

DATED 4 JUNE 2009

CUMBRIA COUNTY COUNCIL

and

SHANKS CUMBRIA LIMITED

PROJECT AGREEMENT



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THIS AGREEMENT dated 4 June 2009 is made BETWEEN:-

- (1) CUMBRIA COUNTY COUNCIL whose address for the purposes of this Agreement is The Courts, Carlisle, Cumbria, CA3 8NA (“the Authority”); and
- (2) SHANKS CUMBRIA LIMITED (company registered number 06799850) whose registered office is at 4 Dunedin House, Auckland Park, Mount Farm, Bletchley, Milton Keynes Buckinghamshire MK1 1BU (“the Contractor”).

BACKGROUND

- (A) By an advertisement dated 12 February 2004 in the Supplement to the Official Journal of the European Union, the Authority sought proposals for the provision of an integrated waste management service to minimise waste arising and to recover, recycle, treat and dispose of specified quantities and types of waste under a Public Private Partnership.
- (B) The Authority has selected the Contractor to carry out the Project.
- (C) The parties intend that this Agreement be a certified contract for the purposes of the Local Government (Contracts) Act 1997.
- (D) The relevant discharge terms are set out in clause 76 of this Agreement.

IT IS AGREED as follows:-

PART 1 – PRELIMINARY

1. DEFINITIONS AND INTERPRETATION

1.1 Definitions

In this Agreement unless the context otherwise requires the following terms shall have the meanings given to them below:-

“1999 Act”	the Local Government Act 1999;
“Abandon”	not to carry out any Works contemplated by the Construction Programme at a Site for twenty (20) consecutive Working Days or during sixty (60) Working Days (whether consecutive or not) in any Contract Year;
“Acceptance Certificate”	a certificate issued by the Independent Certifier pursuant to clause 19;
“Acceptable Parameters”	has the meaning given in paragraph 4 of Schedule 29 (Contractor Waste Review Procedure);
“Active Waste Standard”	has the meaning given in Schedule 5 (Payment Mechanism);
“Actual Relevant Insurance Cost”	the aggregate of the annual insurance premiums reasonably incurred by the Contractor to maintain the Relevant Insurance during the Insurance Review Period but excluding insurance premium tax and all broker’s fees

and commissions;

“Additional HWRC Project”

any works in the administrative area of the Authority where the works involve any construction of, or refurbishment, repair or extension to any HWRC which is an Existing Facility or a replacement HWRC for an Existing Facility;

“Additional Mileage Deduction”

the Deduction calculated in accordance with paragraph 6.5 of Schedule 5 (Payment Mechanism);

“Additional Permitted Borrowing”

on any date, the amount equal to any amount of principal outstanding under the Senior Financing Agreements (as the same may from time to time be amended, whether or not with the approval of the Authority) in excess of the amount of principal scheduled under the Senior Financing Agreements at Financial Close to be outstanding at that date, but only to the extent that:-

- (a) this amount is less than or equal to the Additional Permitted Borrowings Limit; and
- (b) in respect of any Additional Permitted Borrowing the Agent is not in material breach of its obligations under clause 11.4.3 of the Direct Agreement as it applies to such Additional Permitted Borrowing,

and provided further that any such excess amount of principal which is:-

- (i) invested as part of any Qualifying Variation; or
- (ii) outstanding from time to time as a result of any drawing under the Senior Finance Agreements as entered into at the date of this Agreement, disregarding any subsequent amendment; or
- (iii) outstanding from time to time as a result of any amendment to the Senior Finance Agreements in respect of which the Authority has agreed that its liabilities on a termination may be increased pursuant to clause 40.2.1 shall not be counted as Additional Permitted Borrowing;

“Additional Permitted Borrowings Limit”

an amount equal to:-

- (a) (*FIGURE REDACTED*), of the Original Senior Commitment, for any Additional Permitted Borrowing subsisting in the period from the date of Financial Close to the date on which the amount

outstanding under the Senior Financing Agreements is reduced to (*FIGURE REDACTED*), or less of the Original Senior Commitment; and thereafter:-

- (b) the higher of:-
 - (i) (*FIGURE REDACTED*), of the Original Senior Commitment; and
 - (ii) the amount of any Additional Permitted Borrowing outstanding on the last day of the period referred to in (a);

“Adjoining Property”

any land and/or property adjoining or in the neighbourhood of any Waste Management Facilities and each and every part thereof including any Conduits, roads, footpaths, walls, fences, buildings and other apparatus on, under or within such land and/or property;

“Adjusted Estimated Fair Value of the Contract”

the Estimated Fair Value of the Contract, less an amount equal to the aggregate of:-

- (a) where relevant any Post Termination Service Amounts paid by the Authority (if a positive number);
- (b) the Tender Costs; and
- (c) amounts that the Authority is entitled to set off or deduct under clause 26.13 (Rights of Set-Off),

plus an amount equal to the aggregate of:-

- (i) all credit balances on any bank accounts held by or on behalf of the Contractor on the date that the Estimated Fair Value of the Agreement is calculated; and
- (ii) any insurance proceeds and other amounts owing to the Contractor (and which the Contractor is entitled to retain), to the extent not included in (i) above; and
- (iii) the Post Termination Service Amounts (if a negative number),

to the extent that:-

- (A) (i), (ii) and (iii) have not been directly taken into account in calculating the Estimated Fair Value of the Contract; and

- (B) the Authority has received such

amounts in accordance with this Agreement or such amounts are standing to the credit of the Joint Insurance Account;

“Adjusted Highest Compliant Tender Price”	<p>the Highest Compliant Tender Price less the aggregate of:-</p> <ul style="list-style-type: none">(a) any Post Termination Service Amounts paid to the Contractor to date;(b) the Tender Costs; and(c) amounts that the Authority is entitled to set off or deduct under clause 26.13 (Rights of Set Off); <p>plus an amount equal to the aggregate of:-</p> <ul style="list-style-type: none">(i) all credit balances on any bank accounts held by or on behalf of the Contractor on the date that the highest priced Compliant Tender is received; and(ii) any insurance proceeds and other amounts owing to the Contractor (and which the Contractor under this Agreement is entitled to retain) to the extent not included in (i) above; and(iii) the Post Termination Service Amounts (if a negative number) <p>to the extent that:-</p> <ul style="list-style-type: none">(A) (i), (ii) and (iii) have not been directly taken into account in that Compliant Tender; and(B) the Authority has received such amounts in accordance with this Agreement;
“Administration Regulations”	<p>the Local Government Pension Scheme (Administration) Regulations 2008 (SI 2008/239) as amended from time to time or any subsequent enactment thereof;</p>
“Admission Agreement”	<p>an admission agreement entered into in accordance with regulations 6 and 7 of the Administration Regulations (or any subsequent enactment thereof) by the Authority and the Contractor or relevant Sub-Contractor the terms of which shall be agreed between the Authority, acting in its capacity as administering authority of the Fund, and the Contractor or relevant Sub-Contractor;</p>

“Admitted Body”	a transferee admission body for the purposes of regulation 6 of the Administration Regulations (or any subsequent enactment thereof);
“Adverse Ground Condition”	the existence, presence, occurrence and/or effects of any contamination, Hazardous Materials or substances, explosives or munitions, deleterious materials, subsidence, landslip, heave, geological conditions, ground conditions, groundwater or obstructions that have not been accounted for and priced in the Barrow Scope of Work in Schedule 35 (setting out the projected enabling works and foundations works for the Southern Resource Park);
“Affected Party”	the Party that is unable to comply with all or a material part of its obligations under this Agreement as a result of the occurrence of a Force Majeure Event;
“Affiliate”	in relation to any company, any holding company or subsidiary of that person or any subsidiary of such holding company and “holding company” and “subsidiary” shall have the meaning given to them in section 1159 of the Companies Act 2006;
“Agent”	Sumitomo Mitsui Banking Corporation Limited of 99 Queen Victoria Street, London, EC4V 4EH in its capacity as agent for the Senior Lenders under the Senior Financing Agreements;
“Agreed Form”	in relation to any document, the form of the document initialled by or on behalf of the Parties for the purpose of identification;
“Agreement”	this agreement (including its Schedules) and without limitation and for the avoidance of doubt including the Leases;
“Allowable Third Party Revenue Cost”	the proper and reasonable additional costs directly incurred by the Contractor or a Contractor Related Party in the generation of Third Party Revenue (excluding for the avoidance of doubt, revenue derived from SRF);
“Ancillary Documents”	the Building Contract, the Principal Building Sub-Contracts, the Operating Contract, and the guarantees in the Agreed Form under which the obligations of the Building Contractor under the Building Contract and the Principal Building Sub-Contractors under the Principal Building Sub-Contracts and the Operating Contractor under the Operating Contract are respectfully guaranteed (in each case to the Contractor), the TS Contracts and the SRF Offtake Contract and any other documents to which the Authority is not a party and which are listed in Part 1 of Schedule 15 (Project Documents and Ancillary Documents) copies of which have been initialled by the

	Parties for the purposes of identification, as they may be amended or replaced from time to time;
“Annual Service Plan”	has the meaning given in clause 28.2.4;
“Annual Service Report”	has the meaning given in clause 28.2.1;
“Annual Unitary Charge”	the annual fee payable by the Authority under clause 26 and calculated in accordance with Schedule 5 (Payment Mechanism);
“APB Distributions”	for the period during which Additional Permitted Borrowing subsists, an amount equal to the aggregate of all Distributions made during that period up to an amount equal to the principal of the Additional Permitted Borrowing on the first day of that period;
“ARD”	EC Directive 2001/23/EC;
“Asset Management Plan”	the plan set out in Schedule 23 (Asset Management Plan);
“Assets”	<p>all assets and rights to enable the Authority or a successor Contractor to own, operate and maintain the Waste Management Facilities in accordance with this Agreement including:-</p> <ul style="list-style-type: none"> (a) any land or premises; (b) any plant and equipment (with regard to the EcoDeco Plant only subject to the terms of the EcoDeco Licence); (c) any books and records (including operating and maintenance manuals, health and safety manuals and other know how); (d) any spare parts, tools and other assets (together with any warranties in respect of assets being transferred); (e) any revenues and any other contractual rights; and (f) (subject to the terms of this Agreement) any Intellectual Property Rights, <p>but excluding any assets and rights in respect of which the Authority is full legal and beneficial owner;</p>
“Authorised Users”	any person or vehicle which is permitted to use a HWRC under the terms of any permitting system agreed by the Parties pursuant to clause 6.6;

“Authority Change”	has the meaning given to it in Part 1 of Schedule 27 (Change Protocol);
“Authority Change Notice”	has the meaning given to it in Part 1 of Schedule 27 (Change Protocol);
“Authority Default”	<p>one of the following events:-</p> <p>(a) an expropriation, sequestration or requisition of a material part of the assets and/or shares of the Contractor by the Authority or a Relevant Authority;</p> <p>(b) a failure by the Authority to make payment of any amount of money exceeding two million five hundred thousand pounds (£2,500,000.00) (T Indexed) that is due and payable by the Authority under this Agreement within twenty (20) Working Days of service of a formal written demand by the Contractor, where the amount fell due and payable two months prior to the date of service of the written demand; or</p> <p>(c) a breach by the Authority of its obligations under this Agreement which substantially frustrates or renders it impossible for the Contractor to perform its obligations under this Agreement for a continuous period of two Months; or</p> <p>(d) a breach by the Authority of its obligations under clause 57 (Assignment and Sub-Contracting);</p>
“Authority’s Policies”	the policies referred to in Part 1 of Schedule 11 (Policies);
“Authority’s Refinancing Share”	an amount specified under clause Error! Reference source not found. in respect of any Refinancing Gain;
“Authority Related Party”	any WCA and an officer, contractor, sub-contractor, agent or employee of the Authority or any WCA acting in the course of his office or employment, but excluding in each case any Contractor Related Party;
“Authority Response”	has the meaning given in clause 26.7 of this Agreement;
“Authority’s Representative”	the Representative appointed by the Authority pursuant to clause 10.4;
“Authority’s Solicitors”	Dickinson Dees LLP of St Ann’s Wharf, 112 Quayside, Newcastle upon Tyne, NE1 3DX or any successor firm whom the Authority shall appoint;
“Barrow HWRC”	the premises at Walney Road, Barrow in Furness, Cumbria, LA14 5UY, forming part of the land registered under title number CU30959 and more particularly described in the relevant Lease included in Schedule 4

	(Leases) hereto;
“Base Case”	the Original Financial Model (as updated from time to time in accordance with the terms of this Agreement);
“Base Case Waste Composition”	has the meaning given to it in Appendix 1 of Schedule 29 (Contract Waste Review Procedure);
“Base Cost”	<i>REDACTED – 10 lines</i>
“Base Date”	31 March 2008;
“Base Relevant Insurance Cost”	the aggregate of the Base Cost which was (at Base Date) projected to be incurred to maintain the Relevant Insurance during the Insurance Review Period RPIx Indexed from the Base Date up to the dates on which the Relevant Insurance was placed or renewed either immediately before or during the Insurance Review Period (as applicable in respect of the Year in question) less any Base Relevant Insurance Reduction;
“Base Relevant Insurance Reduction”	the reduction to be made to the Base Relevant Insurance Cost in respect of a risk which has become Uninsurable or a term or condition which is no longer available and shall be an amount that is either:- <ul style="list-style-type: none"> (a) the amount by which the Base Relevant Insurance Cost would have been a lesser amount had such a risk been Uninsurable or such a term or condition been unavailable at the Base Date (which amount, for the avoidance of doubt, can be zero (£0)); or (b) if it is impossible to determine an amount pursuant to paragraph (a) above, an amount that is reasonable to be deducted from the Base Relevant Insurance Cost having due regard to:- <ul style="list-style-type: none"> (i) the amount by which the Actual Relevant Insurance Cost is less that it would have been as a result of the risk becoming Uninsurable, or the term or condition becoming unavailable (the “Actual Reduction”);

“Base Senior Debt Termination Amount”

(ii) the size of the Actual Reduction as a percentage of the Actual Relevant Insurance Cost immediately prior to the risk becoming Uninsurable, or the term or condition becoming unavailable; and

(iii) the effects of RPIx since the Base Date;

subject to clause 40.2 (Changes to Finance Agreements):-

(a) all amounts outstanding at the Termination Date, including interest and Default Interest accrued as at that date, from the Contractor to the Senior Lenders under the Senior Financing Agreements and in respect of Permitted Borrowing (other than in respect of Additional Permitted Borrowing); and

