
- 12.2 No approval or inspection of the Development or of any designs or specifications and no testing of any work or materials by or on behalf of the Employer and no omission to inspect or test shall negate or diminish any duty or liability of the Consultant arising under this Deed.
- 12.3 This Deed may be executed in any number of counterparts all of which when taken together shall constitute one and the same instrument.
- 12.4 This Deed does not create any right enforceable by any person not a party to it (whether pursuant to the Contracts (Rights of Third Parties) Act 1999 or otherwise) except that a person who is the successor to or the permitted assignee of the rights of the Employer is deemed to be a party to this Deed.
- 12.5 The Consultant and the Contractor undertake to the Employer not to vary or depart from the terms and conditions of the Appointment without the prior written consent of the Employer (such consent not to be unreasonably withheld or delayed).

13. **GOVERNING LAW**

This Deed is subject in all respects to English law and the English Courts shall have jurisdiction with regard to all matters arising under or in connection with it.

14. **CONTRACTOR'S CONSENT**

The Contractor has executed this Deed to signify its consent to its terms.

EXECUTED AS A DEED by the parties on the date which first appears in this Deed.

EXECUTED (but not delivered
until the date hereof)
AS A DEED by
RPS PLANNING & DEVELOPMENT LIMITED
acting by:-

)
)
)
)
)

Director

Director/Secretary

EXECUTED (but not delivered
until the date hereof)
AS A DEED by
DONARBON WASTE MANAGEMENT LIMITED
acting by:-

)
)
)
)
)

Director

Director/Secretary

EXECUTED (but not delivered
until the date hereof)
AS A DEED by
EDMUND NUTTALL LIMITED
acting by:-

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)
)

Director

Director/Secretary

SCHEDULE 6

SUB-CONTRACTOR/CONSULTANT WARRANTIES IN FAVOUR OF THE CONTRACTOR AND FUNDERS

DATED _____ 2008

(1) KELAG UMWELTTECHNIK GMBH & CO KG

(2) DONARBON WASTE MANAGEMENT LIMITED

(3) EDMUND NUTTALL LIMITED

SUB-CONTRACTOR'S EMPLOYER WARRANTY
relating to
the design and construction of a Mechanical Biological
Facility and associated works at Waterbeach, Cambridge



Pinsent Masons

BETWEEN:-

- (1) **KELAG UMWELTECHNIK GMBH & CO KG** (FN 245830f) of Rheinstrasse 26-27, A-6890 Lustenau, Austria (the "**Sub-Contractor**");
- (2) **DONARBON WASTE MANAGEMENT LIMITED** (No 06054499) whose registered office is at Ely Road, Waterbeach, Cambridge, CB25 9PG (the "**Employer**"); and
- (3) **EDMUND NUTTALL LIMITED** (No 00305189) whose registered office is at St James House, Knoll Road, Camberley, Surrey GU15 3XW (the "**Contractor**").

NOW THIS DEED WITNESSES in consideration of the sum of £10.00 paid by the Employer, receipt of which the Sub-Contractor acknowledges, as follows:-

1. INTERPRETATION

1.1 In this Deed:-

"Construction Contract"	means a contract dated _____ and made between (1) the Employer and (2) the Contractor for the design and construction of the Development
"Development"	means the design and construction of a Mechanical Biological Facility and associated works at the Property
"Property"	means Waterbeach Waste Management Park, Ely Road, Waterbeach, Cambridge
"Sub-Contract"	means a Sub-Contract dated _____ made between (1) the Contractor (2) the Sub-Contractor for the carrying out of the Sub-Contract Works
"Sub-Contract Works"	means the works comprising the design, construction and testing of a mechanical treatment facility, a sorting system and associated works, as more particularly described in the Sub-Contract

1.2 In interpreting this Deed:-

- 1.2.1 if any party to this Deed is a partnership then the provisions of this Deed will bind each and every such partner jointly and severally;
- 1.2.2 references to the singular shall be deemed to include the plural (and vice versa) and reference to a "**person**" shall be deemed to include any individual firm unincorporated association or body corporate;
- 1.2.3 references to the Employer shall be deemed to include their successors in title and assigns;
- 1.2.4 any reference to any enactment includes any consolidation, re-enactment, amendment or replacement of it and any subordinate legislation under it;
- 1.2.5 headings to Clauses shall be disregarded.

2. GENERAL

- 2.1 The Employer has by the Construction Contract employed the Contractor to design and build the Development.

2.2 By the Sub-Contract the Contractor has appointed the Sub-Contractor to carry out and complete the Sub-Contract Works at the Development on the terms set out therein.

2.3 The Sub-Contractor has agreed to enter into this Deed with the Employer.

3. **SKILL AND CARE**

3.1 The Sub-Contractor undertakes with and warrants to the Employer that:-

3.1.1 it has observed and performed and will observe and perform its obligations under the Sub-Contract and without prejudice to the generality of the foregoing insofar as the Sub-Contractor is required by the Sub-Contract to:-

- (a) design any part of the Development;
- (b) select materials for incorporation into the Development; or
- (c) ensure compliance of any part of the Development with a performance specification;

in so doing the Sub-Contractor has used and will continue to use all reasonable skill, care and diligence in conformity with the normal standards of the Sub-Contractor's specialist trade;

3.1.2 it has not specified or used nor will it specify for use or use any products or materials in the Development which at the time of use:-

- (a) do not conform with British and European Standards or Codes of Practice;
- (b) are generally known within the Sub-Contractor's trade to be deleterious in the particular circumstances in which they are used or specified for use to health and safety and/or the durability of the Development.

3.2 Notwithstanding any other provision of this Deed and subject to the duty of skill and care set out in Clause 3.1.1, the Sub-Contractor shall perform and assume as part of its obligations under this Deed the Contractor's obligations, liabilities and risks contained within the Construction Contract insofar as any relate to the duties and obligations of the Sub-Contractor under or in connection with this Deed (as if the same were expressly referred to herein as obligations, liabilities and risks of the Sub-Contractor mutatis mutandis). The Sub-Contractor shall ensure that no act or default or omission on its part or the part of any sub-contractor employed directly by it in relation to the performance by the Sub-Contractor of its duties and obligations under this Deed shall cause, contribute or otherwise give rise to any breach by the Contractor of any of its obligations pursuant to the Construction Contract.

4. **OBLIGATIONS PRIOR TO TERMINATION OF THE SUB-CONTRACT BY THE SUB-CONTRACTOR**

4.1 The Sub-Contractor covenants with the Employer that it will not exercise nor seek to exercise any right of termination of its employment under the Sub-Contract or to discontinue the performance of any of its obligations thereunder for any reason whatsoever (including any breach on the part of the Contractor) without giving not less than 21 days written notice of his intention to do so to the Employer and specifying the grounds for the proposed termination or discontinuance.

4.2 Any period stipulated in the Sub-Contract for the exercise of a right of termination by the Sub-Contractor of its employment under the Sub-Contract or to discontinue the performance of any of its obligations thereunder shall nevertheless be extended as may be necessary to take account of the period of notice required under Clause 4.1.

4.3 The right of the Sub-Contractor to terminate its employment under the Sub-Contract or to discontinue to discharge its obligations thereunder shall cease within the period of 21 days referred to in Clause 4.1 if the Employer shall give notice to the Sub-Contractor:-

- 4.3.1 requiring the Sub-Contractor to continue its obligations under the Sub-Contract with the Employer or its nominee; and
 - 4.3.2 acknowledging that the Employer or its nominee will assume all the obligations of the Contractor under the Sub-Contract; and
 - 4.3.3 undertaking that the Employer or its nominee will, within 30 days of service of the Employer's notice discharge all payments which may subsequently become due to the Sub-Contractor under the terms of the Sub-Contract and will pay to the Sub-Contractor any sums which have been due and payable to it under the Sub-Contract but which remain unpaid.
- 4.4 Upon service by the Employer or its nominee of a notice complying with the requirements of Clause 4.3 the Sub-Contract will continue in full force and effect as if the same had been entered into between the Sub-Contractor and the Employer to the exclusion of the Contractor.
- 4.5 Compliance by the Sub-Contractor with the provisions of this Clause 4 will not be treated as a waiver of any breach on the part of the Contractor giving rise to the right of termination nor otherwise prevent the Sub-Contractor from exercising its rights after the expiration of the notice issued pursuant to Clause 4.1 unless the rights of termination have ceased under the provisions of Clause 4.3.
- 4.6 This Clause 4 shall cease to have effect upon the prior exercise by any person of any similar rights of substitution contained in any other agreement concerning the Development and entered into between the Sub-Contractor and such person at the request of the Employer.