(b) all amounts including costs of early termination of interest rate hedging arrangements and other breakage costs, payable by the Contractor to the Senior Lenders as a result of a prepayment in respect of Permitted Borrowings (other than in respect of Additional Permitted Borrowing) or, in the case of early termination of interest rate hedging arrangements only, as a result of termination of this Agreement, subject to the Contractor and the Senior Lenders mitigating all such costs to the extent reasonably possible,

less, to the extent it is a positive amount, the aggregate of (without double counting in relation to the calculation of the Base Senior Debt Termination Amount or the amounts below):-

(i) all credit balances on any bank accounts (but excluding the Joint Insurance Account) held by or on behalf of the Contractor on the Termination Date;

(ii) all amounts, including costs of early termination of interest rate hedging arrangements and other breakage costs, payable by the Senior Lenders to the Contractor as a result of prepayment of amounts outstanding under the Senior Financing Agreements and in respect of Permitted Borrowings (other than in respect of Additional Permitted Borrowing) or, in the case of early termination of interest rate hedging arrangements only, as a result of termination of this Agreement; and

	(iii) all other amounts received by the Senior Lenders on or after the Termination Date and before the date on which any compensation is payable by the Authority to the Contractor as a result of enforcing any other rights they may have;
“Benchmarking Review Date”	(a) in the case of Specific Waste Items 1 April in each Contract Year; and (b) in the case of Utilities 1 April in the second Contract Year and each anniversary of such date or such longer period as shall be agreed by the Parties having regard to any Purchase Agreements entered into by the Contractor;
“Benefits Regulations”	the Local Government Pension Scheme (Benefits, Membership and Contributions) Regulations 2007 (SI 2007/1166) as amended from time to time or any subsequent enactment thereof;
“Best Value Change in Law”	a change in law which comprises:- (a) an order made by the Secretary of State in the exercise of powers conferred upon him by section 4 of the 1999 Act the substance of which amounts to a change in a performance standard or a change in the definition of or details of a performance indicator (as opposed to a change in the description of a performance indicator); (b) a direction made by the Audit Commission in the exercise of powers conferred upon it by sections 44 and 46 of the Audit Commission Act 1998 which in substance is similar to an order referred to in (a) above; (c) Guidance issued by the Secretary of State or Audit Commission or other competent authority in respect of (a) or (b) above;
“Best Value Duty”	the duty imposed on the Authority by section 3 of the 1999 Act in relation to, inter alia, the Services;
“Best Value Inspector”	an officer, agent or employee of the Audit Commission or other Relevant Authority empowered to inspect the Authority’s compliance with Part 1 of the 1999 Act;
“Best Value Performance Plans”	the best value performance plans which are required to be published by the Authority each Year and which take into account the performance indicators and standards specified in the Local Government (Best Value) Performance Indicators and Performance Standards Order 2005 as amended by the Local Government (Best

	Value) Performance Indicators and Performance Standards (England) Order 2007 in accordance with section 6 of the 1999 Act;
“Best Value Review Date”	the date or dates for a Best Value Review as the Authority may specify in a Best Value Performance Plan;
“Best Value Review Plan”	has the meaning given in clause 28.3.6;
“Best Value Review”	the review which is required to be conducted by the Authority in accordance with section 5 of the 1999 Act;
“Best Value Service Change Notice”	has the meaning given in clause 28.2.3;
“Biodegradable Contract Waste Landfill Tonnage Target”	means each of the Biodegradable Contract Waste Landfill Tonnage Deduction Threshold and the Biodegradable Contract Waste Landfill Tonnage Bonus Threshold, each having the meaning given in Appendix 5 of Schedule 5 (Payment Mechanism);
“BMW”	Biodegradable Municipal Waste, as defined by section 21 of the Waste and Emissions Trading Act 2003;
“BMW Input Assumption”	has the meaning given in Appendix 5 of Schedule 5 (Payment Mechanism);
“BMW Reduction Factor”	has the meaning given in Appendix 5 of Schedule 5 (Payment Mechanism);
“Brampton HWRC”	the premises at Townfoot Industrial Estate, Brampton, Carlisle, CA8 1SW, forming the whole of the land registered under title number CU238021 and more particularly described in the relevant Lease included in Schedule 4 (Leases) hereto;
“Branding Strategy”	the Branding Strategy, as defined in the Service Delivery Plan;
“Bring Facilities”	a facility for the deposit by any member of the public of segregated Waste for the purposes of collection, bulking up and distribution for Recycling or Reuse;
“Building Contract”	the EPC contract in the Agreed Form between the Contractor and the Building Contractor relating to the Works;
“Building Contractor”	Shanks Waste Management Limited or any replacement building contractor appointed by the Contractor to carry out the Works;
“Business Interruption Cover”	shall bear the meaning ascribed to it in Schedule 12 (Insurance);

“Capital Expenditure”	any expenditure which falls to be treated as capital expenditure in accordance with generally accepted accounting principles in the United Kingdom from time to time;
“CDM Regulations”	the Construction (Design and Management) Regulations 2007;
“Certificate of Service Availability”	a certificate issued by the Contractor subsequent to the carrying out of Tests on Completion in relation to each New Facility verifying the Contractor’s belief that the Service Availability Requirements have been met;
“Certification Requirements”	the requirements which must be satisfied for a contract to be a certified contract for the purposes of the Local Government (Contracts) Act 1997;
“Cessation Date”	any date on which the Contractor or the relevant Sub-Contractor ceases to be an Admitted Body other than as a result of the expiry or termination of this Agreement or because it ceases to employ any Eligible Employees;
“Change”	has the meaning given to it in Part 1 of Schedule 27 (Change Protocol);
“Change in Costs”	<p>in respect of any Relevant Event, the effect of that Relevant Event (whether of a one off or recurring nature, and whether positive or negative) upon the actual or anticipated costs, losses or liabilities of the Contractor and/or any Key Sub-Contractors (without double counting), including, as relevant, the following:-</p> <ul style="list-style-type: none"> (a) the reasonable costs of complying with the requirements of clause 15 (Extensions of Time), clause 45 (Change in Law), clause 47 (Authority Step-in), Parts 2 to 4 of Schedule 27 (Change Protocol) and/or clause 27.2 (Updating the Base Case), including the reasonable costs of preparation of design and estimates; (b) the costs of continued employment of, or making redundant, staff who are no longer required; (c) the costs of employing additional staff; (d) reasonable professional fees; (e) the costs to the Contractor of financing any Relevant Event (and the consequences thereof) including commitment fees and capital costs interest and hedging costs, lost interest on any of the Contractor’s own capital employed and any finance required pending receipt of a lump sum payment or adjustments to the Annual Unitary

Charge;

- (f) the effects of costs on implementation of any insurance reinstatement in accordance with this Agreement, including any adverse effect on the insurance proceeds payable to the Contractor (whether arising from physical damage insurance or business interruption insurance (or their equivalent)) in respect of that insurance reinstatement and any extension of the period of implementation of the insurance reinstatement;
- (g) operating costs (including costs of generating Third Party Revenue) or life cycle, maintenance or replacement costs;
- (h) Capital Expenditure (or, in the case of a Relevant Event which is a Qualifying Change in Law, Capital Expenditure for which the Authority is responsible);
- (i) the costs required to ensure continued compliance with the Financing Agreements;
- (j) any deductible or increase in the level of deductible, or any increase in premium under or in respect of any insurance policy; and
- (k) Direct Losses or Indirect Losses, including reasonable legal expenses on an indemnity basis;

“Change in Law”

the coming into effect after the date of this Agreement of:-

- (a) Legislation, other than any Legislation which, on the date of this Contract, has been published:-
 - (i) in a draft Bill or as part of a Government Departmental Consultation Paper;
 - (ii) in a Bill;
 - (iii) in a draft statutory instrument; or
 - (iv) as a proposal in the Official Journal of the European Union;
- (b) any Guidance; or
- (c) any applicable judgement of a relevant court of law which establishes or changes a binding precedent;

“Change in Ownership”

- (a) any sale, transfer or disposal of any legal, beneficial or equitable interest in any or all of the shares in the Contractor and/or HoldCo (including

	the control over the exercise of voting rights conferred on those shares, control over the right to appoint or remove directors or the rights to dividends); and/or
	(b) any other arrangements that have or may have or which result in the effect as paragraph (a);
“Change in Revenue”	in respect of any Relevant Event, the effect of that Relevant Event (whether of a one-off or recurring nature, and whether positive or negative) upon the actual or anticipated income of the Contractor and/or any Key Sub-Contractors (including any Third Party Revenue) (without double counting);
“Code”	the Code of Practice on Workforce Matters in Local Authority Service Contracts as currently contained in ODPM Circular 3/03 Annex D;
“Code Obligations”	the obligations of the Contractor and/or the Authority pursuant to clause 24 below and/or the Code;
“Collateral Warranty”	a collateral warranty between the Authority and any of the following as the case may be the Building Contractor either Principal Building Sub-Contractor, and the Operating Contractor, in each case in the relevant form as set out in Schedule 7;
“Commencement Date”	the day immediately following the date of satisfaction of the Conditions Precedent;
“Commercial Waste”	has the definition set out in the Controlled Waste Regulations 1992 and section 75 of the EPA save that any SRF produced as part of the Project shall not be treated as Commercial Waste for the purposes of this Agreement;
“Commercially Sensitive Information”	the subset of Confidential Information listed in Schedule 14;
“Commissioning Waste”	has the definition specified in Schedule 5 (Payment Mechanism);
“Committed Stand-By Facility”	a standby facility committed to by the Senior Lenders at the date of this Agreement for the purposes of funding any unforeseen cost overruns, increased expenses or loss of revenues to be incurred by the Contractor;
“Compensation Date”	either:- (a) if clause 37.2 (Retendering Procedure) applies, the earlier of:- (i) the date that the New Contract is entered

into; and

- (ii) the date on which the Authority pays the Adjusted Highest Compliant Tender Price to the Contractor; or
 - (b) if clause 37.3 (No Retendering) applies, the date on which the Adjusted Estimated Fair Value of the Contract has been agreed or determined;
- “Compensation Event”
- (a) a breach by the Authority of any of its obligations (which for the avoidance of doubt includes the breach of any warranties by the Authority) under this Agreement or any of the Leases;
 - (b) a delay to the Works in accordance with clause 18.3.3; or
 - (c) any Latent Defects in the Existing Facilities not arising from the Works;
 - (d) a failure by the Authority to object to a WCA’s proposed recycling arrangements (including, without limitation, the establishment of a household waste recycling centre (howsoever described)) pursuant to section 48(4) EPA;
 - (e) a failure by a WCA to comply with a notice of objection issued by the Authority pursuant to S48(4) EPA; and
 - (f) any Title Defects;
 - (g) the termination of either the Distington TS Contract or the Flusco TS Contract for TS Operator Default PROVIDED THAT either event of termination shall only give rise to a Compensation Event once the relevant cap on Deductions as specified in paragraph 12 of Schedule 5 (Payment Mechanism) has been reached (so that no further Deductions may be imposed by the Authority in that regard);
 - (h) the successful enforcement action by the local planning authority preventing the use of the Existing Facilities in whole or in part where any such facility would not have suffered such enforcement action but for the fact that the planning permission in existence at the Commencement Date was granted by the Authority to itself (or to itself and a third party) pursuant to the Town and Country Planning (General) Regulations 1992;

- (i) the termination of either the Distington TS Contract or the Flusco TS Contract by CWM in accordance with either clause 29.2A.1 or 29.2A.2 of such TS Contract PROVIDED THAT such event shall only give rise to a Compensation Event from 1 August 2010 unless the Authority by such date has (in the case of the relevant TS Contract) agreed with the Contractor an Authority Change to make alternative provision for the storage and collection of Contract Waste which would otherwise have been handled under such TS Contract;
- (j) a Compensation Event as described under clause 21.4;
- (k) a Compensation Event as described in clause 7.13.3;
- (l) with regard to Flusco HWRC, if the cost of drainage of leachate from the site levied by the freehold owner of the site (or by any party with a derivative interest superior to that of the Authority) is increased in any Contract Year by more than RPIx, on the basis that any Compensation Event claimed puts the Contractor (from time to time) in no better and no worse position than it would have been in, had the cost increased by RPIx;
- (m) with regard to the Brampton HWRC, any Losses suffered by the Contractor in the period up to the twelfth anniversary of completion of construction of the Brampton HWRC, as a direct consequence of the construction (but not the design, for which the Contractor takes responsibility under this Agreement) of the Brampton HWRC not having been carried out in accordance with Good Industry Practice by the Authority (such construction having been completed by the Authority on 17 December 2008);
- (n) any misrepresentation contained in the replies to enquiries before contract issued by the solicitors acting for H Wicks (Lindel) Limited (copies of which have been provided to the Contractor) in respect of the Southern Resource Park and which are attached in the Agreed Form;

“Compensation Regulations”

the Local Government (Discretionary Payments) Regulations 1996 and the Local Government (Early Termination of Employment) (Discretionary Compensation) (England and Wales) Regulations 2006;

“Completion Date”	is as defined in the Southern Resource Park Land Option Agreement (Holker)
“Compliant Tender”	any tender submitted by a Compliant Tenderer that meets all of the Qualification Criteria notified under clause 37.2;
“Compliant Tenderer”	a tenderer who is a Suitable Substitute Contractor;
“Composting”	has the meaning given, as at the Commencement Date, to the term in the Department for Communities and Local Government National Indicator 192 as defined in Annex 4 to the National Indicators for Local Authorities and Local Authority Partnerships: Handbook of Definitions, being the controlled biological decomposition and stabilisation of organic substrates, under conditions that are permanently aerobic and that allow the development of thermophilic temperatures as a result of biologically produced heat which results in a final product that has been sanitised and stabilised, is high in humic substances and can be used as a soil improver, as an ingredient in growing media, or blended to produce a top soil that will meet British Standard BS 3882, incorporating amendment No.1. In the case of vermicomposting these thermophilic temperatures can be foregone at the point the worms are introduced. Output from a mechanical biological treatment facility can be included within this definition; and “Compost” and “Composted” shall be construed accordingly;
“Conditions Precedent”	the conditions referred to in clause 3.2;
“Conduit”	all pipes, sewers, drains, mains, ducts, gutters, watercourses, wires, cables, meters, switches, channels, flues and all other conducting media appliances and apparatus including any fixtures, louvres, cowls and other ancillary apparatus;
“Confidential Information”	(a) information that ought to be considered as confidential (however it is conveyed or in whatever media it is stored) and may include information whose disclosure would, or would be likely to prejudice the commercial interests or any person, trade secrets, Intellectual Property Rights, know-how of either Party and all Personal Data and sensitive Personal Data within the meaning of the Data Protection Act 1998; and (b) Commercially Sensitive Information;
“Consents”	all approvals, permissions, consents, licences, certificates and authorisations (whether statutory or otherwise) which are required for the purposes of carrying out the Project, whether required in order to comply with Legislation or as

	a result of the rights of any third party;
“Containers”	containers provided by the Contractor for the receipt, separation or transport of Waste in accordance with this Agreement;
“Construction Programme”	the programme for the carrying out of the Works set out in Appendix 20 (Works Period Timetable) to Schedule 2 Part 2 (Works Delivery Plan) of the Service Delivery Plan;
“Contract Month”	has the definition set out in Schedule 5 (Payment Mechanism);
“Contract Period”	the period from the Commencement Date to the Expiry Date, or if earlier, the Termination Date;
“Contract Waste”	<ul style="list-style-type: none"> (a) Specific Waste Items (as identified in Appendix 2 of Schedule 5 (Payment Mechanism)); (b) Household Waste, as collected by or on behalf of a WCA (including Hazardous Waste arising from such collections but excluding kerbside collected Recycling and Green Waste; (c) (subject, where relevant, to compliance by the Authority with the provisions of clause 6.6 in relation to the acceptance of such waste at HWRCs) Commercial Waste, as collected by or on behalf of a WCA; (d) (subject to compliance by the Authority with the provisions of clause 6.7) Industrial Waste as collected by or on behalf of a WCA; (e) all Waste deposited at any HWRC by householders and other Authorised Users (following implementation of the permitting system set out in clause 6.6) and any other Waste which is discarded (but not in a Bring Facility) within fifty (50) metres of the Site boundary of an HWRC (or such other distance as may be specified in the relevant Lease for such HWRC) and to which the Contractor has free access without the payment of any consideration to any person for such access; (f) all Waste from the cleansing of all public highways, public areas, footpaths, footways, public parks, beaches, and like areas including gully sweepings and gully emptyings as collected by or on behalf of the WCAs and the Authority acting either as the WDA or the Highway Authority (but for the avoidance of doubt this shall not include grass clippings, hedge trimmings or other Green Waste arising from grounds maintenance

or similar activities within public parks);

- (g) all Waste from the litter prevention/fly tipping prevention activities carried out by the WDA, WCAs or community, voluntary and not for profit organisations operating within the Authority's administrative area and delivered to the Contractor with the prior consent of the WDA;
- (h) any other Waste collected by or on behalf of a WCA from Bring Facilities or from the kerbside collection activities of the WCA which in the reasonable opinion of such WCA is not suitable material for Recycling or Composting; and
- (i) Waste collected from or delivered by registered charities operating within the Authority's administrative area and delivered to the Contractor with the prior consent of the WDA;

and, for the avoidance of doubt, the definition of Contract Waste shall not double count SRF, any Waste Derived Products, Reclaimed Materials or Residues and shall not include any abandoned vehicles;

“Contract Year”

a period of twelve (12) months commencing on 1 April and each anniversary thereafter provided that:-

- (a) the first Contract Year shall be the period commencing on the Commencement Date and ending on the immediately following 31 March; and
- (b) the final Contract Year shall be the period commencing on 1 April immediately preceding the last day of the Contract Period and ending on that day;

“Contract Waste Audit”

has the meaning given to it in section 4 of Schedule 29 (Contract Waste Review Procedure);

“Contractor Change”

has the meaning given to it in Part 1 of Schedule 27 (Change Protocol);

“Contractor Change Notice”

has the meaning given to it in Part 1 of Schedule 27 (Change Protocol);

“Contractor Default”

one of the following events:-

- (a) a breach by the Contractor of any of its obligations under this Agreement which materially and adversely affects the performance of the Services PROVIDED THAT prior to determining whether to exercise this right of termination, the Authority

shall, acting reasonably and in good faith (by reference to the nature and gravity of the breach), determine whether action other than termination, including exercising its other contractual rights and remedies under this Agreement (having regard to the nature of such rights and remedies), would be more appropriate to deal with this breach or circumstances giving rise to the breach and if the Authority so determines, shall not terminate this Agreement as a result of this particular breach arising;

- (b) the occurrence of a Persistent Breach;
- (c) a court makes an order that the Contractor be wound up or a resolution for a voluntary winding-up of the Contractor is passed;
- (d) any receiver or manager in respect of the Contractor is appointed or possession is taken by or on behalf of any creditor of any property that is the subject of a charge;
- (e) any voluntary arrangement is made for a composition of debts or a scheme of arrangement is approved under the Insolvency Act 1986 or the companies Act 2006 in respect of the Contractor;
- (f) an administration order is made;
- (g) a breach of clause 57.2 (Assignment and Sub-Contracting) occurs;
- (h) a breach of clause 59 (Corporate Structures) occurs;
- (i) the Contractor has failed to commence any Works on any Site on the date that is two (2) Months after the proposed Start on Site Date in respect of such Site;
- (j) the Contractor Abandons the Works;
- (k) REDACTED – 16 Ines

(l) REDACTED – 18 lines

(m) a failure to complete the Works in relation to the Southern Resource Park by the Southern Resource Park Longstop Date and/or a failure to complete the Works in relation to the Northern Resource Park by the Northern Resource Park Longstop Date;

(n) subject to clause 53 (Risks that become Uninsurable), a breach by the Contractor of its obligation under clause 51.1 (Insurance) to take out and maintain any of the Required Insurances;

(o) the Contractor committing a material breach of its obligations under this Agreement (other than as a consequence of a breach by the Authority of its obligations under this Agreement) which results in the criminal investigation, prosecution and conviction of the Contractor or any Contractor Related Party or the Authority under Health and Safety Law (an "H&S Conviction") provided that an H&S Conviction of a Contractor Related Party or the Authority shall not constitute a Contractor Default if, within ninety (90) Working Days from the date of the H&S Conviction (whether or not the H&S Conviction is subject to an appeal or any further judicial process), the involvement in the Project of each relevant Contractor Related Party (which in the case of an individual director, officer or employee shall be deemed to include the Contractor Related Party of which that person is a director, officer or employee) is terminated and a

replacement is appointed by the Contractor in accordance with clause 57.6 (Replacement of Sub-Contractors) provided always that in determining whether to exercise any right of termination or right to require the termination of the engagement of a Contractor Related Party under this limb (o), the Authority shall:-

- (i) act in a reasonable and proportionate manner having regard to such matters as the gravity of any offence and the identity of the person committing it; and
 - (ii) give all due consideration, where appropriate, to action other than termination of this Agreement;
- (p) a Target Failure Default; and
- (q) *REDACTED – 17 lines*

“Contractor Offered Price”	has the meaning set out in clause 27B.1.2;
“Contractor Related Party”	<ul style="list-style-type: none">(a) an officer, servant or agent of the Contractor, or any Affiliate of the Contractor and any officer, servant or agent of such a person;(b) any Sub-Contractor or sub-contractor of the Contractor of any tier and any of their officers, servants or agents; and(c) any person on or at any of the Waste Management Facilities at the express or implied invitation of the Contractor (other than the Authority or an Authority Related Party);
“Contractor’s Representative”	the person to be appointed by the Contractor pursuant to clause 10 or his deputy appointed pursuant to clause

	10.1;
“Contractor Response”	has the meaning contained in Part 1 of Schedule 27 (Change Protocol);
“Contractor’s Services Proposals”	the proposals for the provision of the Services set out in Part 2 of Schedule 2;
“Contractor’s Share”	the percentage figure corresponding to that part of the Cumulative Capital Expenditure at the relevant time shown in the first column of the table set out in Schedule 26;
“Contractor’s Works Proposals”	the proposals for the construction of the Waste Management Facilities set out in Part 1 of Schedule 2;
“Cumulative Capital Expenditure”	the aggregate of:- <ul style="list-style-type: none"> (a) all Capital Expenditure which has been incurred as a result of each General Change in Law that has come into effect on or after the Service Availability Date for the second of the New Facilities to achieve Service Availability; and (b) the amount of Capital Expenditure that is agreed, or determined to be required, as a result of a General Change in Law under clause 45 (Change in Law);
“Current SRF Offtake Contract”	the SRF Offtake Contract in operation at the SRF Contract Review Date;
“CWM”	Cumbria Waste Management Limited (Registered No. 02665973) of Unit 5A, Wavell Drive, Rosehill Industrial Estate, Carlisle, CA1 2ST;
“CWM Employees”	any employee employed by CWM in the provision of any of the Services (or any equivalent services);
“CWM Policies”	the policies referred to in Part 2 of Schedule 11 (Policies);
“Data Room”	the designated room at the Courts, Carlisle, Cumbria, CA3 8LZ in which data and resources relevant to the Project were made available to the Contractor;
“Deductions”	has the meaning given in Schedule 5 (Payment Mechanism);
“Deemed New Contract”	an agreement on the same terms and conditions as this Agreement as at the Termination Date, but with the following amendments:- <ul style="list-style-type: none"> (a) if this Agreement is terminated prior to achieving the Service Availability Date for each Resource Park, then each relevant Target Service

Availability Date shall be extended by such period as would have been granted to allow a New Contractor to achieve completion of the Works;

- (b) any accrued Performance Points and/or warning notices shall, for the purposes of termination only, and without prejudice to the rights of the Authority to make financial Deductions be cancelled;
- (c) the term of such agreement shall be for a period equal to the term from the Termination Date to the Expiry Date; and
- (d) the inclusion of a provision confirming that in the event that any New Contractor Rectification Works are required (in relation to a Waste Management Facility that has, at the Termination Date, been completed) to enable the New Contractor to provide the Services to the full specification and standards required by this Contract then provided that the New Contractor complies with the New Contractor Rectification Plan for the New Contractor Rectification Period the Authority shall not exercise its rights to terminate the Contract under clause 29.3 (Termination for Contractor Default) by reason of any failure to achieve some or all of the specification and/or standards required by this Agreement solely as a consequence of the New Contractor Rectification Works being required. Such provision shall for the avoidance of doubt not affect the Authority's entitlement to make adjustments and/or Deductions in accordance with Schedule 5 (Payment Mechanism) as a result of failure to achieve the specification and/or standards required by this Agreement during the New Contractor Rectification Period;

“Default Interest”

any increased margin that is payable to the Senior Lenders or which accrues as a result of any payment due to the Senior Lenders not being made on the date which it is due;

“Delivery Requirements”

the delivery of the Output Specification to the extent it is applicable to the Landfill Service in a manner that is in accordance with and subject to the obligations of the Contractor under this Agreement, based on contract terms that:-

- (a) back to back applicable terms, risks and liabilities from this Agreement that are relevant to the

	<p>Landfill Services into the contract for the Landfill Services including (if required by the Contractor) the provision of a performance guarantee to a value reasonably commensurate (in the opinion of a reasonable contractor) with the value of the contract for the Landfill Services;</p> <p>(b) are for a duration equal to the relevant market testing period up to the next Market Testing Review Date;</p> <p>(c) are fully transferable to the Authority or any new contractor appointed by the Authority to undertake the relevant part of the Services; and</p> <p>(d) are for volumes consistent with reasonable assumptions as to tonnages of relevant categories of Contract Waste for the period to the next Market Testing Review Date;</p>
“Design Consultant”	Capita Symonds Limited or any successor Design Consultant appointed by the Building Contractor to undertake the design of the Works;
“Design Consultant Appointment”	the appointment to be agreed between the Building Contractor and the Design Consultant relating to the design of the Works;
“Design Data”	all drawings, reports, documents, plans, software, formulae, calculations and other data relating to the design, construction, testing or operation of the Waste Management Facilities;
“Direct Agreement”	the agreement of the same date as this Agreement between the Authority the Contractor and the Security Trustee in the Agreed Form;
“Direct Losses”	Losses, but excluding Indirect Losses;
“Disclosed Data”	<p>information relating to the Project disclosed to the Contractor and its shareholders and advisers including:-</p> <p>(a) the Invitation to Negotiate;</p> <p>(b) the Data Room;</p> <p>(c) any information obtained by the Contractor in relation to the Project;</p>
“Discriminatory Change in Law”	<p>a Change in Law, the terms of which apply expressly to:-</p> <p>(a) the Project and not to similar projects procured under public private partnership;</p>

	(b) the Contractor and not to other persons; and/or
	(c) persons who have contracted with the Government, a local authority or other public or statutory body to provide services under a public private partnership and not to other persons;
"Dispute Resolution Procedure"	the procedure for the resolution of disputes set out in clause 54;
"Distington Transfer Station"	the waste transfer station to be located at Distington;
"Distington TS Contract"	the contract of even date herewith between the Operating Contractor (1) and Cumbria Waste Management Limited (2) in relation to the use of the Distington Transfer Station for the purposes of the Project;
"Distribution"	whether in cash or in kind, any:- <ul style="list-style-type: none"> (a) dividend or other distribution in respect of share capital; (b) reduction of capital, redemption or purchase of shares or any other reorganisation or variation to share capital; (c) payments under the Subordinated Financing Agreements (whether of principal, interest, breakage costs or otherwise); (d) payment, loan, contractual arrangement or transfer of assets or rights to the extent (in each case) it was put in place after Financial Close and was neither in the ordinary course of business nor on reasonable commercial terms; or (e) the receipt of any other benefit which is not received in the ordinary course of business and on reasonable commercial terms;
"Distribution Date"	has the meaning given in Schedule 5 (Payment Mechanism);
"District Councils"	the six (6) Cumbria District Councils of Carlisle, Allerdale, Copeland, Eden, South Lakeland, Barrow-in-Furness;
"DPA"	the Data Protection Act 1998;
"EcoDeco Confidentiality Undertaking"	the form of undertaking set out in Part 3 of the Schedule to the EcoDeco Licence;
"EcoDeco Licence"	the licence of even date herewith between Sistema EcoDeco Srl (1) (Italian Fiscal Code Number 01255650168) and the Contractor (2) as novated from

	time to time in accordance with its terms;
“EcoDeco Plant”	all and any part of either of the plant and equipment forming the subject matter of the EcoDeco Licence and as more particularly described in paragraph 1.4 of Schedule 2, Part 2 (Works Delivery Plan);
“Eligible Employees”	the Relevant Employees who are either members of or entitled to join the LGPS immediately prior to the Relevant Transfer Date for so long as they are employed in connection with the provision of the Services or part of such Services, and provided that they satisfy all eligibility criteria in the LGPS Regulations but excluding, for the avoidance of doubt any New Employees;
“Employment Claims”	any claim for breach of contract, redundancy, unfair dismissal, sex, race or disability discrimination, or any other claim within the jurisdiction of an employment tribunal or arising at common law, in tort or otherwise (in all cases whether arising under British or European law);
“Employment Costs”	all costs, awards, damages, penalties, fines, compensation (including interest therein) and reasonable legal costs arising as a consequence of Employment Claims;
“Environment”	has the meaning given in section 1(2) of EPA and its regulations and includes soil, land, water (including controlled waters as defined in section 104(1) of the Water Resources Act 1991 and water and drains and sewers) air and any living organism supported by those media;
“Environmental Damage”	any harm, damage or impairment to the Environment relating to or arising from Hazardous Materials;
“Environmental Information Regulations”	the Environmental Information Regulations 2004 together with any Guidance and/or codes of practice issued by the Information Commissioner or relevant Government Department in relation to such regulations;
“Environmental Report”	a report to be included with the Annual Service Report pursuant to clause 28.2.1 giving a comprehensive overview of all issues relating to the Environment relevant to the delivery of the Services;
“EP”	a waste management licence, pollution prevention and control permit, and any environmental permit issued by the Environment Agency under the Environmental Permitting (England and Wales) Regulations 2007;
“EPA”	the Environmental Protection Act 1990;