5. EMPLOYER'S RIGHTS IN RELATION TO THE SUB-CONTRACT

- 5.1 Notwithstanding that as between the Contractor and the Sub-Contractor the Sub-Contractor's right of termination of its employment under the Sub-Contract may not have arisen the provisions of Clause 4.4 shall also apply if the Employer gives notice to the Sub-Contractor and to the Contractor to the effect that the Employer wishes the provisions of Clause 4.4 to apply and the Employer or its nominee complies with the requirements of Clause 4.3.
- 5.2 The Sub-Contractor shall not be concerned, or required to enquire whether, and shall be bound to assume that as between the Contractor and the Employer the circumstances have arisen permitting the Employer to give notice under Clause 5.1.
- 5.3 This Clause 5 shall cease to have effect upon the prior exercise by any third person of any similar rights of substitution contained in any other agreement concerning the Development and entered into between the Sub-Contractor and such person at the request of the Employer.
- 5.4 The Sub-Contractor agrees that in the event of a termination of the Construction Contract by the Employer the Sub-Contractor will if so required by notice given in writing by the Employer enter into an agreement for the novation of the Sub-Contract to the Employer or its appointee, such agreement to be in a form and containing such terms as may be reasonably required by the Employer. The Contractor acknowledges that the Sub-Contractor shall be entitled to rely on a notice given to the Sub-Contractor by the Employer under this clause 5.4 as conclusive evidence for the purposes of this Deed of the termination of the Construction Contract by the Employer.

6. SUB-CONTRACTOR'S POSITION

By acting in accordance with Clauses 4 and 5 the Sub-Contractor shall not incur any liability to the Contractor.

7. COPYRIGHT

- 7.1 The copyright in all drawings, reports, specifications, bills of quantities, calculations and other similar documents provided by the Sub-Contractor in connection with the Development shall remain vested in the Sub-Contractor but the Sub-Contractor grants to the Employer and its nominees with full title guarantee a non-exclusive irrevocable royalty free licence to copy and use

such drawings and other documents and to reproduce the designs contained in them for any purpose related to the Development including (but without limitation) the construction, completion, maintenance, letting, promotion, advertisement, reinstatement, extension and repair of the Development. Such licence shall include a licence to grant sub-licences and to transfer the same to third parties.

- 7.2 The Sub-Contractor shall not be liable for any such use by the Employer or its nominees of any drawings and other documents for any purposes other than those for which they were originally prepared by the Sub-Contractor.
- 7.3 The Employer shall on written request and upon paying a reasonable copying charge therefor, be entitled to be supplied by the Sub-Contractor with copies of the drawings and other items referred to in Clause 7.1.

8. INDEMNITY INSURANCE

- 8.1 The Sub-Contractor shall maintain product liability insurance covering (inter alia) all its design liability hereunder upon customary and usual terms and conditions prevailing for the time being in the insurance market, and with reputable insurers lawfully carrying on such insurance business in the European Union or Switzerland, in an amount of not less than [REDACTED] in the annual aggregate for a period beginning now and ending 12 years after the date of practical completion of the Development, provided always that such insurance is available at commercially reasonable rates. The said terms and conditions shall not include any term or condition to the effect that the Sub-Contractor must discharge any liability before being entitled to recover from the insurers, or any other term or condition which might adversely affect the rights of any person to recover from the insurers pursuant to the Third Parties (Rights Against Insurers) Act 1930, or any amendment or re-enactment thereof. The Sub-Contractor shall not, without the prior approval in writing of the Employer, settle or compromise with the insurers any claim which the Sub-Contractor may have against the insurers and which relates to a claim by the Employer against the Sub-Contractor or by any act or omission lose or prejudice the Sub-Contractor's right to make or proceed with such a claim against the insurers.
- 8.2 Any increased or additional premium required by insurers by reason of the Sub-Contractor's own claims record or other acts, omissions, matters or things particular to the Sub-Contractor shall be deemed to be within commercially reasonable rates.
- 8.3 The Sub-Contractor shall immediately inform the Employer if such insurance ceases to be available at commercially reasonable rates in order that the Sub-Contractor and the Employer can discuss means of best protecting the respective positions of the Employer and the Sub-Contractor in respect of the Development in the absence of such insurance.
- 8.4 The Sub-Contractor shall fully co-operate with any measures reasonably required by the Employer, including (without limitation) completing any proposals for insurance and associated documents, maintaining such insurance at rates above commercially reasonable rates if the Employer undertakes in writing to reimburse the Sub-Contractor in respect of the net cost of such insurance to the Sub-Contractor above commercially reasonable rates, or if the Employer effects such insurance at rates at or above commercially reasonable rates, reimbursing the Employer in respect of what the net cost of such insurance to the Employer would have been at commercially reasonable rates.
- 8.5 As and when reasonably requested to do so by the Employer the Sub-Contractor shall produce for inspection documentary evidence that his professional indemnity/product liability insurance is being maintained.
- 8.6 The above obligations in respect of professional indemnity/product liability insurance shall continue notwithstanding termination of this Deed for any reason whatsoever, including (without limitation) breach by the Employer.

9. **LIABILITY PERIOD**

No action or proceedings for any breach of this Deed shall be commenced against the Sub-Contractor after the expiry of 12 years from the date of practical completion of the Development.

10. **ASSIGNMENT**

10.1 The Sub-Contractor consents to the benefit of this Deed being assigned twice only **PROVIDED ALWAYS** that the maximum number of two assignments referred to above shall not be affected by assignments by way of security and assignments to and from subsidiary or other associated companies within the same group of companies as the Employer so long as such assignee company remains within the same group of companies as the Employer.

10.2 The Sub-Contractor shall not be entitled to contend that any person to whom this Deed is assigned in accordance with Clause 10.1 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.

11. **NOTICES**

Any notice required to be given under this Deed shall be in writing and shall be deemed to be properly given if given in compliance with section 196 of the Law of Property Act 1925 (as amended by the Recorded Delivery Service Act 1962).

12. **EXTRANEOUS RIGHTS**

12.1 This Deed shall not negate or diminish any duty or liability otherwise owed by the Sub-Contractor to the Employer.

12.2 No approval or inspection of the Development or of any designs or specifications and no testing of any work or materials by or on behalf of the Employer and no omission to inspect or test shall negate or diminish any duty or liability of the Sub-Contractor arising under this Deed.

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

12.4 This Deed does not create any right enforceable by any person not a party to it (whether pursuant to the Contracts (Rights of Third Parties) Act 1999 or otherwise) except that a person who is the successor to or the permitted assignee of the rights of the Employer is deemed to be a party to this Deed.

12.5 The Contractor and the Sub-Contractor undertake to the Employer not to vary or depart from the terms and conditions of the Sub-Contract without the prior written consent of the Employer (such consent not to be unreasonably withheld or delayed).

13. **GOVERNING LAW**

This Deed is subject in all respects to English law and the English Courts shall have jurisdiction with regard to all matters arising under or in connection with it.

14. **CONTRACTOR'S CONSENT**

The Contractor has executed this Deed to signify consent to its terms.

EXECUTED AS A DEED by the parties on the date which first appears in this Deed.

EXECUTED (but not delivered
until the date hereof)
AS A DEED by
KELAG UMWELTTECHNIK GMBH & CO KG
acting by:-

)
)
)
)
)

Director

Director/Secretary

EXECUTED (but not delivered
until the date hereof)
AS A DEED by
DONARBON WASTE MANAGEMENT LIMITED
acting by:-

)
)
)
)
)

Director

Director/Secretary

EXECUTED (but not delivered
until the date hereof)
AS A DEED by
EDMUND NUTTALL LIMITED
acting by:-

)
)
)
)
)

Director

Director/Secretary

DATED _____ **200**

Draft (3): 12.12.07
SC/629403.07000/DML

(1) [_____]

(2) [_____]

(3) [_____]

SUB-CONTRACTOR'S FUND WARRANTY
relating to
[the design and construction of a Mechanical Biological
Facility and associated works at Waterbeach, Cambridge
]



Pinsent Masons

THIS DEED is made on

BETWEEN:-

- (1) [] (No []) of/whose registered office is at [] (the "**Sub-Contractor**"); [and]
- (2) [] (No []) of/whose registered office is at [] (the "**Beneficiary**"); and
- (3) **EDMUND NUTTALL LIMITED** (No 00305189) whose registered office is at St James House, Knoll Road, Camberley, Surrey GU15 3XW (the "**Contractor**").

NOW THIS DEED WITNESSES in consideration of the sum of £10.00 paid by the Beneficiary, receipt of which the Sub-Contractor acknowledges, as follows:-

1. **INTERPRETATION**

1.1 In this Deed:-

"Construction Contract"	means a contract dated [] and made between (1) the Employer and (2) the Contractor for the design and construction of the Development
["Contractor"]	means EDMUND NUTTALL LIMITED (No 00305189) whose registered office is at St James House, Knoll Road, Camberley, Surrey GU15 3XW]
"Development"	means the design and construction of a Mechanical Biological Facility and associated works at the Property
"Employer"	means [Donarbon Waste Management Limited]
"Property"	means Waterbeach Waste Management Park, Ely Road, Waterbeach, Cambridge
"Sub-Contract"	means a Sub-Contract dated [] made between (1) the Contractor (2) the Sub-Contractor for the carrying out of the Sub-Contract Works
"Sub-Contract Works"	means the works comprising [] more particularly described in the Sub-Contract

1.2 In interpreting this Deed:-

- 1.2.1 if any party to this Deed is a partnership then the provisions of this Deed will bind each and every such partner jointly and severally;
- 1.2.2 references to the singular shall be deemed to include the plural (and vice versa) and reference to a "**person**" shall be deemed to include any individual firm unincorporated association or body corporate;
- 1.2.3 references to the Beneficiary shall be deemed to include their successors in title and assigns;
- 1.2.4 any reference to any enactment includes any consolidation, re-enactment, amendment or replacement of it and any subordinate legislation under it;
- 1.2.5 headings to Clauses shall be disregarded.