“Equity IRR”	the projected blended rate of return, stated in real terms, to the Relevant Persons over the full term of the Agreement, having regard to Distributions made and projected to be made;
“Estimated Change in Project Costs”	in relation to any Relevant Event, the aggregate of any Change in Costs and/or Change in Revenue (as relevant);
“Estimated Fair Value of the Contract”	the amount determined in accordance with clause 37.3 that a third party would pay to the Authority as the market value of the Deemed New Contract;
“Exceptional Cost”	for an Insurance Review Period, the extent to which there is an Insurance Cost Increase which exceeds in amount thirty per cent (30%) of Base Relevant Insurance Cost for that Insurance Review Period;
“Exceptional Saving”	for an Insurance Review Period, the extent to which there is an Insurance Cost Decrease which exceeds in an amount of thirty per cent (30%) of the Base Relevant Insurance Cost for that Insurance Review Period;
“Excess Contract Waste”	shall have the meaning given in clause 6.2;
“Exempt Refinancing”	<ul style="list-style-type: none"> (a) any Refinancing that was fully taken into account in the calculation of the Annual Unitary Charge; (b) a change in taxation or change in accounting treatment; (c) waivers, Consents and similar actions which relate to day to day administrative and supervisory matters that are in respect of:- <ul style="list-style-type: none"> (i) breach of representations and warranties or undertakings; (ii) movement of monies between the Project Accounts in accordance with the terms of the Senior Financing Agreements as at Financial Close; (iii) late or non-provision of information, Consents or licences; (iv) amendments to Sub-Contracts; (v) approval of revised technical and economic assumptions for Base Case runs (to the extent required for forecasts under the Financing Agreements); (vi) restrictions imposed by the Senior Lenders on the dates at which the Senior Debt can

be advanced to the Contractor under the Senior Financing Agreements and/or amounts released from the Proceeds Account during the Availability Period each as defined in the Senior Financing Agreements and which are given as a result of any failure by the Contractor to ensure that the Works are performed in accordance with the Construction Programme and which are notified in writing by the Contractor or the Senior Lenders to the Authority prior to being given;

- (vii) changes to milestones for drawdown and/or amounts released from the Proceeds Account during the Availability Period set out in the Senior Financing Agreements and which are given as a result of any failure by the Contractor to ensure that construction work is performed in accordance with the agreed Construction Programme and which are notified in writing by the Contractor or the Senior Lenders to the Authority prior to being given;
 - (viii) failure by the Contractor to obtain any consent by statutory bodies required by the Senior Financing Agreements; or
 - (ix) voting by the Senior Lenders and the voting arrangements between the Senior Lenders in respect of the levels of approval required by them under the Senior Financing Agreements;
- (d) any amendment, variation or supplement of any agreement approved by the Authority as part of any Qualifying Variation under this Contract;
 - (e) any sale of shares in the Contractor by the shareholders or securitisation of the existing rights and/or interests attaching to shares in the Contractor;
 - (f) any sale or transfer of the Subordinated Lenders' existing rights and/or interests under the Subordinated Financing Agreements or securitisation of the Subordinated Lenders' existing rights and/or interests under the Subordinated Financing Agreements; or

	(g) any Qualifying Bank Transaction;
“Existing Facility”	the waste management facilities together with all supporting infrastructure located on any of the Sites listed in Part 1 of Schedule 3 (Facilities), and “Existing Facilities” shall be construed accordingly;
“Expiry Date”	the day prior to the twenty fifth (25 th) anniversary of the Commencement Date;
“Fair Value”	the amount at which an asset or liability could be exchanged in an arm’s length transaction between informed and willing Parties, other than in a forced or liquidation sale;
“Fast Track Dispute Resolution Procedure”	the procedure described in 54.14 (Fast Track Dispute Resolution Procedure);
“Fees Regulations”	The Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004;
“Final Acceptance Certificate”	the certificate issued by the Independent Certifier in accordance with clause 19.10 (Issue of Final Acceptance Certificate);
“Financial Close”	shall have the meaning given to it in the Senior Financing Agreements;
“Financing Agreements”	all or any of the agreements or instruments entered into by the Contractor for the provision of finance or financial facilities to enable the Contractor to undertake the Project including the Initial Financing Agreements (and any amendments to them) and any agreements providing for the Junior Debt and including any agreements or instruments to be entered into by the Contractor to raise additional or substitute finance or financial facilities of any form (whether for a Refinancing or otherwise) or relating to the rescheduling of its indebtedness or Refinancing of the Project or reinvestment in respect of the Project and including any related security documents, Loan Agreement, Hedging Agreements and the Direct Agreement;
“First Acceptance Date”	has the meaning given in Schedule 5 (Payment Mechanism);
“First Annual Reconciliation Report”	the report setting out the draft calculation by the Contractor of the First Annual Reconciliation (as the same is defined in Schedule 5 (Payment Mechanism)) in each Contract Year, such report being in the form set out in the specimen First Annual Reconciliation Report annexed at Schedule 36 (Reporting Proformas);
“First Insurance Review	the first Working Day following the first anniversary of the

Date”	Relevant Insurance Inception Date;
"First Landfill Market Testing Review Date"	five (5) years from the Commencement Date;
"Flusco HWRC"	the premises at Flusco Landfill Site Penrith CA11 OJB forming part of the land registered under title number CU232561 and more particularly described in Schedule 1 of the relevant lease included at Schedule 4 (Leases) hereto;
"Flusco Transfer Station"	the waste transfer station to be located at Flusco Landfill Site Penrith CA11 OJB;
"Flusco TS Contract"	the contract of even date herewith between the Operating Contractor (1) and Cumbria Waste Management Limited (2) in relation to the use of the Flusco Transfer Station for the purposes of the Project;
"FoIA"	the Freedom of Information Act 2000 and any subordinate legislation (as defined in section 84 of the Freedom of Information Act 2000 from time to time together with any Guidance and/or) codes of practice issued by the Information Commissioner or relevant Government Department in relation to such Act;
"Force Majeure Event"	<p>the occurrence after the date of this Agreement of:-</p> <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 the result of the acts or omissions of the Contractor or its Sub-Contractors except where the act of the Contractor or its Sub-Contractor is solely the receipt or treatment of Contract Waste in accordance with this Agreement which contains nuclear, chemical or biological contamination; or (c) pressure waves caused by devices travelling at supersonic speeds, <p>which directly causes either Party (the "Affected Party") to be unable to comply with all or a material part of its obligation under this Agreement;</p>
"Frizington HWRC"	the premises at Yeathouse Quarry, Frizington, Cumbria, CA26 3QR forming part of the land registered under title number CU214616 and more particularly described in Schedule 1 of the relevant lease included at Schedule 4 (Leases) hereto;
"Full Service Period"	has the meaning given in Schedule 5 (Payment Mechanism);

“Fund”	the Cumbria Local Government Pension Scheme in the LGPS;
“Funders Technical Adviser”	has the meaning attributed to “Technical Adviser” under the terms of the Financing Agreements;
“Future Service Provider”	each and every service provider who shall provide any service equivalent to any of the Services after expiry or earlier termination of this Agreement in whole or in part;
“General Change in Law”	a Change in Law which is not a Discriminatory Change in Law or a Specific Change in Law;
“Good Industry Practice”	that degree of skill, care, prudence and foresight and operating practice which would reasonably and ordinarily be expected from time to time of a skilled and experienced contractor (engaged in the same type of undertaking as that of the Contractor) or operating contractor, building contractor or any sub-contractor under the same or similar circumstances;
"Green Waste"	biodegradable waste comprised of garden or park waste;
“Guidance”	any applicable guidance, or directions with which the Contractor is bound to comply;
“Handback Requirements”	the requirements set out in Schedule 22 (Handback Requirements);
“Hazardous Materials”	any pollutant, contaminant or hazardous, toxic, radioactive, noxious, flammable, corrosive or caustic matter (whether in solid, liquid or gaseous form) which is (alone or in combination) capable of causing harm to the Environment or to human health and any waste;
“Hazardous Waste”	has the meaning given in regulation 6 of the Hazardous Waste (England and Wales) Regulations 2005;
“Health and Safety Law”	the Health and Safety at Work etc. Act 1974 together with all subordinate and associated legislation and all applicable judicial decisions, the law of the European Union, codes of practice and guidance notes having legally binding effect;
“Hedging Agreement”	has the meaning set out in the Loan Agreement;
“Highest Compliant Tender Price”	the price offered by the Compliant Tenderer (if any) with the highest tender price;
“HoldCo”	Shanks Cumbria Holdings Limited of 4 Dunedin House, Auckland Park, Mount Farm, Bletchley, Milton Keynes Buckinghamshire MK1 1BU;
“Household Waste”	as defined in section 75 of the EPA;

“HWRC”	<ul style="list-style-type: none"> (a) any of the Existing Facilities; (b) any replacement facility for any of the Existing Facilities; or (c) any other facility within the administrative area of the Authority which is acquired or leased by the Authority during the Contract Period to be used as a household waste recovery centre, <p>at which Waste may be deposited under section 1 of the RDA or 51(1)(b) of the EPA as detailed in Part 3 of Schedule 3;</p>
“HWRC Operational Service”	the services carried out at the HWRCs in accordance with the Output Specification and Service Delivery Plan;
“Independent Certifier’s Deed of Appointment”	the deed of appointment of the Independent Certifier in the form set out in Schedule 13;
“Independent Certifier”	the person appointed jointly by the Authority and the Contractor to act as independent certifier to the Project in accordance with the Independent Certifier’s Deed of Appointment;
“Indirect Losses”	loss of profits, loss of use, loss of production, loss of business opportunity, or any claim for consequential loss or for indirect loss of any nature but excluding any of the same which relate to loss of revenue under this Agreement or loss of Third Party Revenue;
“Industrial Waste”	as defined in section 75 of the EPA;
“Information”	has the meaning given under section 84 of the Freedom of Information Act 2000;
“Initial Financing Agreements”	<ul style="list-style-type: none"> (a) the Loan Agreement; (b) the Accounts Agreement (as defined in the Loan Agreement); (c) the Hedging Agreements; (d) the Intercreditor Deed; (e) each Intercreditor Accession Deed (as defined in the Loan Agreement); (f) the Security Documents (as defined in the Loan Agreement); (g) each Transfer Agreement (as defined in the Loan Agreement); (h) the Shanks PFI Investments L/C (as defined in the

	Loan Agreement); and
	(i) each of the collateral warranties provided to the Senior Lender pursuant to the Loan Agreement;
“Initial SRF Offtake Contract”	the agreement of even date herewith between the Operating Contractor (1) and Shanks SRF Offtake Limited (2);
“Initial SRF Offtake Contract Direct Agreement”	the agreement of even date herewith between the Authority (1), the Contractor (2), and Shanks SRF Offtake Limited (3);
“Instalment Dates”	the definition set out in clause 42.2.1(a);
“Insurance Cost Decrease”	the Insurance Cost Differential if the value thereof is less than zero (0), multiplied by minus one (1);
“Insurance Cost Differential”	shall, subject to the Insurance Review Procedure, be determined as follows:- Insurance Cost Differential = (ARIC – BRIC) – (+/- PIC) where:- ARIC is the Actual Relevant Insurance Cost BRIC is the Base Relevant Insurance Cost PIC is any Project Insurance Change
“Insurance Cost Increase”	the Insurance Cost Differential if the value thereof is greater than zero (0);
“Insurance Cost Index”	any index introduced by the United Kingdom Government or the Office of National Statistics after the date of this Agreement and which is anticipated to be published annually to provide an independent and objective measure of changes in prevailing market insurance costs;
“Insurance Review Date”	the First Insurance Review Date and, thereafter, each date falling on the second anniversary of the previous Insurance review Date, except where such date lies beyond the end of the Contract Period, in which case the Insurance Review Date shall be last renewal date of the Relevant Insurance prior to the end of the Contract Period;
“Insurance Review Period”	a two (2) Year period from the Relevant Insurance Inception Date and each subsequent two (2) Year period commencing on the second anniversary of the Relevant Insurance Inception Date except where the end of such period lies beyond the end of the Contract Period, in which case the Insurance Review Period shall be the period from the end of the penultimate Insurance Review