2. **GENERAL**

- 2.1 The Employer has by the Construction Contract employed the Contractor to design and build the Development.
- 2.2 By the Sub-Contract the Contractor has appointed the Sub-Contractor to carry out and complete the Sub-Contract Works at the Development on the terms set out therein.
- 2.3 The Employer has entered into [a private finance initiative agreement] [an agreement for lease] [a funding agreement] [a sale agreement] with the Beneficiary relating to the Property.
- 2.4 The Sub-Contractor has agreed to enter into this Deed with the Beneficiary.

3. **SKILL AND CARE**

- 3.1 The Sub-Contractor undertakes with and warrants to the Beneficiary that:-

3.1.1 it has observed and performed and will observe and perform its obligations under the Sub-Contract and without prejudice to the generality of the foregoing insofar as the Sub-Contractor is required by the Sub-Contract to:-

- (a) design any part of the Development;
- (b) select materials for incorporation into the Development; or
- (c) ensure compliance of any part of the Development with a performance specification;

in so doing the Sub-Contractor has used and will continue to use all reasonable skill, care and diligence in conformity with the normal standards of the Sub-Contractor's specialist trade;

3.1.2 it has not specified or used nor will it specify for use or use any products or materials in the Development which at the time of use:-

- (a) do not conform with British and European Standards or Codes of Practice;
- (b) are generally known within the Sub-Contractor's trade to be deleterious in the particular circumstances in which they are used or specified for use to health and safety and/or the durability of the Development.

- 3.2 Notwithstanding any other provision of this Deed and subject to the duty of skill and care set out in Clause 3.1.1, the Sub-Contractor shall perform and assume as part of its obligations under this Deed the Contractor's obligations, liabilities and risks contained within the Construction Contract insofar as any relate to the duties and obligations of the Sub-Contractor under or in connection with this Deed (as if the same were expressly referred to herein as obligations, liabilities and risks of the Sub-Contractor mutatis mutandis). The Sub-Contractor shall ensure that no act or default or omission on its part or the part of any sub-contractor employed directly by it in relation to the performance by the Sub-Contractor of its duties and obligations under this Deed shall cause, contribute or otherwise give rise to any breach by the Contractor of any of its obligations pursuant to the Construction Contract.

4. **[OBLIGATIONS PRIOR TO TERMINATION OF THE SUB-CONTRACT BY THE SUB-CONTRACTOR]**

- 4.1 The Sub-Contractor covenants with the Beneficiary that it will not exercise nor seek to exercise any right of termination of its employment under the Sub-Contract or to discontinue the performance of any of its obligations thereunder for any reason whatsoever (including any breach on the part of the Contractor) without giving not less than 21 days written notice of his intention to do so to the Beneficiary and specifying the grounds for the proposed termination or discontinuance.

- 4.2 Any period stipulated in the Sub-Contract for the exercise of a right of termination by the Sub-Contractor of its employment under the Sub-Contract or to discontinue the performance of any of its obligations thereunder shall nevertheless be extended as may be necessary to take account of the period of notice required under Clause 4.1.
- 4.3 The right of the Sub-Contractor to terminate its employment under the Sub-Contract or to discontinue to discharge its obligations thereunder shall cease within the period of 21 days referred to in Clause 4.1 if the Beneficiary shall give notice to the Contractor:-
- 4.3.1 requiring the Sub-Contractor to continue its obligations under the Sub-Contract with the Beneficiary or its nominee; and
 - 4.3.2 acknowledging that the Beneficiary or its nominee will assume all the obligations of the Contractor under the Sub-Contract; and
 - 4.3.3 undertaking that the Beneficiary or its nominee will, within 30 days of service of the Beneficiary's notice discharge all payments which may subsequently become due to the Sub-Contractor under the terms of the Sub-Contract and will pay to the Sub-Contractor any sums which have been due and payable to it under the Sub-Contract but which remain unpaid.
- 4.4 Upon service by the Beneficiary or its nominee of a notice complying with the requirements of Clause 4.3 the Sub-Contract will continue in full force and effect as if the same had been entered into between the Sub-Contractor and the Beneficiary to the exclusion of the Contractor.
- 4.5 Compliance by the Sub-Contractor with the provisions of this Clause 4 will not be treated as a waiver of any breach on the part of the Contractor giving rise to the right of termination nor otherwise prevent the Sub-Contractor from exercising its rights after the expiration of the notice issued pursuant to Clause 4.1 unless the rights of termination have ceased under the provisions of Clause 4.3.
- 4.6 This Clause 4 shall cease to have effect upon the prior exercise by any third person of any similar rights of substitution contained in any other agreement concerning the Development and entered into between the Sub-Contractor and such person at the request of the Employer.

5. BENEFICIARY'S RIGHTS IN RELATION TO THE SUB-CONTRACT

- 5.1 Notwithstanding that as between the Contractor and the Sub-Contractor the Sub-Contractor's right of termination of its employment under the Sub-Contract may not have arisen the provisions of Clause 4.4 shall also apply if the Beneficiary gives notice to the Sub-Contractor and to the Contractor to the effect that the Beneficiary wishes the provisions of Clause 4.4 to apply and the Beneficiary or its nominee complies with the requirements of Clause 4.3.
- 5.2 The Sub-Contractor shall not be concerned, or required to enquire whether, and shall be bound to assume that as between the Contractor and the Beneficiary the circumstances have arisen permitting the Beneficiary to give notice under Clause 5.1.
- 5.3 This Clause 5 shall cease to have effect upon the prior exercise by any third person of any similar rights of substitution contained in any other agreement concerning the Development and entered into between the Sub-Contractor and such person at the request of the Employer.

6. SUB-CONTRACTOR'S POSITION

By acting in accordance with Clauses 4 and 5 the Sub-Contractor shall not incur any liability to the Contractor.]

7. COPYRIGHT

- 7.1 The copyright in all drawings, reports, specifications, bills of quantities, calculations and other similar documents provided by the Sub-Contractor in connection with the Development shall remain vested in the Sub-Contractor but the Sub-Contractor grants to the Beneficiary and its

nominees with full title guarantee a non-exclusive irrevocable royalty free licence to copy and use such drawings and other documents and to reproduce the designs contained in them for any purpose related to the Development including (but without limitation) the construction, completion, maintenance, letting, promotion, advertisement, reinstatement, extension and repair of the Development provided that the licence to use the drawings and documents for an extension of the Development shall not include the right to reproduce the designs contained in such documents and drawings for any extension of the Development. Such licence shall include a licence to grant sub-licences and to transfer the same to third parties.

- 7.2 The Sub-Contractor shall not be liable for any such use by the Beneficiary or its nominees of any drawings and other documents for any purposes other than those for which they were originally prepared by the Sub-Contractor.
- 7.3 The Beneficiary shall on written request and upon paying a reasonable copying charge therefor, be entitled to be supplied by the Sub-Contractor with copies of the drawings and other items referred to in Clause 7.1.

8. INDEMNITY INSURANCE

- 8.1 The Sub-Contractor shall maintain professional indemnity/product liability insurance covering (inter alia) all its design liability hereunder upon customary and usual terms and conditions prevailing for the time being in the insurance market, and with reputable insurers lawfully carrying on such insurance business in the United Kingdom, in an amount of not less than [REDACTED] for any one occurrence or series of occurrences arising out of any one event for a period beginning now and ending 12 years after the date of practical completion of the Development, provided always that such insurance is available at commercially reasonable rates. The said terms and conditions shall not include any term or condition to the effect that the Sub-Contractor must discharge any liability before being entitled to recover from the insurers, or any other term or condition which might adversely affect the rights of any person to recover from the insurers pursuant to the Third Parties (Rights Against Insurers) Act 1930, or any amendment or re-enactment thereof. The Sub-Contractor shall not, without the prior approval in writing of the Beneficiary, settle or compromise with the insurers any claim which the Sub-Contractor may have against the insurers and which relates to a claim by the Beneficiary against the Sub-Contractor or by any act or omission lose or prejudice the Sub-Contractor's right to make or proceed with such a claim against the insurers.
- 8.2 Any increased or additional premium required by insurers by reason of the Sub-Contractor's own claims record or other acts, omissions, matters or things particular to the Sub-Contractor shall be deemed to be within commercially reasonable rates.
- 8.3 The Sub-Contractor shall immediately inform the Beneficiary if such insurance ceases to be available at commercially reasonable rates in order that the Sub-Contractor and the Beneficiary can discuss means of best protecting the respective positions of the Beneficiary and the Sub-Contractor in respect of the Development in the absence of such insurance.
- 8.4 The Sub-Contractor shall fully co-operate with any measures reasonably required by the Beneficiary, including (without limitation) completing any proposals for insurance and associated documents, maintaining such insurance at rates above commercially reasonable rates if the Beneficiary undertakes in writing to reimburse the Sub-Contractor in respect of the net cost of such insurance to the Sub-Contractor above commercially reasonable rates, or if the Beneficiary effects such insurance at rates at or above commercially reasonable rates, reimbursing the Beneficiary in respect of what the net cost of such insurance to the Beneficiary would have been at commercially reasonable rates.
- 8.5 As and when reasonably requested to do so by the Beneficiary the Sub-Contractor shall produce for inspection documentary evidence that his professional indemnity/product liability insurance is being maintained.
- 8.6 The above obligations in respect of professional indemnity/product liability insurance shall continue notwithstanding termination of this Deed for any reason whatsoever, including (without limitation) breach by the Beneficiary.