	Period to the last day of the Contract Period;
“Insurance Review Procedure”	the procedure set out in clauses 51.13 to 51.14;
“Insurance Term”	any terms and/or conditions required to be in a policy of insurance by clause 51.1.1 and/or Schedule 12 (Insurance) but excluding any risk;
“Insurance Undertaking”	has the meaning given in the rules from time to time of the Financial Services Authority;
“Intellectual Property Rights”	any and all patents, Trade Marks, New Trade Marks, trade marks, service marks, copyright, moral rights, rights in a design, know-how, Confidential Information and all or any other intellectual or industrial property rights whether or not registered or capable of registration and whether subsisting in the United Kingdom or any other part of the world together with all or any goodwill relating or attached thereto;
“Intercreditor Deed”	the intercreditor deed of even date herewith between the Agent (1), the Security Trustee (2), the Account Bank (as defined in the Loan Agreement) (3), the Hedge Providers (as defined in the Loan Agreement) (4), the Lenders (as defined in the Loan Agreement) (5), the Contractor (as borrower under the Loan Agreement) (6), HoldCo (7) and the Shareholders (as defined in the Loan Agreement) (8);
“Interface Site”	any of the following:- <ul style="list-style-type: none"> (a) a Resource Park; (b) a Transfer Station; or (c) a Landfill Site to which any WCA makes a direct delivery of Contract Waste in accordance with the terms of this Agreement;
“Invitation to Negotiate”	the Invitation to Negotiate issued by the Authority in relation to the Project and dated 22 October 2004;
“IRR”	the internal rate of return for the Project as set out in the Base Case;
“ITS Reduction Factor”	has the meaning given in Appendix 1 of Schedule 5 (Payment Mechanism);
“Joint Insurance Account”	the account named “Joint Insurance Proceeds Account” held by the Contractor in accordance with clause 52.1 of this Agreement at the Account Bank (as defined in the Loan Agreement), account number 307151, sort code 40-51-25;
“Joint Insurance Cost	has the meaning given in clause 51.13.2;

Report”	
“Junior Debt”	all amounts outstanding on the Termination Date under the Subordinated Financing Agreements;
“Kendal Fell Expiry Date”	31 March 2015;
“Kendal Fell TS”	the transfer station at Kendal Fell Quarry, Kendal, Cumbria;
“Key Sub-Contractor”	the Building Contractor and/or Operating Contractor;
“Key Target”	the Biodegradable Contract Waste Landfill Tonnage Deduction Threshold, the Active Waste Standard or the HWRC Target Recycling and Composting Rate as defined in Schedule 5 (Payment Mechanism);
“Landfill”	has the meaning set out in section 22 of the Waste Emissions Trading Act 2003;
“Landfill Allowance”	the amount of collected municipal waste (having the meaning given by LATS) which the Authority is entitled to dispose of to Landfill pursuant to its allocation of Landfill allowances under LATS;
“Landfill Element”	has the meaning given in Schedule 5 (Payment Mechanism);
“Landfill Gate Fee Deduction”	has the meaning given in Schedule 5 (Payment Mechanism);
“Landfill Service”	the transportation to and the disposal at a Landfill Site of:- (a) Contract Waste; and/or (b) Residues from the Resource Parks;
“Landfill Site”	any landfill site used by the Contractor during the Contract Period for the disposal by way of landfilling of Contract Waste;
“Landfill Tax”	shall have the meaning set out in section 39(1) Finance Act 1996, and shall for the avoidance of doubt include any successor tax on Waste disposed of by way of Landfill;
“Landfill Tax Deduction”	has the meaning given in Schedule 5 (Payment Mechanism);
“Latent Defects”	any defect in any of the Waste Management Facilities, or any part of them, or anything installed in the Waste Management Facilities attributable to:- (a) defective design;

	<ul style="list-style-type: none"> (b) defective workmanship or defective materials, plant or machinery used in such construction having regard to Good Industry Practice and to appropriate British Standards and codes of practice current at the date of construction of the Waste Management Facilities; (c) defective installation of anything in or on the Waste Management Facilities; and (d) defective preparation of a Site on which any building or structure or any Asset is constructed;
“LATS”	the Landfill Allowance and Trading Scheme (England) Regulations 2004 introduced under the Waste and Emissions Trading Act 2003;
“LATS Trading Year”	has the meaning given in Schedule 5 (Payment Mechanism);
“Lease”	each of the leases to be granted by the Authority to the Contractor of each of the Waste Management Facilities in accordance with the terms of this Agreement as set out in Schedule 4 and “Leases” shall be construed accordingly;
“Legislation”	in relation to the United Kingdom:- <ul style="list-style-type: none"> (a) any Act of Parliament; (b) any subordinate legislation within the meaning of section 21(1) of the Interpretation Act 1978; (c) any exercise of the Royal Prerogative; and (d) any enforceable community right within the meaning of section 2 of the European Communities Act 1972;
“LGFA”	has the meaning given in paragraph 4.5 of Schedule 5 (Payment Mechanism);
“LGPS Regulations”	the Local Government Pension Scheme Regulations 1997 (SI 1997/1612) as amended from time to time, the Administration Regulations, the Benefits Regulations, the Local Government Pension Scheme (Transitional Provisions) Regulations 2008 (SI 2008/238) as amended from time to time, or any subsequent enactment thereof, together with any other regulations from time to time applicable to the Contractor’s or Sub-Contractor’s participation in the Fund or any Eligible Employee’s membership of the Fund;
“Liaison Procedure”	the procedure set out in Schedule 9;

“Liquid Market”	a market where there are sufficient willing parties (being at least two parties, each of whom is capable of being a Suitable Substitute Contractor in the market) for PFI contracts or similar contracts (in each case the same as or similar to this Agreement) for the price that is likely to be achieved through a Compliant Tender for the New Contract to be a reliable indicator of Fair Value provided always that any vehicle controlled by the Senior Lenders and to which this Agreement may be novated shall be discounted in assessing whether there are sufficient willing bidders in that market for such purposes;
“Litter Code of Practice”	is as defined in the Service Delivery Plan;
“Loan Agreement”	an agreement of even date herewith between the Contractor (1), HoldCo (2), the Arrangers (as defined in the Loan Agreement) (3), the Agent (4), the Security Trustee (5), the Account Bank (as defined in the Loan Agreement) (6), the Equity Bridge Lenders (as defined in the Loan Agreement) (7), the Term Loan Lenders (as defined in the Loan Agreement) (8) and the Change in Law Lenders (as defined in the Loan Agreement) (9);
“Local Government Pension Scheme” or “LGPS”	the Local Government Pension Scheme established pursuant to regulations made by the Secretary of State in exercise of powers under section 7 and 12 of the Superannuation Act 1972 as from time to time amended;
“Longstop Date”	the Northern Resource Park Longstop Date or the Southern Resource Park Longstop Date;
“Losses”	all damages, losses, liabilities, costs, expenses (including legal and other professional charges and expenses) and charges whether arising under statute, contract or at common law, or in connection with judgements, proceedings, internal costs or demands;
“Management Services Agreement”	an agreement of even date herewith between the Contractor (1) and Shanks Waste Management Limited (2) in relation to the management of the Contractor company;
“Market Costs”	has the meaning given in clause 27A.3;
"Market Testing"	market testing in accordance with clause 27B.2;
"Market Testing Tender Price"	the price offered by the winning tenderer for the provision of the Landfill Service or any element thereof;
"Market Testing Review Date"	the First Landfill Market Testing Review Date and every fifth anniversary of the First Landfill Market Testing Review Date;
“Market Value Deduction	for any Month or part of a Month, an amount equal to the

Amount”	Additional Mileage Deductions for the Payment Period immediately preceding the Termination Date, less an amount equal to any Additional Mileage Deductions to the extent that the Additional Mileage Deduction relates to an Interface Site which has subsequently become Available whether it has become available as a result of the Authority incurring Rectification Costs or otherwise;
“Maximum Unitary Charge”	in respect of a Month, the Monthly Unitary Charge payable during that Month excluding any Deductions under Schedule 5 (Payment Mechanism) and any reconciliation payments made under paragraphs 7, 8, 9, and 10 of Schedule 5 (Payment Mechanism) but allowing for indexation in accordance with Schedule 5 (Payment Mechanism);
“Month”	a period starting at midnight on one (1) day in a calendar month and ending at midnight on the day before the numerically corresponding day in the next calendar month save that if there is no numerically corresponding day in the next calendar month, the period shall end at midnight on the last day of that next calendar month;
“Monthly Monitoring Report”	the monthly report setting out the draft calculation by the Contractor of the Monthly Unitary Charge, such report being in the form set out in the specimen Monthly Monitoring Report annexed at Schedule 36 (Reporting Proformas);
“Monthly Unitary Charge”	has the meaning given in Schedule 5 (Payment Mechanism);
“Necessary Consents”	all permits, licences, permissions, consents, approvals, certificates and authorisations (whether statutory or otherwise) which are required for the performance of any of the Contractor’s obligations under this Agreement, whether required in order to comply with Legislation or as a result of the rights of any third party;
“Net Present Value”	aggregate of the discounted values, calculated as of the estimated date of the Refinancing of each of the relevant projected Distributions, in each case discounted using the Threshold Equity IRR;
“New Contract”	an agreement on the same terms and conditions as this Agreement at the Termination Date, but with the following amendments:- (a) if this Agreement is terminated prior to achieving the Service Availability Date for each Resource Park, then each relevant Target Service Availability Date shall be extended by a period to allow a New Contractor to achieve completion of

the Works;

- (b) any accrued Performance Points and/or warning notices shall for the purposes of termination only, and without prejudice to the rights of the Authority to make financial Deductions, shall be cancelled;
- (c) the term of such agreement shall be for a period equal to the term from the Termination Date to the Expiry Date;
- (d) the inclusion of a provision confirming that in the event that any New Contractor Rectification Works are required to enable the New Contractor to achieve the full specification and standards required by this Agreement then provided the New Contractor complies with the New Contractor Rectification Plan for the New Contractor Rectification Period the Authority shall not exercise its rights to terminate the Contract under clause 29.3 (Termination on Contractor Default) by reason of any failure to achieve some or all of the specification and/or standards required by this Agreement. Such provision shall for the avoidance of doubt not affect the Authority's entitlement to make adjustments and/or Deductions in accordance with Schedule 5 (Payment Mechanism) as a result of failure to achieve the specification and/or standards required by this Agreement during the New Contractor Rectification Period; and
- (e) any other amendments which do not adversely affect the Contractor;

“New Contractor”	the person who has entered or who will enter into the New Contract with the Authority;
“New Contractor Rectification Period”	such period as is reasonable in the circumstances from the date of the New Contract to allow the New Contractor to carry out the New Contractor Rectification Works as shall be agreed by the Parties or in default of agreement determined pursuant to clause 54 (Dispute Resolution);
“New Contractor Rectification Plan”	the rectification plan to be implemented by the New Contractor setting out the New Contractor Rectification Works and timescales;
“New Contractor Rectification Works”	the carrying out of such works (including new and rectification works) and implementation of such new systems as shall be required to enable the New Contractor to achieve the standards and targets set out in Schedule 1 (Authority Requirements), such works being evidenced as complete by an appropriate testing

	procedure overseen by an independent third party appointed by the relevant parties at that time;
“New Employee”	any employee engaged to work in the provision of the Services at any of the Existing Facilities by an employer other than the Authority and whose employment in this role commences after the Commencement Date;
“New Facility”	the waste management facilities together with all supporting infrastructure to be constructed by the Contractor and located on a New Site, and “New Facilities” shall be construed accordingly;
“New Site”	any of the Sites listed in Part 2 of Schedule 3 (Facilities) and more particularly delineated by reference to a plan included in such Schedule upon which a New Facility is to be constructed and “New Sites” shall be construed accordingly;
“New Trade Marks”	any modifications or amendments to the Trade Marks and any new trade marks created or developed under the Branding Strategy;
“Non-Contract Waste”	(a) Waste received by or on behalf of the Contractor which is not Contract Waste and has not been authorised as Third Party Waste by the Authority under the terms of clause 6; or (b) any Waste Derived Product;
“Northern Resource Park”	the Resource Park at Hespian Wood as set out in Schedule 3 (Facilities);
“Northern Resource Park Longstop Date”	the date twenty four (24) Months after the Target Service Availability Date for the Northern Resource Park;
“Notice Date”	the later of the Termination Date and (if applicable) the date that the Adjusted Estimated Fair Value of the contract is agreed between the Parties pursuant to clause 37.3 (No Retendering Procedure);
“Notifiable Financings”	any Refinancing described in paragraph (a) or (c) of the definition of Refinancing and any other arrangement which has or would have a similar effect or which has or would have the effect of limiting the Contractor’s or any Associated Company’s ability to carry out any such arrangement;
“Opening Hours”	in relation to each Waste Management Facility and Transfer Station means the hours of business that the Contractor is required to keep open each such Waste Management Facility and Transfer Station being more specifically set out in Schedule 1 (Output Specification);

“Operating Contract”	subject to clause 71.3 (Ancillary Documents) the agreement in the Agreed Form between the Contractor and the Operating Contractor relating to the Services;
“Operating Contractor”	Shanks Waste Management Limited or any replacement Operating Contractor appointed by the Contractor to carry out the Services;
“Original Financial Model”	the computer spreadsheet model for the Project as at the Commencement Date, a copy of which is attached at Schedule 17;
“Original Senior Commitment”	the amount committed under the Senior Financing Agreements as at Financial Close (as adjusted to take into account any Qualifying Variation);
“Output Specification”	the works specification and service specification produced by the Authority as set out in Schedule 1;
“Outstanding Principal”	the principal amount outstanding at the Termination Date of each borrowing (other than any borrowing under any equity bridge facility under the Loan Agreement);
“Party”	either of the Authority or the Contractor (as the case may be);
“Payment Period”	each Month during the Contract Period;
“PC Date”	has the meaning set out in Schedule 5 (Payment Mechanism);
“Performance Deductions”	has the meaning set out in Schedule 5 (Payment Mechanism);
“Performance Points”	has the meaning given in Part 1 of Schedule 1 (Output Specification);
“Permitted Borrowing”	without double counting, any:- <ul style="list-style-type: none"> (a) advance to the Contractor under the Senior Financing Agreements, provided that such advance is not made under any Committed Stand-By Facility; (b) Additional Permitted Borrowing; (c) advance to the Contractor under any Committed Stand-By Facility which is made solely for the purpose of funding any cost overruns, increased expenses or loss of revenue which the Contractor incurs, provided that such funds are not used in substitution of other sources of committed funding designated for those purposes; and (d) interest and, in respect of the original Senior

Financing Agreements only (as entered into at the date of this Agreement, prior to any subsequent amendment), other amounts accrued or payable under the terms of such original Senior Financing Agreements,

except where the amount referred to in paragraphs (a) to (d) above is or is being used to fund a payment of Default Interest on any Additional Permitted Borrowing;