9. **LIABILITY PERIOD**

No action or proceedings for any breach of this Deed shall be commenced against the Sub-Contractor after the expiry of 12 years from the date of practical completion of the Development.

10. **ASSIGNMENT**

10.1 The Sub-Contractor consents to the benefit of this Deed being assigned twice only **PROVIDED ALWAYS** that the maximum number of two assignments referred to above shall not be affected by assignments by way of security and assignments to and from subsidiary or other associated companies within the same group of companies as the Beneficiary so long as such assignee company remains within the same group of companies as the Beneficiary.

10.2 The Sub-Contractor shall not be entitled to contend that any person to whom this Deed is assigned in accordance with Clause 10.1 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.

11. **NOTICES**

Any notice required to be given under this Deed shall be in writing and shall be deemed to be properly given if given in compliance with section 196 of the Law of Property Act 1925 (as amended by the Recorded Delivery Service Act 1962).

12. **EXTRANEOUS RIGHTS**

12.1 This Deed shall not negate or diminish any duty or liability otherwise owed by the Sub-Contractor to the Beneficiary.

12.2 No approval or inspection of the Development or of any designs or specifications and no testing of any work or materials by or on behalf of the Beneficiary and no omission to inspect or test shall negate or diminish any duty or liability of the Sub-Contractor arising under this Deed.

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

12.4 This Deed does not create any right enforceable by any person not a party to it (whether pursuant to the Contracts (Rights of Third Parties) Act 1999 or otherwise) except that a person who is the successor to or the permitted assignee of the rights of the Beneficiary is deemed to be a party to this Deed.

13. **[RESTRICTION OF LIABILITY]**

13.1 The Sub-Contractor shall have no greater liability under this Deed than it would have had the Beneficiary been named in the Sub-Contract as the joint employer with the Contractor (ignoring set-off and counter-claim) and the Sub-Contractor shall be entitled in any action or proceedings by the Beneficiary to rely on any limitation in the Sub-Contract and to raise the equivalent rights in defence of liability (excluding set-off and counterclaim) as it would have had if the Employer had been named as a joint employer under the Sub-Contract.] [DN: To be inserted in Purchaser/Tenant warranties only]

14. **GOVERNING LAW**

This Deed is subject in all respects to English law and the English Courts shall have jurisdiction with regard to all matters arising under or in connection with it.

15. **[CONTRACTOR'S CONSENT**

The Contractor has executed this Deed to signify consent to its terms.]

EXECUTED AS A DEED by the parties on the date which first appears in this Deed.

EXECUTED (but not delivered
until the date hereof)
AS A DEED by
[]
acting by:-

)
)
)
)
)

Director

Director/Secretary

EXECUTED (but not delivered
until the date hereof)
AS A DEED by
[]
acting by:-

)
)
)
)
)

Director

Director/Secretary

SIGNED (but not delivered
until the date hereof)
AS A DEED by
[]
in the presence of:-

)
)
)
)
)

Signature of Witness:

Name of Witness:

Address:

SIGNED (but not delivered)
until the date hereof))
AS A DEED by)
[])
in the presence of:-)

Signature of Witness:

Name of Witness:

Address:

SCHEDULE 7
PERFORMANCE BOND

DATED 2008

(1) HCC INTERNATIONAL INSURANCE COMPANY PLC

(2) EDMUND NUTTALL LIMITED

(3) DONARBON WASTE MANAGEMENT LIMITED

PERFORMANCE BOND
relating to
the provision of waste management facilities

THIS DEED is made on

2008

BETWEEN:-

- (1) **HCC INTERNATIONAL INSURANCE COMPANY PLC** (No 01575839) whose registered office is at Walsingham House, 35 Seething Lane, London, EC3N 4AH (the "**Surety**");
- (2) **EDMUND NUTTALL LIMITED** (Number 00305189) whose registered office is at St James House, Knoll Road, Camberley, Surrey GU15 3XW (the "**Contractor**"); and
- (3) **DONARBON WASTE MANAGEMENT LIMITED** (No 06054499) whose registered office is at Ely Road, Waterbeach, Cambridge CB25 9PG (the "**Employer**").

WHEREAS:-

- (A) By an agreement in writing (the "**Building Contract**") dated _____ between (1) the Employer and (2) the Contractor, the Contractor has undertaken the design, construction and completion of the building works therein mentioned (the "**Works**") at Waterbeach, Cambridge in conformity with the provisions of the Building Contract.
- (B) The Surety and the Contractor have agreed to bind themselves jointly and severally to the Employer in the sum of _____ (the "**Maximum Amount**") on the terms of this Deed.

IT IS AGREED as follows:-

1. INTERPRETATION

- 1.1 In this Deed (a) "**person**" includes any firm and any entity having legal capacity and (b) the "**Required Evidence**" means (i) in the case of an Award or Decision pursuant to clause 3, a copy of such Award or Decision certified by a solicitor of the Supreme Court of England and Wales as being a true copy of the original and (ii) in all cases, a copy of the signatures of those authorised to represent the Employers as evidenced by a copy of the Employer's bank mandates provided by the Employer's bankers.
- 1.2 The definitions given in the recitals to this Deed apply to this Deed.
- 1.3 Clause headings do not form part of this Deed.

2. PROMISE TO PAY

- 2.1 In consideration of the Employer accepting the Surety's obligations herein contained in discharge of the Contractor's obligation to procure a performance bond, the Surety hereby unconditionally and irrevocably guarantees to the Employer, subject to the provisions of this Deed, as a continuing guarantee, the due, proper and punctual performance by the Contractor of the obligations on its part contained in the Building Contract (the "**Guaranteed Obligations**") and hereby undertakes that, in the event of breach by the Contractor of any of the Guaranteed Obligations ("**Contractor Default**"), which shall, for the purposes of this Deed, include insolvency of the Contractor in the terms of any one or more of the insolvency events specified in clause 40.1.8 (Termination on Construction Contractor Default) of the Building Contract ("**Contractor Insolvency**"), the Surety will where such Contractor Default relates to a failure on the part of the Contractor to pay any amount, due and payable from the Contractor to the Employer in accordance with the terms of the Building Contract, pay such amount, up to the Maximum Amount, to the Employer or its assigns, and/or, where such Contractor Default relates to a breach by the Contractor of any other of the Guaranteed Obligations, pay any sum or sums payable as a consequence thereof by the Contractor to the Employer or its assigns as established and ascertained pursuant to and in accordance with or by reference to the provisions of the Building Contract:
 - 2.1.1 without the Surety being entitled or obliged to make any enquiry of the Employer (save for the Required Evidence or in the circumstances set out in Clause (4) below, where appropriate);

- 2.1.2 without the need for the Employer to take any legal action or obtain the consent of the Contractor (other than that required to be evidenced under Clause (3) or Clause (4) below, as appropriate) or obtain the consent of the Contractor;
- 2.1.3 notwithstanding any objection by the Contractor, Surety or any other third party;
- 2.1.4 without proof or conditions (other than those required to be evidenced under Clause (3), the Required Evidence, or Clause (4) below, as appropriate);
- 2.1.5 without any right of set-off, deduction or counterclaim; and
- 2.1.6 within the timescales set out in Clauses (3) and (4) below.

3. **NON-INSOLVENCY CLAIMS**

Save in the event of Contractor Insolvency, the Employer's written demand shall contain a statement that Contractor Default has occurred and that:

- (a) an adjudicator's decision ("Decision") or arbitrator's award ("Award") has been made in respect of the Contractor Default, in favour of the Employer under the adjudication or arbitration procedure specified in the Building Contract; or
- (b) a court order or judgment ("Judgment") has been made in respect of the Contractor Default, in favour of the Employer,

and shall have appended to it a copy of the corresponding Decision, Award or Judgment; following which, subject to Clause (7) and Clause (10) below, the Bondsman shall pay, within five business days, the sum specified in such demand.

4. **INSOLVENCY CLAIMS**

Save where there is an existing Decision, Award or Judgment (in which case, the provisions of Clause (3) above shall apply in respect of any demand made under this Bond in connection with any such Decision, Award or Judgment), in the event of Contractor Insolvency, the provisions of Clause (3) of this Bond shall not apply and the Employer shall make demand under this Bond under the terms of this Clause (4).