“Persistent Breach”

a breach by the Contractor of its obligations under this Agreement for which a Final Warning Notice has been issued (and in respect of which no other termination right under clause 29 (Termination of this Agreement) can apply) which has continued for sixty (60) days or has recurred in three (3) or more Months within a six (6) Month period after the date on which a final warning notice referred to in clause 29.6 (Final Notice) is served on the Contractor;

“Personal Data”

personal data within the meaning given to the phrase personal data by DPA which is acquired by or communicated to the Contractor in connection with the Project;

“Physical Damage Policies”

has the meaning set out in clause 52 (Reinstatement and Change of Requirement After Insured Event);

“PFI Insurance Market”

the insurance market which insures the majority of all PFI projects across all of the PFI sectors (as determined by the number of PFI projects, but excluding all waste PFI Projects). At the date of this Agreement, the PFI Insurance Market is in the United Kingdom;

“PM Report”

any of the following:-

- (a) Monthly Monitoring Report;
- (b) SRF Six Monthly Reconciliation Report;
- (c) First Annual Reconciliation Report;
- (d) Second Annual Reconciliation Report;
- (e) Third Annual Reconciliation Report;

“Post Termination Service Amount”

for the purposes of clause 37.2 (Retendering Procedure), for the whole or any part of a Month for the period from the Termination Date to the Compensation Date, an amount equal to the Maximum Unitary Charge which would have been payable in that Month under this Agreement had this Agreement not been terminated together with Third Party Revenue actually received by the Authority in the relevant Month, less an amount equal

to the aggregate of:-

- (a) the Market Value Deduction Amount for the Month;
- (b) the Rectification Costs incurred by the Authority during the Month;
- (c) (where relevant) the amount by which the Post Termination Service Amount for the previous Month was less than zero (0);

“Portfolio Cost Saving”

any insurance cost saving which arises from the Contractor changing the placement of the Required Insurance from being on a stand-alone project-specific basis assumed at Financial Close, and reflected in the Base Cost, to being on the basis of a policy or (policies) also covering risks on other projects or other matters which are outside the scope of the Project so as to benefit from portfolio savings. A Portfolio Cost Saving is defined to be a positive sum and cannot be less than zero (0);

“Power and Engineering Insurance Market”

the insurance market that insures the majority of European based Relevant Assets. At the date of this Agreement, the Power and Engineering Insurance Market is in Europe;

“Practical Completion”

has the definition set out in the Building Contract;

“Pre-Refinancing Equity IRR”

the real post tax Equity IRR calculated immediately prior to the Refinancing;

“Prescribed Rate”

two per cent (2%) above the base rate from time to time of National Westminster Bank plc;

“Principal Building Sub-Contract”

either of the three (3) principal building sub-contracts in the Agreed Form between the Building Contractor and the Principal Building Sub-Contractors relating to the Works (there being separate contracts for the Works relating to the Northern Resource Park and Southern Resource Park respectively in regard to Sistema EcoDeco (as defined below));

“Principal Building Sub-Contractor”

any of:-

- (a) Hanson Quarry Products Europe Limited (registered in England under company number 00300002) having its registered office at Hanson House, 14 Castle Hill, Maidenhead SL6 4JJ (“Hanson”);
- (b) Sistema EcoDeco UK Limited (registered in England under company number 05049191)

having its registered office at Matrix House, 12-16 Lionel Road, Canvey Island, Essex SS8 9DE (“Sistema EcoDeco”); or

- (c) any sub-contractor replacing (a) or (b) above appointed by the Building Contractor to undertake the design and/or construction of any of the Works;
- “Prohibited Act”
- (a) offering giving or agreeing to give to any servant of the Authority any gift or consideration of any kind as an inducement or reward:-
 - (i) for doing or not doing (or for having done or not having done) any act in relation to the obtaining or performance of this Agreement or any other contract with the Authority; or
 - (ii) for showing or not showing favour or disfavour to any person in relation to this Agreement or any other contract with the Authority;
 - (b) entering into this Agreement or any other contract with the Authority in connection with which commission has been paid or has been agreed to be paid by the Contractor or on its behalf, or to its knowledge, unless before the relevant contract is entered into particulars of any such commission and of the terms and conditions of any such contract for the payment thereof have been disclosed in writing to the Authority; or
 - (c) committing any offence:-
 - (i) under the Prevention of Corruption Acts 1889-1916; or
 - (ii) under Legislation creating offences in respect of fraudulent acts; or
 - (iii) at common law in respect of fraudulent acts in relation to this Agreement or any other contract with the Authority; or
 - (d) defrauding or attempting to defraud or conspiring to defraud the Authority;
- “Project Data”
- (a) all Design Data;
 - (b) all drawings, reports, documents, plans, software, formulae, calculations and other data relating to the carrying out of the Works or the provision of

	the Services;
	(c) any other materials, documents or data acquired brought into existence or used in relation to the Works, the Services or this Agreement;
“Project Documents”	the agreements (excluding the Financing Agreements) entered into by the Contractor for the performance of its obligations under this Agreement which are listed in Schedule 15;
“Project”	the Authority’s “Waste Management Strategic Partnership Project” for carrying out of the Works, the Maintenance of the Waste Management Facilities, the management and operation of the Services and the performance of all other obligations of the Contractor under the Agreement from time to time;
“Project Insurance Change”	any net increase or net decrease in the Actual Relevant Insurance Cost relative to the Base Relevant Insurance Cost, arising from:- <ul style="list-style-type: none"> (a) the claims history or re-rating of the Contractor or any Contractor Related Party; (b) the effect of any change in deductible unless the following applies:- <ul style="list-style-type: none"> (i) such change is attributable to circumstances generally prevailing in the Relevant Insurance Market; and (ii) the deductible, further to such change is either greater than or equal to the maximum in Schedule 12 (Insurance); (c) any other issue or factor other than circumstances generally prevailing in the Relevant Insurance Market, except for any Portfolio Cost Saving, <p>for the purposes of determining the Insurance Cost Differential, in the event that there is a net increase, the Project Insurance Change shall have a positive value. In the event that there is a net decrease the Project Insurance Change shall have a negative value;</p>
“Protester Action”	any picketing, demonstration, blockade, embargo or other protestor action (other than as a result of industrial action which affects only the employees of the Contractor or its Sub-Contractors) taking place at either Resource Park or directly affecting access to either Resource Park;
“Protester Action Protocol”	the protocol for addressing Protester Action at any Resource Park as agreed between the Parties and set

	out in Schedule 24 (Protester Action Protocol);
“Purchase Agreement”	any agreement entered into by the Contractor in relation to the purchase of Utilities;
“Qualification Criteria”	<p>the criteria that the Authority requires tenderers to meet as part of the Tender Process, which (subject to compliance with the procurement regulations) shall be:-</p> <ul style="list-style-type: none"> (a) the New Contract terms; (b) tenderers should have the financial ability to pay the capital sum tendered for the New Contract and the financial ability to deliver the Works and/or the Services (as appropriate) for the price tendered; (c) the tenderers may only bid on the basis of a single capital payment to be made on the date of the New Contract; (d) the tenderer is experienced in providing the Services (either itself or through its proposed subcontractors) or similar services; (e) the technical solution proposed by the tenderers is capable of delivery and the tenderer is technically capable of delivery of the Services (either itself or through its proposed subcontractors); and (f) any other tender criteria agreed by the Authority and the Contractor;
“Qualifying Bank Transaction”	<ul style="list-style-type: none"> (a) the syndication by a Senior Lender, in the ordinary course of its business, of any of its rights or interests in the Senior Financing Agreements; (b) the grant by a Senior Lender of any rights of participation, or the disposition by a Senior Lender of any of its rights or interests (other than as specified in paragraph (a) above), in respect of the Senior Financing Agreements in favour of:- <ul style="list-style-type: none"> (i) any other Senior Lender; (ii) any institution which is recognised or permitted under the law of any member state of the EEA to carry on the business of a credit institution pursuant to Council Directive 2001/12/EC relating to the taking up and pursuit of the business of credit institutions or which is otherwise permitted to accept deposits in the United Kingdom or any other EEA member state;

- (iii) a local authority or public authority;
 - (iv) a trustee of a charitable trust which has (or has had at any time during the previous two (2) Years) assets of at least ten million pounds (£10,000,000) (or its equivalent in any other currency at the relevant time);
 - (v) a trustee of an occupational pension scheme or stakeholder pension scheme where the trust has (or has had at any time during the previous two (2) Years) at least fifty (50) members and assets under management of at least ten million pounds (£10,000,000) (or its equivalent in any other currency at the relevant time);
 - (vi) an EEA or Swiss Insurance Undertaking;
 - (vii) a Regulated Collective Investment Scheme;
 - (viii) any Qualifying Institution; or
 - (ix) any other institution in respect of which the prior written consent of the Authority has been given;
- (c) the grant by a Senior Lender of any other form of benefit or interest in either the Senior Financing Agreements or the revenues or assets of the Contractor whether by way of security or otherwise, in favour of:-
- (i) any other Senior Lender;
 - (ii) any institution specified in paragraphs (b)(ii) to (vii) above;
 - (iii) any Qualifying Institution; or
 - (iv) any other institution in respect of which the prior written consent of the Authority has been given;

“Qualifying Institution”

a Qualifying Bank as defined in the Loan Agreement;

“Qualifying Change in Law”

- (a) a Discriminatory Change in Law;
- (b) a Specific Change in Law;
- (c) a General Change in Law which comes into effect during the Contract Period and which involves Capital Expenditure;

(d) a Best Value Change in Law;

which was not foreseeable at the date of this Agreement;

(e) any Legislation or Guidance coming into effect after the date of this Agreement, giving effect to any Relevant Draft Legislation;

(f) any change to the terms of the EPs for the Resource Parks after such EPs have been granted other than where such change arises as a result of:-

(i) the acts or omission of the Contractor or any Contractor Related Party;

(ii) any breach of this Agreement by the Contractor or any Contractor Related Party;

“Qualifying Refinancing”

any Refinancing that will give rise to a Refinancing Gain that is not an “Exempt Refinancing”;

“Qualifying Variation”

either:-

(a) a change in the Works and/or Services in respect of which either an Authority Change Notice or a Contractor Change Notice has been served and, in the case of:-

(i) an Authority Change Notice, the Authority has confirmed the estimate and, where the Contractor is not funding all or part of the Required Capital Expenditure, the Authority has agreed to meet all or the remaining part (as appropriate) of such Capital Expenditure; and

(ii) a Contractor Notice of Change, the change has been accepted by the Authority; or

(b) a Qualifying Change in Law,

and in respect of which any documents or amendments to the Project Documents which are required to give effect to such change in the Works, Services, or Qualifying Change in Law become unconditional in all respects;

“RDA”

the Refuse Disposal (Amenity) Act 1978;

“Reclaimed Materials”

separated materials suitable for Reuse, Recycling or Composting;

“Recovered”

has the meaning given to the term in the Office of the Deputy Prime Minister Best Value Performance Indicator 82c as defined in the Office of the Deputy Prime Minister Best Value Performance Indicators Guidance Document 2005/2006 dated February 2005, being:-

- (a) the controlled combustion of waste in a specialised plant specifically to generate power and/or heat from the waste feedstock;
- (b) the controlled combustion of refuse derived fuel in specialised plant specifically to generate power and/or heat from the waste feedstock;
- (c) the production of gaseous fuels by reacting hot carbonaceous waste with air, steam or oxygen (gasification);
- (d) the thermal decomposition of organic waste to produce gaseous liquid and solid products by pyrolysis; and
- (e) the biological degradation of organic wastes by anaerobic digestion (see definition of anaerobic digestion in BV82b) except where the primary purpose of the process is considered to be the treatment and stabilisation of organic substrates and where the digestate meets the standards set in BV82b. Waste treated under these circumstances should only be included under BV82b.

BUT excluding methane recovery from landfill AND it is confirmed that incinerator residues should not be subtracted from the amount of household waste used to recover heat and power; and “Recover” and “Recovery” shall be construed accordingly.

“Rectification Costs”

for the purposes of any Termination Date that occurs during the Services Period, an amount equal to the reasonable and proper costs incurred by the Authority in a particular Month or for part of a Month in ensuring that the Services are available, including for the avoidance of doubt any costs or liabilities accrued or incurred or payments made by the Authority in complying with its obligations under or in connection with the SRF Offtake Contract(s) following the exercise by the Authority of its step-in rights under the SRF Offtake Contract Direct Agreement(s) Provided that the Authority shall not include in such amount the costs or liabilities it would otherwise have incurred pursuant to the operation of the SRF Gainshare Mechanism described in paragraph 7 of Schedule 5 (Payment Mechanism);

“Recycling”

has the meaning given to the term, as at the Commencement Date, in the Department for Communities and Local Government National Indicator 192 as defined in Annex 4 to the National Indicators for Local Authorities and Local Authority Partnerships: Handbook of Definitions, being the reprocessing in a production process of the waste materials for the original purpose, or for other purposes, but excluding energy recovery. This includes material collected for recycling by waste collection authorities (eg from kerbside collection, bring sites or street recycling bins), waste disposal authorities (eg from civic amenity sites), and by third party private/voluntary collections sent for recycling on behalf of the WCA/WDA. It excludes materials collected for recycling which are subsequently rejected to disposal whilst under the possession or control of the WCA/WDA. Rejects may occur at collection, during sorting (eg at a materials recycling facility) or at the gate of the reprocessor. All recycling rejects should be excluded from this definition. Recycling can include material within the residual waste stream that is subsequently separated out and sent for recycling. For example, recyclate taken from residual waste sorted at transfer stations or material recycling facilities and recycling outputs from mechanical biological treatment. In order to be included in this definition the waste must be delivered to, and accepted by, a company, individual or organisation which will reprocess waste that is in an acceptable form for inclusion in a recycling process. This includes waste that is exported for recycling (compliant with rules on the transfrontier shipment of waste); and “Recycle and Recycled” shall be construed accordingly;

“Recycling and Composting Rate”

has the meaning given in Schedule 5 (Payment Mechanism);

“Refinancing”