- (a) In the event of Contractor Insolvency, the Employer shall notify the Surety of the amount of costs, losses, expenses, liabilities and/or damages it has suffered or incurred as a consequence of Contractor Default, payable by the Contractor to the Employer under the terms of the Contract and payment of which it is seeking under this Bond and, on or after making any demand for payment under this Clause (4), provide to the Surety such information and copies of such documentation as might be reasonably required in order to properly assess that demand and the amount payable under this Bond in respect thereof.
- (b) Within twenty business days of receipt of a demand for payment under this Clause (4) and such information and copy documentation as the Employer is willing to provide in support thereof, the Surety and the Employer shall meet to agree the amount payable by the Surety to the Employer under this Bond in respect thereof, and, in the event that the Employer and the Surety reach such agreement, the Surety shall pay to the Employer, within ten Business Days of such agreement, the sum so agreed. If the Employer and the Surety cannot agree the amount payable by the Surety to the Employer under this Bond in respect of such demand, either the Employer or the Surety may refer the matter for adjudication in accordance with Clause (4)(c) below.
- (c) In the event of Contractor Insolvency, either the Employer or the Surety shall be entitled to refer any dispute regarding a claim made by the Employer pursuant to this Clause (4) to adjudication in accordance with the adjudication procedure set out in Schedule 1 to this Bond (the "Adjudication Procedure").

- (d) In respect to any demand made by the Employer under this Clause (4) and any dispute referred to adjudication under this Bond, the Surety may raise any matter by way of defence, abatement, deduction or counterclaim which the Contractor would be entitled to raise under the Building Contract in respect of the Employer's claim under this Bond.
- (e) Without prejudice to the right of either party to refer such decision for final determination by the courts, the decision of an Adjudicator under the Adjudication Procedure shall constitute conclusive proof (and shall be admissible as such) of the Surety's obligation to pay the amount or amounts set out in that decision and, subject to Clause (7) and Clause (10) below, the Surety shall pay such amount or amounts within five Business Days of that decision or at such other time as the Adjudicator may determine (whichever shall be the later).

5. AMENDMENTS TO BUILDING CONTRACT

The Building Contract may be modified, amended or supplemented in any manner whatsoever without the consent of the Surety, and no such modification, amendment or supplement shall release or impair the liability of the Surety under this Deed, which shall extend to the liabilities of the Contractor under the Building Contract as so modified, amended or supplemented. No invalidity in the Building Contract or its avoidance or termination shall affect or impair the liability of the Surety under this Deed. No waiver or concession or allowance of time or compromise or forbearance given to or made with the Contractor shall release or affect or impair the liability of the Surety under this Deed and the terms of this Deed shall apply to the terms of such compromise as they apply to the Building Contract.

6. PRIORITY OF CLAIMS AGAINST THE CONTRACTOR

- 6.1 Until such time as the Employer has recovered all amounts due to it under or in connection with the Building Contract, the Surety shall not without the prior written consent of the Employer, in respect of any payment made or liability under this Deed, claim, rank or vote as a creditor in the liquidation of the Contractor in competition with the Employer, or enforce any security over the assets of the Contractor in respect of any such payment or liability in competition with the Employer, but this Clause 6 shall not limit or restrict the exercise or enforcement by the Surety of its rights against any other persons.
- 6.2 The Surety shall hold in trust any sums recovered by it contrary to the provisions of Clause 6.1:-
 - 6.2.1 to pay to the Employer in full the unrecovered balance of any damages or other sums due from the Contractor to the Employer under or in connection with the Building Contract, to the extent set out in Clause 6.3; and
 - 6.2.2 subject thereto, for the benefit of the Surety.
- 6.3 The Employer shall be entitled to enforce the foregoing provisions of this Clause 6 only so far as required to keep itself or to put itself in the position it would occupy (so far as concerns the benefit of this Deed) if the Surety had no rights of recourse against the Contractor or its assets in respect of any payment made or liability arising under this Deed, but no further; and any consent required of the Employer under Clause 6.1 above shall not be refused or delayed unreasonably.

7. EXTENT OF LIABILITY

- 7.1 The Employer shall be entitled to recover no more under this Deed in respect of any matter than the Employer would be entitled to recover from the Contractor in respect of that matter, net of any set-off, but in any event the Employer shall not be entitled to recover under this Deed any more than the Maximum Amount.
- 7.2 The Surety's obligations and liability under this Deed will remain in full force and effect and are not to be discharged, released, reduced or affected in any way by reason of any of the following:
 - 7.2.1 any provision of the Building Contract being or becoming illegal, invalid, void, voidable or unenforceable for any reason whatsoever, save where the Employer has sought to

impose obligations on the Building Contractor, the enforcement of performance of which would be unlawful (in relation to which the Surety shall have no liability under this Deed);

- 7.2.2 any indulgence, forbearance or waiver of any right of action or remedy of the Employer against the Contractor or negligence by the Employer in enforcing any such right of action or remedy;
- 7.2.3 any failure of supervision or detection or prevention of any default of the Contractor under or in connection with the Building Contract;
- 7.2.4 any additional or advance payment to the Contractor under or in connection with the Building Contract;
- 7.2.5 the suspension or termination of the Building Contract or of the employment of the Contractor under the Building Contract for any reason whatsoever;
- 7.2.6 any compromise of any dispute with the Contractor arising out of or in connection with the Contract;
- 7.2.7 the insolvency, bankruptcy, winding up, dissolution, administration, incapacity, amalgamation, reconstruction, re-organisation or any analogous proceeding relating to the Contractor or any change in the status, function, control or ownership of the Contractor; and
- 7.2.8 any other fact, circumstance, act, event, omission or provision of statute or law or otherwise which but for this clause might operate to discharge, impair or otherwise affect any of the obligations of the Surety under this Deed or any of the rights, powers or remedies conferred on the Employer by this Deed or by law.

7.3 The Employer shall not be obliged to pursue any means of recourse against the Contractor before being entitled to enforce this Deed against the Surety and the Employer shall be at liberty to compromise, release, waive or neglect any security as it sees fit, without impairment of its rights under this Deed.

7.4 Any money judgment or award or adjudicators decision against the Contractor in favour of the Employer under the Building Contract shall be conclusive evidence for the purposes of this Deed as to any liability of the Contractor to which such judgment or award relates, but on condition that if the Employer commences any adjudication or legal proceedings or arbitration proceedings against the Contractor in connection with the Building Contract, it shall so notify the Surety within 28 days after their commencement.

8. EXPIRY

This Deed shall cease to have effect 90 days after RT Completion (as defined in the Building Contract) save in connection with any demand notified to the Surety in writing prior to the expiry of the said period of 90 days.

9. ASSIGNMENT

9.1 The Employer shall be entitled to assign or charge the benefit of this Deed without the consent of the Surety or of the Contractor.

9.2 Neither the Contractor nor the Surety shall be entitled to contend that any person to whom this Deed is assigned is precluded from recovering under this Deed any loss incurred by such assignee resulting from any breach of this Deed by reason that such person is an assignee and not a named promisee hereunder.

10. SERVICE OF NOTICES

Any notice to be served under this Deed must be in writing and must be served by hand or by registered post or recorded delivery, and in the case of a corporation must be served at its

registered office for the time being. In any other case notice may be served at any address for the time being of the person to be served. Service shall take effect, if given by hand, on the date of delivery. If given by post, it shall take effect two days after posting, excluding Saturdays, Sundays and statutory holidays.

11. **GOVERNING LAW**

The law of this Deed is English law and the English Courts shall have jurisdiction with regard to all matters arising from it.

EXECUTED AS A DEED by the parties on the date which first appears in this Deed.

SCHEDULE 1

The Adjudication Procedure ("These Rules")

COMMENCEMENT

- 1.1 These Rules shall apply to the exclusion of any other procedure upon either the Employer or the Surety (each a "Party" and together the "Parties") serving upon the other written notice of its intention to refer any inability to agree the amount payable in respect of a demand submitted under Clause (4) of this Bond to this adjudication procedure (a "Notice of Adjudication"); any such Notice of Adjudication to be served in accordance with the provisions of Clause (4) and to identify in sufficiently full terms the inability to agree or objection ("Dispute") which is to be referred to adjudication under These Rules ("Adjudication").
- 1.2 Within seven days from the date of referral to him of a Notice of Adjudication, and provided that he is willing and able to act, the adjudicator identified and agreed upon under Rule 2, or the adjudicator nominated under Rule 3, or the replacement adjudicator nominated under Rule 4 ("Adjudicator") shall give written notice of his acceptance of appointment to each of the Parties.
- 1.3 The date of the referral of the Dispute shall be the date that the Adjudicator so confirms his acceptance.

Either Party may serve a Notice of Adjudication at any time and either Party may serve more than one Notice of Adjudication but no Notice of Adjudication shall refer more than one Dispute to Adjudication although the same Adjudicator may act as the Adjudicator of more than one Dispute if so identified and agreed, or nominated, and willing to act.

APPOINTMENT

2. Subject to the following provisions of this Rule 2, where the Parties agree within three days of service of the Notice of Adjudication (or have agreed in advance) upon the identity of the Adjudicator then, subject to Rule 1.2, above, that person shall be the Adjudicator.
3. Where the Parties have not so agreed upon the identity of the Adjudicator, or where such person has not so confirmed his willingness to act, then the Party who is seeking the referral of the Dispute to Adjudication may apply to the Chairman, Vice-Chairman, President or Vice-President (as appropriate or available) of the Royal Institute of Chartered Surveyors (the "Nominator") to nominate the Adjudicator; application to the Nominator will be made in writing and accompanied by a copy of this Bond, or other evidence of the agreement of the Parties that These Rules should apply, and a copy of the Notice of Adjudication, and requiring the Nominator to secure the appointment of the Adjudicator and the referral of the Dispute to the Adjudicator within seven days from the date of application being made upon him.
4. The Nominator may replace the Adjudicator with another nominated person as Adjudicator if and when it appears to him necessary to do so but only after giving written notice to the Parties of his intention to make such replacement. The Nominator may only exercise such power if and when either Party shall satisfy him that the Adjudicator (whether agreed or nominated) is not acting impartially, or that the Adjudicator is physically or mentally incapable of conducting the Adjudication, or that the Adjudicator is failing to proceed with the Adjudication or make his decision with necessary despatch. In the event that the Adjudicator is replaced by a Nominator in accordance with this Rule 4, the Parties agree that all timescales shall be re-calculated from the date that his replacement confirms acceptance of his appointment to each of the Parties.

SCOPE OF THE ADJUDICATION

5. The scope of an Adjudication shall be the matters identified in the relevant Notice of Adjudication, together with any further matters that both Parties agree in writing should be within the scope of the Adjudication.
6. The Adjudicator may rule upon his own substantive jurisdiction and as to the scope of the Adjudication but should the Adjudicator at any time decide that the Dispute upon which he has

been asked to adjudicate is, in fact, the same or substantially the same (in all material respects) as a Dispute which has already been decided upon by way of referral to Adjudication under this Bond and in accordance with These Rules, then he shall immediately bring the Adjudication in which he is acting to an end and that earlier decision shall stand.

THE PURPOSE OF THE ADJUDICATION AND THE ROLE OF THE ADJUDICATOR

7. The underlying purpose of an Adjudication shall be to resolve the relevant Dispute, or such elements of it that the Adjudicator rules are within the scope of the Adjudication, as rapidly and economically as is reasonably possible.
8. Subject to the other terms of this Band, a decision of the Adjudicator shall be binding as to the amount of any sum payable under this Bond until the relevant Dispute is finally determined by legal proceedings, by arbitration (where the Parties so elect) or by arrangement between the Parties.
9. The Adjudicator shall have the like power to open up and review any certificates, or other decisions, relevant to the Dispute, that have been or are to be issued or made pursuant to the Building Contract or this Bond as would a court or arbiter given such powers and the power to award sums equivalent to damages payable under the Building Contract.
10. The Adjudicator shall act fairly and impartially, but shall not be obliged to act as though he were an arbiter.

CONDUCT OF THE ADJUDICATION

11. The Adjudicator shall establish the procedure and timetable for the Adjudication.
12. Without prejudice to the generality of Rule 11, the Adjudicator may if he thinks fit:
 - 12.1 require the delivery of written statements relating to matters in issue in the Dispute;
 - 12.2 require either Party to produce a bundle of key documents, whether helpful or otherwise to that Party's case, and to draw such inference as may seem proper from such bundle that may become apparent;
 - 12.3 require either Party to deliver to him and/or the other Party copies of any documents other than documents that would be privileged from production to a court;
 - 12.4 limit the length of any written or oral submission;
 - 12.5 require the attendance before him for questioning of either Party or employee or agent of either Party;
 - 12.6 make site visits;
 - 12.7 make use of his own specialist knowledge;
 - 12.8 obtain advice from specialist consultants, provided that at least one of the Parties so requests or consents;
 - 12.9 review and revise any of his own previous directions; and
 - 12.10 conduct the Adjudication in an inquisitorial manner and take the initiative in ascertaining the facts and the law;
 - 12.11 require any Party to pay or make contribution to the legal and other costs of the other Party arising in the Adjudication.
13. The Adjudicator may reach his decision with or without the holding of an oral hearing.

14. The Adjudicator shall exercise his powers in accordance with These Rules, shall act fairly and impartially and shall give each Party a reasonable opportunity to put its case and to deal with that of the other Party.
15. In reaching any decision as to the amount of any sum payable under this Bond and the liability of the Surety to pay it the Adjudicator shall have regard to the documentation required by the Surety and the documentation provided by the Employer pursuant to Clause (4) of this Bond (or lack of it).
16. The Adjudicator may not:
 - 16.1 require any advance payment of or security for his fees;
 - 16.2 receive any written submissions from one Party that are not also made available to the other
 - 16.3 refuse any Party the right at any hearing or meeting to be represented by a representative of that Party's choosing who is present;
 - 16.4 act or continue to act in the face of a conflict of interest.

THE ADJUDICATOR'S DECISION, FEES AND EXPENSES

17. The Adjudicator shall reach a decision within 28 days of the date of the referral of the Dispute (as defined in Rule 1.3, above) or such longer period as is agreed by the Parties after the Dispute has been referred to him. The Adjudicator shall be entitled to extend the said period of 28 days by up to 14 days with the consent of the Party by whom the Dispute was referred. As soon as possible after he has reached a decision, the Adjudicator shall deliver a copy of the decision to each of the Parties.
18. The Parties shall be jointly and severally liable for the Adjudicator's reasonable fees and expenses including those reasonable fees and expenses of any specialist consultant appointed by the Adjudicator under These Rules ("Costs of Adjudication"), and the Adjudicator shall have the discretion to make directions regarding the apportionment of the Costs of Adjudication. If no such directions are made, the Parties shall bear the Costs of Adjudication in equal shares.
19. The Adjudicator may in any decision direct the payment of such compound or simple interest as may be permitted by this Bond.
20. All decisions shall be in writing and, within seven days of the request of either Party, such request to be made not later than seven days from the date of delivery of his decision to both Parties, the Adjudicator shall provide detail of his reasons for that decision.

IMMUNITY, CONFIDENTIALITY AND NON-COMPELLABILITY

21. Neither the Nominator, nor the Adjudicator nor any employee or agent of any of them shall be liable for anything done or not done in the discharge or purported discharge of their functions, whether in negligence or otherwise, unless the act or omission is in bad faith.
22. The Adjudication and all matters arising in the course thereof are and will be kept confidential by the Parties except insofar as necessary to implement or enforce any decision of the Adjudicator or as may be required for the purpose of any subsequent proceedings under this Bond and save insofar as may be required by law.
23. In the event that either Party seeks to challenge or review any decision of the Adjudicator in any subsequent legal proceedings, the Adjudicator shall not be joined as a party to, nor shall be cited or otherwise required to give evidence or provide his notes in, such legal proceedings except where required by law.
24. All information, data or documentation disclosed or delivered by a Party to the Adjudicator in consequence of or in connection with his appointment hereunder shall be treated as confidential by the Adjudicator and each party to the Adjudication (save as otherwise agreed between the Parties).

EXECUTED (but not delivered
until the date hereof)
AS A DEED by
**HCC INTERNATIONAL INSURANCE
COMPANY PLC**
acting by:-

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)
)
)
)

Director

Director/Secretary

EXECUTED (but not delivered
until the date hereof)
AS A DEED by
EDMUND NUTTALL LIMITED
acting by:-

)
)
)
)
)

Director

Director/Secretary

EXECUTED (but not delivered
until the date hereof)
AS A DEED by
DONARBON WASTE MANAGEMENT LIMITED
acting by:-

)
)
)
)
)

Director

Director/Secretary

SCHEDULE 8

NOT USED

SCHEDULE 9
RETENTION BOND

DATED 2008

(1) NATIONAL WESTMINSTER BANK PLC

(2) DONARBON WASTE MANAGEMENT LIMITED

RETENTION BOND

**relating to the contract for the design,
construction and testing of a Main Treatment
Facility and associated works at Waterbeach,
Cambridge**



Pinsent Masons

THIS DEED is made on

BETWEEN:

- (1) **National Westminster Bank PLC** (No 929027) whose registered office is at 135 Bishopsgate London EC2R 3UM and whose address for service is situate at London Trade Services Centre PO Box 39971 Ground Floor Devonshire Square London EC2M 4XB, (the "**Surety**"); and
- (2) **DONARBON WASTE MANAGEMENT LIMITED** (Company Number 6054499) whose registered office is at Ely Road, Waterbeach, Cambridge, CB25 9PG, (the "**Employer**", which expression shall include its successors and assignees).

WHEREAS:

- (A) By the Contract, the Contractor has agreed to carry out the Works.
- (B) The Surety has been requested by the Contractor to provide, and has agreed to provide, a bond on the following terms.

NOW THIS DEED WITNESSES as follows:

1. **INTERPRETATION**

"Contract"

means a design and build contract dated and entered into between the Employer and the Contractor, which expression shall mean such contract as amended, varied and/or supplemented from time to time and shall include any settlement or other agreement reached between the Employer and the Contractor in connection with such contract;

"Contractor"

means EDMUND NUTTALL LIMITED (Company Number 00305189) whose registered office is at St James House, Knoll Road, Camberley, Surrey GU15 3XW;

"Insolvency Event"

means the Contractor making a composition or arrangement with its creditors or becoming bankrupt or insolvent or effecting a transfer of its property to its creditors' advantage or signing a fiduciary agreement in their favour or, being a company:-

1. making a proposal for a voluntary arrangement for a composition of debts or scheme of arrangement to be approved in accordance with relevant legislation; or
2. having a provisional liquidator appointed; or
3. having a winding up order made; or
4. passing a resolution for voluntary winding up; or
5. having a receiver, an administrator or administrative receiver appointed; or
6. having an application made for an inventory of its assets to be taken as part of, or as precursor to, any of the circumstances above; or
7. being unable to pay its debts as defined by

sections 123(i) and 268(i) of the Insolvency Act 1986 as amended; or

8. suffering any event analogous to the events set out in paragraphs 1 to 7 above in any jurisdiction in which it is incorporated or resident;

"Maximum Sum"

has the same meaning as that term is defined in Clause 2.1;

- 1.1 Words and expressions used but not defined in this Deed shall have the meanings attributed to them in the Contract.