- (a) any agreement, variation, novation, supplement or replacement of any Financing Agreement (other than any Subordinated Financing Agreement);
- (b) the exercise of any right, or the grant of any waiver or consent, under any Financing Agreement (other than any Subordinated Financing Agreement);
- (c) the disposition of any rights or interests in, or the creation of any rights of participation in respect of, the Financing Agreements (other than the Subordinated Financing Agreements) or the creation or granting of any other form of benefit or interest in either the Financing Agreements (other than the Subordinated Financing Agreements) or the contracts, revenues or assets of the Contractor whether by way of security or

otherwise; or

- (d) any other arrangement put in place by the Contractor or another person which has an effect which is similar to any of (a) to (c) above or which has the effect of limiting the Contractor's ability to carry out any of (a) to (c) above;

“Refinancing Gain”

an amount equal to the greater of zero (0) and $\{(A-B-C)\}$, where:-

A = the Net Present Value of the Distributions projected immediately prior to the Refinancing (taking into account the effect of the Refinancing and using the Base Case updated (including as to the performance of the Project) so as to be current immediately prior to the Refinancing) to be made to each Relevant Person over the remaining term of the Contract following the Refinancing;

B = the Net Present Value of the Distributions projected immediately prior to the Refinancing (but without taking into account the effect of the Refinancing and using the Base Case as updated (including as to the performance of the Project) so as to be current immediately prior to the Refinancing) to be made to each Relevant Person over the remaining term of the Contract following the Refinancing; and

C = any adjustment required to raise the Pre-Refinancing Equity IRR to the Threshold Equity IRR;

“Relevant Assets”

assets in European Member States insured and/or reinsured in the Power and Engineering Insurance Market, including:-

- (a) municipal solid waste technology and other renewables;
- (b) coal fired plants;
- (c) oil fired plants;
- (d) gas turbine power plants;
- (e) hydro power plants;
- (f) coal/oil refiners;
- (g) chemical plants;
- (h) petrochemical plants;

	(i) gas plants; and
	(j) overhead transmission lines and underground cabling;
“Relevant Assumptions”	the assumptions that the sale of the Contractor is on the basis that there is no default by the Authority, that the sale is on a going concern basis, that no restrictions exist on the transfer of share capital, that no Additional Permitted Borrowing has taken place and therefore that the effect of the Additional Permitted Borrowing on the calculation of such amount is disregarded but that otherwise the actual state of affairs of the Contractor and the Project is taken into account;
“Relevant Authority”	any court with the relevant jurisdiction and any local, national or supra-national agency, inspectorate, minister, ministry, official or public or statutory person of the Government of the United Kingdom or of the European Union;
“Relevant Employees”	CWM Employees whose employment will transfer to the Contractor and/or one or more Sub-Contractors by virtue of a Relevant Transfer;
“Relevant Draft Legislation”	<ul style="list-style-type: none"> (a) Commission communication of 21 December 2005 on thematic strategy on the prevention and recycling of waste (COM (2005) 666); (b) DEFRA / WAG Waste Data Strategy for Waste Streams Across the UK dated April 2006; (c) Directive 2008/99/EC on the Protection of the Environment through Criminal Law; (d) European Commission proposal for a Directive on Waste Electrical and Electronic Equipment (WEEE) Com (2008) 810/4; (e) The Groundwater Directive 2006/118/EC published on 12 December 2006 and DEFRA Consultation on Transposition of Article 6 of the Groundwater directive issued 28 March 2008; (f) EU Water Framework Directive (2000/60/EC); (g) Communication from the Commission to the Council and the European Parliament: Thematic Strategy on Air Pollution (COM (2005) 446); (h) The European Union Thematic Strategy for Soil Protection: COM (2006) 231 and proposal for a soil framework directive: COM (2006) 232; (i) Kyoto Protocol (approved by Decisions 2002/358

of 25/04/02) and Directive 2003/87/EC (as amended by Directive 2004/101/EC) in relation to a national allocation plan for Phase II of the greenhouse gas emissions trading scheme;

- (j) The Government's Strategy for Combined Heat and Power to 2010 published April 2004;
- (k) European Commission Proposal for a Directive of the European Parliament and of the Council on the promotion of the use of energy from renewable sources published on 23 January 2008 (2008/00 16 (COD));
- (l) The Barker Report (Nov 2006) on Waste Infrastructure Facilities;
- (m) DCLG Planning White Paper "Planning for a Sustainable Future" published on 21 May 2007 and DCLG Consultation on Planning and Climate Change - Supplement to PPSI dated 13 December 2006 and DCLG consultations of May 2007 on various planning law matters such as Improving the Appeals Process, Planning for a Sustainable Future, Planning Fees and Planning Performance Agreements;
- (n) The Community Infrastructure Levy published 24 January 2008;
- (o) Directive 2008/1/EC of the European Parliament and of the Council of 15 January 2008 concerning integrated pollution prevention and control (Codified version);
- (p) EC Commission proposal for a Regulation laying down health rules as regards animal by-products not intended for human consumption and repealing Regulation 1774/2002 COM (2008) 345;
- (q) Communication from Commission on Biomass Action Plan (COM (2005) 628 Final) of 7 December 2005 and UK Biomass Strategy 2007 issued May 2007;
- (r) Directive 2008/33/EC Amending Directive 2000/53 On End-Of-Life Vehicles, as regards the implementing powers conferred on the Commission;
- (s) The EU's 6th Environmental Action Programme: Decision No. 1600/2202/EC of the European Parliament and of the European Council dated 22 July 2002, laying down the Sixth Community

Action Programme, was published in OJ L 242, 10/09/2002, p. 0001-00 15 and Communication on mid-term review of the Environmental Action Programme published 3 May 2007 (COM (2007) 225);

- (t) Directive relating to arsenic, cadmium, mercury, nickel and polycyclic aromatic hydrocarbons in ambient air (2004/107/EC) (also Directive 99/30/EC relating to the same);
- (u) Regulation (EC) No 166/2006 of the European Parliament and of the Council of 18 January 2006 concerning the establishment of a European Pollutant Release and Transfer Register amending Directive 91/689 and 96/61/EC;
- (v) Thematic strategy on the sustainable use of natural resources (Com (2005)572);
- (w) Directive 2008/50/EC of the European Parliament and Council on ambient air quality and cleaner air for Europe;
- (x) Draft Marine Bill - published on 3 April 2008;
- (y) Draft Heritage Protection Bill - published 2 April 2008;
- (z) Climate Change (Sectoral Targets) Bill - published on 19 February 2008;
- (aa) Environmental Protection Act 1990 (Amendment) Bill - published on 24 April 2008;
- (bb) Microgeneration (Definition) (Amendment) Bill - published on 3 April 2008;
- (cc) Microgeneration and Local Energy Bill - published on 16 October 2008;
- (dd) Planning (Location of Hazardous Sites) Bill - published on 15 January 2008;
- (ee) Sustainable Energy (Local Plans) Bill - 10 July 2007;
- (ff) The third round of UN-led negotiations on a climate change agreement to succeed the Kyoto Protocol when it comes to an end in 2012;
- (gg) Draft Waste Controls (England and Wales) Regulations 2009 pending enactment and the DEFRA's Consultation in relation thereto;

- (hh) Draft Environmental Noise (England) (Amendment) (No.2) Regulations 2009 pending enactment;
- (ii) EU Communication Limiting Global Climate Change to 2C: The way ahead for 2020 and beyond (Com (2007) 2);
- (jj) Communication by the Commission dated 10 January 2007 on An Energy Policy for Europe (Com (2007) 1);
- (kk) Air Quality Strategy dated 17 July 2007;
- (ll) Rights and Responsibilities Bill 2007;
- (mm) Communication from the Commission on Waste Oils dated 19 December 2007 in accordance with Article 19(1) of Council Directive 2003/96 (waste oils) (COM(2007) 826 final);
- (nn) Future water: The Government's Water Strategy for England;
- (oo) Decision 2008/350/EC on UK Rules Concerning Permit Exemptions For Undertakings And Establishments Recovering Hazardous Waste;
- (pp) DEFRA UK report regarding plans and programmes to meet EU air quality limit values (reporting year 2006) issued 5 August 2008;
- (qq) DEFRA Waste incentive schemes: draft recycling service guidance Issued 15 September 2008 (ends 24 November 2008);
- (rr) Transposition of EU Floods Directive transposed by November 2009;
- (ss) Joint Government and Business document 'Strategy for sustainable construction' published June 2008 and Department of Business Enterprise and Regulatory Reform Consultation: Strategy for Sustainable Construction;
- (tt) DEFRA Publication: Designing waste facilities: a key guide to modern design in waste;
- (uu) DEFRA Local area agreements 2008;
- (vv) Environment Agency "Hazardous Waste Technical Guidance WM2 (Interpretation of the definition and classification of hazardous waste)" dated May 2008;

- (ww) Developing Greenfield and Brownfield Sites and the Code of Practice for reused and waste materials on development sites and Development Industry Code of Practice published by the Contaminated Land: Application in Real Environments (CL:AIRE) dated 11 September 2008 and Environment Agency Position Statement on the CL:AIRE Code of Practice dated 11 September 2008;
- (xx) DEFRA Guidance on the Legal Definition of Contaminated Land dated 31 July 2008;
- (yy) DEFRA paper entitled, "Outcome of the Way Forward Exercise on Soil Guideline Values" dated 22 July 2008;
- (zz) The Heat Call for Evidence published by DEFRA and the Department for Communities and Local Government dated 31 January 2008;
- (aaa) Directive 2006/66/EC on Batteries and Accumulators and Waste Batteries and Accumulators (and Directive 2008/12/EC setting out minor amendments to the Batteries Directive);
- (bbb) Department of Business Enterprise and Regulatory Reform consultation on new Waste Electrical and Electronic Equipment Regulations 2006 and further development of the supporting infrastructure to take effect from the fourth compliance period (1 January to 31 December 2010 onwards) including Impact Assessments and Draft Regulations;
- (ccc) The Commission's Proposal for a Directive of the European Parliament and of the Council on Industrial Emissions (COM (2007) 843 Final) and the European Commission's communication "Towards an improved policy on Industrial Emissions" (COM (2007) 844 final) as well as the various DEFRA and Environmental Agency Consultations on the same, dated May and June 2008;
- (ddd) Proposal for a Directive amending Directive 96/61/EC concerning integrated pollution prevention and control;
- (eee) DEFRA consultation on the composition of Solid Recovered Fuel;
- (fff) Directive 2008/98/EC (the Framework Directive on Waste) and COM (2008) 0559 Decision of the

	European Council on proposals for the revision of the Waste Framework Directive;
	(ggg) Renewables Obligation Order 2009;
	(hhh) Proposal for a directive on environmental quality standards and pollution control in the field of water policy and to amend the Water Framework Directive (2000/60/EC) COM (2006) 397;
“Relevant Event”	an Authority Change, Change in Law, Compensation Event or other matter as a result of which there may be an adjustment to the Annual Unitary Charge and/or other compensation, in accordance with clause 27;
“Relevant Incident”	has the meaning given to it in clause 52.2 (Obligations);
“Relevant Insurance”	the Required Insurance and any other insurances as may be required by law other than:- <ul style="list-style-type: none"> (a) the Required Insurances relating solely to the Works; (b) Business Interruption Cover except to the extent that it relates to Unavoidable Fixed Costs;
“Relevant Insurance Market”	in relation to the Relevant Insurance, the PFI Insurance Market and the Power and Engineering Insurance Market, weighted 80:20 in favour of the PFI Insurance Market;
“Relevant Insurance Inception Date”	the date on which the Relevant Insurance is first providing active insurance cover to the Contractor, being a date no earlier than the Commencement Date;
“Relevant Person”	any person or organisation that is an equity capital share bidder and/or Junior Debt bidder of the Contractor;
“Relevant Transfer Date”	the date on which any Relevant Employees transfer to the Contractor and/or one or more Sub-Contractors whether by virtue of any Relevant Transfers or deemed Relevant Transfers or otherwise;
“Relevant Transfer”	a relevant transfer for the purposes of TUPE;
“Relief Event”	(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 (other than the Authority) or other like body to carry out works or provide

services;

- (c) any accidental loss or damage to the Waste Management Facilities and/or Interface Sites or any roads servicing any of them;
- (d) any failure or shortage of power, fuel or transport (other than an interruption under an interruptible supply arrangement);
- (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, haulage/logistics, transport, waste management or any offtake industry to which the Services relate (including without limitation the cement industries) in the United Kingdom or a significant sector of either of them, but not including industrial action specific to Waste Management Facilities or industrial action which affects only the employees of the Contractor or its Sub-Contractors;
- (g) the discovery of unexploded ordinance, fossils, antiquities or human remains at any of the Sites requiring action in accordance with clause 17.8; or
- (h) Protester Action during the Works Period at either Resource Park to the extent that the Contractor has complied with the Protester Action Protocol;

unless any of the events listed in (a) to (h) inclusive arises (directly or indirectly) as a result of any wilful default or wilful act of the Contractor or any of its Sub-Contractors;

“Replies to Enquiries Before Contract”

in relation to each of the Sites, save for the Southern Resource Park, the written replies given by the Authority (or, where relevant, by the Authority’s Solicitors) to the written enquiries raised by the Contractor prior to the date of this Agreement, the written enquiries and the written replies (including e-mail correspondence clarifying the written replies) being annexed at Schedule 30 (Replies to Enquiries Before Contract);

“Request for Information”

shall have the meaning set out in the FoIA or the Environmental Information Regulations as relevant (where the meaning set out for the terms “request” shall apply);

“Required Insurances”

the insurances specified in Schedule 12 (Insurances);

“Residues”	any solids and leachates arising from the treatment or processing of Contract Waste at either Resource Park which are not Reused and which are not Reclaimed Materials or Waste Derived Products;
“Resource Park”	each of those Waste Management Facilities specified as Resource Parks in Part 3 of Schedule 3;
“Restrictions”	all matters (whether arising before or after the date of this Agreement) affecting a Waste Management Facility or its use registered or capable of registration as local land charges, and all notices, charges, orders, resolutions demands, proposals, requirements, regulations restrictions, agreements, directions or other matters affecting a site or its use served or made by any local or other competent authority or otherwise arising under any Legislation;
“Retention Fund Account”	an account opened in accordance with clause 32.6;
“Reuse”	to use items for their original or a different purpose without processing or treatment other than by repairing or refurbishing and the expression “Reusing” and “Reused” shall be construed accordingly;
“Revenue”	the projected Unavoidable Fixed Costs and Senior Debt Service Costs of the Contractor;
“Review Procedure”	the procedure set out in Schedule 8 (Review Procedure);
“Revised Senior Debt Termination Amount”	<p>subject to clause 40.2 (Changes to Financial Agreements):-</p> <p>(a) all amounts outstanding at the Termination Date, including interest and (other than in respect of Additional Permitted Borrowing) Default Interest accrued as at that date, from the Contractor to the Senior Lenders in respect of Permitted Borrowing;</p> <p>(b) all amounts including costs of early termination of interest rate hedging arrangements and other breakage costs, payable by the Contractor to the Senior Lenders as a result of a prepayment in respect of Permitted Borrowing or, in the case of early termination or interest rate hedging arrangements only, as a result of termination of this Agreement, subject to the Contractor and the Senior Lenders mitigating all such costs to the extent reasonably possible,</p> <p>less, to the extent it is a positive amount, the aggregate of (without doubt counting in relation to the calculation of the Revised Senior Debt</p>