2. MAXIMUM SUM

- 2.1 Subject always to Clause 2.3, the maximum amount payable by the Surety to the Employer under this Deed is [REDACTED] (the "Maximum Sum").

- 2.2 Subject to Clause 2.3, the Maximum Sum shall reduce by [REDACTED] the issue by the Contractor's Representative of the Take-Over Certificate, a certified copy of which will be presented to the Surety to enable reduction of liability.

- 2.3 There shall be no maximum to the amount payable in relation to any rights or remedies which the Employer may have arising from any breach by the Surety of the terms of this Deed.

3. PROCEDURE FOR CALLING

- 3.1 The Employer may from time to time (including, without limitation, following the occurrence of an Insolvency Event) make a written demand upon the Surety stating the Insolvency Event and/or the default by the Contractor and/or the failure by the Contractor to observe or perform any of its duties or obligations to the Employer under or in connection with the Contract and the amount claimed by the Employer.

- 3.2 Any demand must be signed by the company secretary or a director of the Employer.

- 3.3 The Surety shall immediately upon receipt of any demand served from time to time by the Employer pay to the Employer the amount demanded to the extent that such amount together with the amount(s) of any previous payment(s) by the Surety to the Employer under this Deed does not in the aggregate exceed the Maximum Sum.

4. PAYMENT

- 4.1 Subject to Clause 2:

- 4.1.1 all sums payable under this Deed shall be paid to the Employer in full, free of any present or future taxes, levies, duties, charges, fees or withholdings and without any deduction, restriction, conditions, withholding, set-off or counterclaim whatsoever; and

- 4.1.2 if the Surety is compelled by law to make any deduction or withholding, the Surety will gross up the payment so that the net sum received by the Employer will be equal to the full amount which the Employer would have received had no such deduction or withholding been made.

- 4.2 Any demand made by the Employer in accordance with Clause 3 shall be conclusive evidence that the sum stated in such demand is properly due and payable to the Employer under this Deed.

Save as required by applicable law, the Surety shall have no right and shall not be under any duty or responsibility to enquire into the reason or circumstances of any demand made by the Employer, the respective rights and/or obligations and/or liabilities of the Employer and the Contractor under the Contract, the authenticity of any written demand made by the Employer or the authority of the persons signing any written demand in accordance with Clause 3.2.

5. VALIDITY AND COMPLETENESS

5.1 The Surety acknowledges and agrees that the liability of the Surety under this Deed shall not be impaired, reduced, discharged or otherwise affected by reason of any of the following:

- 5.1.1 any variation, amendment, alteration or supplement to the Contract or to the extent, nature or method of performance of the duties and/or obligations referred to in the Contract; or
- 5.1.2 any allowance of time, delay, waiver, forbearance, forgiveness, indulgence, compromise, delay by or on the part of the Employer in asserting any of its rights against the Contractor or other dealing under or in connection with the Contract or in respect of any right or remedy arising thereunder; or
- 5.1.3 any settlement or arrangement made between the Employer and the Contractor in relation to the Contract; or
- 5.1.4 any composition, discharge, release, concession or other variation of liability entered into with, or granted to, the Contractor; or
- 5.1.5 the Contract or any provision thereof becoming illegal, invalid, void, voidable or unenforceable; or
- 5.1.6 termination of the Contract or of the Contractor's employment under it; or
- 5.1.7 any disability, incapacity, legal limitation, change in ownership or change in status of the Contractor; or
- 5.1.8 an Insolvency Event; or
- 5.1.9 a change in the constitution of the Contractor; or
- 5.1.10 the Employer taking, holding, varying, realising or not enforcing any other security for the liabilities of the Contractor under the Contract; or
- 5.1.11 any other act, omission or default which, in the absence of this provision, would or might have operated to discharge, reduce, exonerate or otherwise affect the liability of the Surety under the terms of this Deed,

in each case whether with or without notice to or the consent of the Surety and the Surety hereby waives any requirement for notice to it of any such event.

6. CONTINUITY AND DISCHARGE

6.1 The Surety confirms that:

- 6.1.1 its obligations under this Deed shall be irrevocable;
- 6.1.2 this Deed shall remain in full force and effect until the date which is 14 days after the issue of the Final Acceptance Certificate under the Contract, which event shall be evidenced by the Contractor sending a copy of the Final Acceptance Certificate to the Surety, whereupon this Deed shall cease to have effect save in connection with any

demand notified to the Surety on or prior to the said date and/or as set out in Clause 6.1.3; and

- 6.1.3 any release, discharge or settlement between the Surety and the Employer shall be conditional upon no security, disposition or payment to the Employer being void, set aside or ordered to be refunded pursuant to any enactment or law relating to bankruptcy, liquidation, administration or insolvency or for any other reason whatsoever and, should this condition not be fulfilled, the Employer shall be entitled to enforce this Deed subsequently as if such release, discharge or settlement had not occurred and any payment had not been made.

7. NON-WAIVER

- 7.1 No failure or delay by the Employer in exercising any right or remedy shall operate as a waiver, nor shall any single or partial exercise or waiver of any right or remedy preclude its further exercise or the exercise of any other right or remedy.

8. PROVISIONS SEVERABLE

- 8.1 Each of the provisions of this Deed is severable and distinct from the others, and if at any time any such provision is or becomes ineffective, inoperable, invalid or unenforceable it shall be severed and deemed to be deleted from this Deed, and in such event the remaining provisions of this Deed shall continue to have full force and effect.

9. ASSIGNMENT

- 9.1 The Employer may assign, charge or transfer this Deed without the consent of the Surety, and shall give the Surety written notice of any assignment.
- 9.2 The Surety may not assign, charge or transfer this Deed.

10. NOTICES

- 10.1 Any demand or notice hereunder shall be in writing and shall be served personally or by pre-paid post. The address for service of any demand or notice shall be the relevant address stated above or such other address in England as may from time to time be notified in writing by the Surety to the Employer.
- 10.2 The demand or notice shall be deemed to be received:
- 10.2.1 if served personally, when so served; and/or
- 10.2.2 if served by pre-paid post, on the second Business Day after day it is posted.

11. RIGHTS OF THIRD PARTIES

- 11.1 No term of this Deed is enforceable under the Contracts (Rights of Third Parties) Act 1999 by a person who is not a party to this Deed.

12. GOVERNING LAW

- 12.1 This Deed shall be governed by the laws of England, and the courts of England and Wales shall have exclusive jurisdiction over any dispute arising under or in connection with this Deed save that any decision, judgment or award of such courts may be enforced in the courts of any jurisdiction.

EXECUTED as a **DEED** and delivered by the parties on the date first above written.

EXECUTED (but not delivered
until the date hereof)
AS A DEED by
DONARBON WASTE MANAGEMENT LIMITED
acting by:-

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)
)
)
)
)
)

Director

Director/Secretary

Signed as a deed by

as the attorney and on behalf of
National Westminster Bank Plc

in the presence of

Bank Official
National Westminster Bank Plc
London Trade Services Centre
PO Box 39971
Devonshire Square
London EC2M 4XB

SCHEDULE 10
SPECIFICATION

SCHEDULE 11
CONSTRUCTION CONTRACTOR'S PROPOSALS

SCHEDULE 13
TESTING SCHEDULE

SCHEDULE 14

ADVANCE PAYMENTS AND OFF-SITE MATERIALS COMBINED BOND

DATED 2008

(1) NATIONAL WESTMINSTER BANK PLC

(2) DONARBON WASTE MANAGEMENT LIMITED

BOND

**in respect of advance payments and payment for off-site
materials and/or goods relating to the design and
construction of a Mechanical Biological Facility and
associated works at Waterbeach, Cambridge**



Pinsent Masons

BETWEEN:-

- (1) **NATIONAL WESTMINSTER BANK PLC** (No 929027) whose registered address is 135 Bishopsgate, London EC2M 3UR and whose address for service is London Trade Services Centre, PO Box 39971, Ground Floor, Devonshire Square, London EC2M 4XB (the "**Surety**"); and
- (2) **DONARBON WASTE MANAGEMENT LIMITED** (No 6054499) whose registered office is at Ely Road, Waterbeach, Cambridge CB25 9PG (the "**Employer**").

WHEREAS:-

- (A) The Employer and Edmund Nuttall Limited (No 305189) (the "**Contractor**") have agreed to enter into a contract (the "**Contract**") for the design and construction of a Mechanical Biological Facility and associated works as more particularly described in the Contract (the "**Works**") at Waterbeach, Cambridge.

1. GENERAL

- 1.1 Subject to the relevant provisions of the Contract as summarised below, but with which the Surety shall not at all be concerned:

- 1.1.1 the Employer has agreed to include the amount stated as due in payments under the Contract the value of those materials or goods or items pre-fabricated for inclusion in the Works listed by the Employer in clause 35.16 of the Contract (the "**Listed Items**") before their delivery to or adjacent to the Works; and
- 1.1.2 the Contractor has agreed to insure the Listed Items against loss or damage for their full value under a policy of insurance protecting the interest of the Employer and the Contractor during the period commencing with the transfer of the property in the items to the Contractor until they are delivered to or adjacent to the Works; and
- 1.1.3 the Employer has agreed to pay the Contractor the sum of £[] ([] pounds) as an advance payment of sums due to the Contractor under the Contract (the "**Advance Payment**") for reimbursement by the Surety on the terms of this Deed; and
- 1.1.4 this Bond shall exclusively relate to, the amount paid to the Contractor in respect of the Listed Items which have not been delivered to or adjacent to the Works, and, the Advance Payment.

2. PROMISE TO PAY

- 2.1 When the Surety receives a demand from the Employer in accordance with Clause 2.2 the Surety shall pay the Employer the sum demanded up to the Maximum Amount.
- 2.2 The Employer shall in making any demand provide to the Surety a "Notice of Demand" in the form of the Schedule attached hereto which shall be accepted as conclusive evidence for all purposes under this Bond. The Notice of Demand shall be signed by two directors of the Employer or a director and a company secretary of the Employer. The Employer may make one or more demands under this Bond.
- 2.3 The Surety shall within 5 Business Days after receiving the demand pay to the Employer the sum so demanded. "Business Day" means the day (other than a Saturday or Sunday) on which commercial banks are open for business in London, failing which interest shall accrue on the unpaid balance from time to time of the amount so demanded at the rate which is four per cent (4%) above the base rate from time to time of the Surety until paid in full by the Surety.
- 2.4 Payments due under this Bond shall be made notwithstanding any dispute between the Employer and the Contractor and whether or not the Employer and the Contractor are or might be under any liability one to the other. Payment by the Surety under this Bond shall be deemed a valid payment

for all purposes of this Bond and shall discharge the Surety from liability to the extent of such payment.

2.5 Any demand made by the Employer in accordance with this Clause 2 shall be conclusive evidence that the sum stated in such demand is properly due and payable to the Employer under this Bond. Save as required by applicable law, the Surety shall have no right and shall not be under any duty or responsibility to enquire into the reason or circumstances of any demand made by the Employer, the respective rights and/or obligations and/or liabilities of the Employer and the Contractor under the Contract, the authenticity of any written demand made by the Employer or the authority of the persons signing any written demand by the Employer.

2.6 All payments by the Surety under this bond shall be made free, clear of and without any deduction or withholding for or on account of any set-off whatsoever, counterclaim or tax save to the extent that the Surety is required by law to make payment subject to the deduction or withholding of tax. In such event the Surety shall make such further payments as are necessary to ensure that, after the making of such deduction or withholding, the Employer receives (free from any liability in respect of any such deduction or withholding) a net sum equal to the sum the Employer would have received had no such deduction or withholding been made or required to be made.

3. **AMENDMENTS TO CONTRACT**

3.1 The Contract may be modified, amended or supplemented in any manner whatsoever without the consent of the Surety, and no such modification, amendment or supplement shall release or impair the liability of the Surety under this Bond, which shall extend to the liabilities of the Contractor under the Contract as so modified, amended or supplemented. No invalidity in the Contract or its avoidance or termination shall affect or impair the liability of the Surety under this Bond. No waiver or concession or allowance of time or compromise or forbearance given to or made with the Contractor shall release or affect or impair the liability of the Surety under this Bond and the terms of this Bond shall apply to the terms of such compromise as they apply to the Contract.

3.2 The liability of the Surety under this Bond shall not be affected or reduced by the insolvency of the Contractor or its liquidation or receivership.

4. **EXTENT OF LIABILITY**

4.1 The Surety's maximum aggregate liability under this Bond shall be £[] ([] pounds) (the "**Maximum Amount**") which sum shall be reduced:-

4.1.1 by the amount of any reimbursement of the Advance Payment made by the Contractor to the Employer as certified by the Employer in writing to the Surety; and

4.1.2 provided always that the total amount of the Advance Payment has been reimbursed by the Contractor to the Employer, and that the relevant Listed Items are in accordance with the Contract, by the amount equal to the value of the relevant Listed Items that have been delivered to or adjacent to the Works as certified by the Employer in writing to the Surety.

4.2 The limit in Clause 4.1 shall not apply to any default interest payable by the Surety pursuant to Clause 2.3.

4.3 The Surety's obligations and liability under this Bond are irrevocable and will remain in full force and effect and are not to be discharged, released, reduced or affected in any way by reason of any of the following:

4.3.1 any provision of the Contract being or becoming illegal, invalid, void, voidable or unenforceable for any reason whatsoever, save where the Employer has sought to impose obligations on the Contractor, the enforcement or performance of which would be unlawful (in relation to which the Surety shall have no liability under this Bond);

- 4.3.2 any indulgence, forbearance or waiver of any right of action or remedy of the Employer against the Contractor or negligence by the Employer in enforcing any such right of action or remedy;
 - 4.3.3 any failure of supervision or detection or prevention of any default of the Contractor under or in connection with the Contract;
 - 4.3.4 any additional or advance payment to the Contractor under or in connection with the Contract;
 - 4.3.5 the suspension or termination of the Contract or of the employment of the Contractor under the Contract for any reason whatsoever;
 - 4.3.6 any compromise of any dispute with the Contractor arising out of or in connection with the Contract;
 - 4.3.7 the insolvency, bankruptcy, winding up, dissolution, administration, incapacity, amalgamation, reconstruction, re-organisation or any analogous proceeding relating to the Contractor or any change in the status, function, control or ownership of the Contractor; and
 - 4.3.8 any other fact, circumstance, act, event, omission or provision of statute or law or otherwise which but for this clause might operate to discharge, impair or otherwise affect any of the obligations of the Surety under this Bond or any of the rights, powers or remedies conferred on the Employer by this Bond or by law.
- 4.4 The Employer shall not be obliged to pursue any means of recourse against the Contractor before being entitled to enforce this Bond against the Surety and the Employer shall be at liberty to compromise, release, waive or neglect any security as it sees fit, without impairment of its rights under this Bond.
- 4.5 The obligations of the Surety under this Bond shall cease upon whichever is the earlier of:-
- 4.5.1 the date on which;
 - (a) all the Listed Items have been delivered to or adjacent to the Works, provided that such items are in accordance with the Contract (as certified in writing to the Surety by the Employer); and
 - (b) the Advance Payment has been reduced to nil (as certified in writing to the Surety by the Employer) or the Advance Payment or any balance thereof has been repaid to the Employer by the Contractor (as certified in writing to the Surety by the Employer); or
 - 4.5.2 the date on which this Bond has been fully called on; or
 - 4.5.3 90 days after the date of issue of the final Take-Over Certificate under and in accordance with the Contract save in respect of a demand notified to the Surety in writing prior to the expiry of such period;

and any claims hereunder must be received by the Surety in writing on or before such earlier date.

5. **ASSIGNMENT**

- 5.1 The Employer may without the consent of the Surety assign the benefit of this Bond to any person to whom the Employer lawfully assigns the whole of the benefit of the Contract. No other assignment by the Employer of any of its rights or obligations under this Bond shall be permitted without the Surety's prior written consent (such consent not to be unreasonably withheld or delayed).

5.2 Neither the Contractor nor the Surety shall be entitled to contend that any person to whom this Bond is assigned is precluded from recovering under this Bond any loss incurred by such assignee resulting from any breach of this Bond by reason that such person is an assignee and not a named promisee hereunder.

6. **MISCELLANEOUS**

6.1 Subject to clause 5, nothing in this Bond confers or is intended to confer any right to enforce any of its terms on any person who is not a party to it.

6.2 This Bond shall be governed and construed in accordance with the laws of England and Wales.

EXECUTED AS A DEED by the parties on the date which first appears in this Deed.

SCHEDULE
NOTICE OF DEMAND

Date of Notice: []

Date of Bond: []

Employer: **DONARBON WASTE MANAGEMENT LIMITED**

Surety: []

The Bond has come into effect.

We hereby demand payment of the sum of £[] which does not exceed the Maximum Amount as determined in accordance with Clause 4.1 of the Bond.

Address of Payment: []

This Notice is signed by the following persons who are authorised by the Employer to act for and on his behalf:

Signed by: []

Name: []

Official Position: [Director/Secretary]

Signed by: []

Name: []

Official Position: [Director /Secretary]

SIGNED AS A DEED by)
)
as attorney and on behalf of)
NATIONAL WESTMINSTER BANK PLC)
in the presence of:-)
)

Bank Official
National Westminster Bank plc
Bonds and Guarantees
London Trade Services Centre
PO Box 39971
Devonshire Square
London
EC2M 4XB

EXECUTED (but not delivered)
until the date hereof))
AS A DEED by)
DONARBON WASTE MANAGEMENT LIMITED)
acting by:-)

Director

Director/Secretary

SCHEDULE 15
CASH FLOW FORECAST

SCHEDULE 16
THE WORKS PROGRAMME