Termination Amount or the amounts below):-

- (i) all credit balances on any bank accounts (but excluding the Joint Insurance Account held by or on behalf of the Contractor) on the Termination Date;
- (ii) all amounts, including costs of early termination of interest rate hedging arrangements and other breakage costs, payable by the Senior Lenders to the Contractor as a result of prepayment of amounts outstanding in respect of Permitted Borrowing or in the case of early termination of interest rate hedging arrangements only, as a result of termination of this Agreement;
- (iii) all other amounts received by the Senior Lenders on or after the Termination Date and before the date on which any compensation is payable by the Authority to the Contractor as a result of enforcing any other rights they may have; and
- (iv) all APB Distributions;

“RPIx Indexed”	has the meaning set out in clause Error! Reference source not found. ;
“RPIx”	the index published in Table 5 (excluding mortgage interest payments) of Business Monitor (MM23) published by the Office of National Statistics (or any index that replaces it);
“Second Annual Reconciliation Report”	the report setting out the draft calculation by the Contractor of the Second Annual Reconciliation (as the same if defined in Schedule 5 (Payment Mechanism)) in each Contract Year, such report being in the form set out in the specimen Second Annual Reconciliation Report annexed at Schedule 36 (Reporting Proformas);
“Security Trustee”	Sumitomo Mitsui Banking Corporation Europe Limited of 99 Queen Victoria Street, London EC4V 4EH or any other person appointed security trustee in accordance with the Intercreditor Deed;
“Senior Debt”	the financing provided by the Senior Lenders under the Senior Financing Agreements;
“Senior Debt Rate”	at any time the rate of interest payable set out in clause 8 of the Loan Agreement or such other lower rate as the Parties may agree;

“Senior Debt Service Costs”	interest and debt service costs incurred in respect of the Senior Financing Agreement less:- (a) sums which are in arrears; (b) all sums reserved by the Contractor and which the Contractor is entitled to use to make such payments, without breaching the Senior Financing Agreements;
“Senior Financing Agreements”	those of the Financing Agreements listed in Schedule 19 (Financing Agreements) or as amended with the prior written approval of the Authority in accordance with clause 40.2.1;
“Senior Lender”	a person providing finance to the Contractor under the Senior Financing Agreements;
“Service Availability”	in relation to each New Facility, satisfaction of the Service Availability Requirements;
“Service Availability Date”	the date being the first Working Day immediately following the receipt by the Authority of the Acceptance Certificate;
“Service Availability Requirements”	the requirements set out in Schedule 6 (Service Availability Requirements);
“Service Delivery Plan”	together the Contractor’s Works Proposals and the Contractor’s Services Proposals;
“Service Road”	the road adjacent to the Southern Resource Park to be constructed by the Contractor to an adoptable standard suitable for industrial use and to a width and specification no less than 11.3 metres wide (of which 7.3 metres is carriageway and 4 metres is footway) giving access from Bouthwood Road and to property adjoining the Southern Resource Park;
“Services”	the services to be provided by the Contractor during the Services Period in accordance with this Agreement and as set out in the Output Specification and the Service Delivery Plan;
“Site”	any of the Sites listed in Part 1 and Part 2 of Schedule 3 (Facilities) and more particularly delineated by reference to a plan included in such Schedule;
“Site Conditions”	the condition of each Waste Management Facility including (but not limited to) climatic, hydrological, hydrogeological, ecological, environmental, geotechnical and archaeological conditions;
“Snagging Items”	minor defects, deficiencies and omissions which do not prevent the Independent Certifier from issuing an

	Acceptance Certificate;
“Snagging List”	the list, to be prepared by the Contractor and agreed by the Independent Certifier of minor defects, deficiencies or omissions of a snagging nature which do not prevent the Contractor from issuing a Certificate of Service Availability;
“Southern Resource Park”	the Resource Park and related facilities at Sowerby Woods Industrial Estate, Barrow, more particularly described in Part 2 of Schedule 3 (Facilities);
“Southern Resource Park Headlease”	is a lease of the Southern Resource Park to be granted to the Authority pursuant to the Southern Resource Park Land Option Agreement (Wicks);
“Southern Resource Park Land Option Agreements”	<p>the option agreements:-</p> <p>(a) between H Wicks (Lindal) Limited (1) and the Authority (2) (“Southern resource Park Land Option Agreement (Wicks)”); and</p> <p>(b) between Peter Anthony Bostock and Lord Charles Edward Vere Cecil (1) and the Authority (2) (“Southern Resource Park Land Option Agreement (Holker)”);</p> <p>in relation to the Southern Resource Park in the Agreed Form annexed;</p>
“Southern Resource Park Longstop Date”	the date twenty four (24) Months after the Target Services Availability Date for the Southern Resource Park;
“South Lakeland Waste”	has the meaning given in clause 6.1.5(a);
“Specific Change in Law”	<p>any Change in Law which specifically refers to:-</p> <p>(a) the provision of services the same as or similar to the Services;</p> <p>(b) the construction, operation and maintenance of premises for the provision of any service the same as or similar to any Service; or</p> <p>(c) the holding of shares in companies whose main business is:-</p> <p>(i) providing services the same as or similar to the Services;</p> <p>(ii) the construction, operation and maintenance of premises for the provision of any service the same as or similar to the</p>

Service;

“Specific Waste Items”	has the meaning set out in column 1 of Table 5 in Schedule 5 (Payment Mechanism);
“SRF”	solid fuel prepared (being processed, homogenised and upgraded to a quality that can be traded amongst producers and users) from Contract Waste to be utilised for energy recovery and meeting the classification and specification requirements laid down in CEN/TS 15359 specifically to fall within Class 1 to 4 for the classification characteristics of Net Calorific Value (NCV), chlorine (CL) and mercury (Hg), the minimum classification that SRF shall attain being described as Class Code NCV4: Cl4: Hg4;
“SRF Contract Review Date”	1 October 2017 and each fifth (5th) anniversary of such date;
“SRF Force Majeure Event”	any acts of God, war, flood, fire, riots, civil commotion, malicious damage, explosion, terrorism, governmental actions and any other similar events provided that such event is outside the control of the relevant party to the SRF Offtake Contract;
“SRF Gainshare”	has the meaning set out in Schedule 5 (Payment Mechanism);
“SRF Offtake Service”	the Services comprising the collection, transportation and disposal of SRF produced by the Northern Resource Park or Southern Resource Park from the Northern Resource Park or Southern Resource Park (as appropriate) to its point of final disposal (for which purposes the disposal of any rejects or Residues or Landfilling of SRF, shall be ignored);
“SRF Offtake Contract”	any offtake contract entered into by the Contractor or the Operating Contractor with an SRF Offtaker for the purchase of SRF produced from Contract Waste, including the Initial SRF Offtake Contract;
“SRF Offtake Contract Direct Agreement”	any direct agreement relating to any SRF Offtake Contract between the Authority, the Contractor and any SRF Offtaker substantially following the form of the Initial SRF Offtake Contract Direct Agreement;
“SRF Offtake Facility”	any facility owned, operated, managed and/or utilised to burn and/or store SRF produced from Contract Waste;
“SRF Offtaker”	any counterparty to an SRF Offtake Contract entered into by the Contractor, or the Operating Contractor (as the case may be);

“SRF Relief Event”

- (a) fire, explosion, lightning, storm, tempest, flood, bursting or overflowing of water tanks apparatus or pipes, ionising radiation earthquakes, riot and civil commotion affecting an SRF Offtake Facility;
- (b) a Force Majeure Event to the extent such Force Majeure Event prevents a party from complying with its obligations under an SRF Offtake Contract or an SRF Sub-Offtake Contract;
- (c) failure by any statutory undertaker, utility company, local authority (other than the Authority) or other like body to carry out works or provide services to the extent the same affects an SRF Offtake Facility;
- (d) any accidental loss or damage to an SRF Offtake Facility or any roads servicing such facility;
- (e) any failure or shortage of power, fuel or transport (other than an interruption under an interruptible supply arrangement) affecting an SRF Offtake Facility;
- (f) any blockade or embargo which does not constitute a Force Majeure Event affecting an SRF Offtake Facility; or
- (g) any SRF Force Majeure Event which relieves or prevents an SRF Offtaker from complying with its obligations in accordance with the terms of the relevant SRF Offtake Contract (save to the extent such event comprises a breach of such SRF Offtake Contract by the SRF Offtaker’s counterparty to such SRF Offtake Contract);
- (h) any SRF Force Majeure Event which relieves or prevents an SRF Sub-Offtaker from complying with its obligations in accordance with the terms of the relevant SRF Sub-Offtake Contract (save to the extent such event comprises a breach of such SRF Sub-Offtake Contract by the SRF Sub-Offtaker’s counterparty to such SRF Sub-Offtake Contract);

unless any of the events listed in (a) to (h) inclusive arises (directly or indirectly) as a result of any breach of contract, wilful default or wilful act or omission of the Contractor, the Operating Contractor or the relevant SRF Offtaker;

“SRF Six Monthly Reconciliation Report”

the report setting out the draft calculation by the Contractor of the SRF Gainshare (as the same is defined in Schedule 5 (Payment Mechanism)), such report being

	in the form set out in the specimen SRF Six Monthly Reconciliation Report annexed at Schedule 36 (Reporting Proformas);
“SRF Sub-Offtake Contract”	any offtake contract entered into by an SRF Offtaker with an SRF Sub-Offtaker for the purchase of SRF produced from Contract Waste;
“SRF Sub-Offtaker”	any counterparty to an SRF Sub-Offtake Contract entered into by an SRF Offtaker;
“SRP Design Data”	to the extent the plans, documents and information relating to the Works in relation to the Southern Resource Park are not the same or materially the same as those for the Northern Resource Park (unless any changes have already been undertaken as a consequence of the design development process set out in paragraph 6 of Part 1 of Schedule 10 (Planning and Permitting Obligations)), such plans, documents and information relating to the Works in relation to the Southern Resource Park shall be referred to as the “SRP Design Data”;
“Start on Site Date”	in relation to each New Facility, the date shown as the Start on Site Date in Parts 1 or 2 of Schedule 3 (Facilities) or such later date as may be allowed in accordance with this Agreement;
“Sub-Contractor”	any person engaged by the Contractor from time to time as may be permitted by this Agreement to procure the provision of the Works or Services (or any of them). References to sub-contractors means sub-contractors (of any tier) of the Contractor;
“Sub-Contractor Breakage Costs”	<p>Losses that have been or will reasonably and properly be incurred by the Contractor as a direct result of the termination of this Agreement, but only to the extent that:-</p> <p>(a) the Losses are incurred in connection with the Project and in respect of the provision of services or the completion of works, including:-</p> <p>(i) any materials or goods ordered or sub-contracts placed that cannot be cancelled without such Losses being incurred;</p> <p>(ii) any expenditure incurred in anticipation of the provision of services or the completion of works in the future;</p> <p>(iii) the cost of demobilisation including the cost of any relocation of equipment used in connection with the Project; and</p>

	(iv) redundancy payments; and
	(b) the Losses are incurred under arrangements and/or agreements that are consistent with terms that have been entered into in the ordinary course of business and on reasonable commercial terms; and
	(c) the Contractor and the relevant Sub-Contractor has each used its reasonable endeavours to mitigate the Losses;
“Subordinated Financing Agreements”	(a) Equity Subscription Agreement to be entered into between:- <ul style="list-style-type: none"> (i) the Contractor; (ii) HoldCo; (iii) Shanks PFI Investments Limited; (iv) the Security Trustee; and (v) the Agent;
	(b) Loan Note Instrument entered into by the Contractor; and
	(c) Loan Note Instrument entered into by HoldCo;
	or as amended with the prior written approval of the Authority;
“Subordinated Lenders”	a person providing finance under a Subordinated Financing Agreement;
“Suitable Substitute Contractor”	a person approved by the Authority (such approval not to be unreasonably withheld or delayed) as:- <ul style="list-style-type: none"> (a) having the legal capacity, power and authority to become a party to and perform the obligations of the Contractor under this Agreement; and (b) employing persons having the appropriate qualifications, experience and technical competence and having the resources available to it (including committed financial resources and sub-contracts) which are sufficient to enable it to perform the obligations of the Contractor under this Agreement; and (c) being a Suitable Third Party;
“Suitable Third Party”	any person who is not an Unsuitable Third Party;

“T Indexed”	has the meaning set out in Schedule 5 (Payment Mechanism);
“Target Failure Default”	<p>(a) in any three (3) consecutive Contract Years, the Contractor fails to achieve the Target HWRC Recycling and Composting Threshold;</p> <p>(b) the Biodegradable Contract Waste (excluding Specific Waste Items, any Commissioning Waste and Untreated Landfill Waste) which the Contractor Landfills from the Resource Parks exceeds $ITST^* (BMWR + 0.3) * BMWIA$ (as such terms are defined in Appendix 5 to the Payment Mechanism) for three (3) consecutive Contract Years PROVIDED THAT measurement for such Target Failure Default shall only commence with effect from the fourth anniversary of the First Acceptance Date;</p>
“Target Practical Completion Date”	in relation to each date shown as the Target Practical Completion Date in Part 2 of Schedule 3 (Waste Management Facilities) or such later date as may be allowed in accordance with the terms of this Agreement;
“Target HWRC Recycling and Composting Rate”	has the meaning given in Schedule 5 (Payment Mechanism);
“Target HWRC Recycling and Composting Threshold”	the target HWRC recycling and composting threshold to be achieved at the HWRCs being thirty two point five per cent (32.5%) for Contract Year 1, thirty seven point five per cent (37.5%) for Contract Year 2 and forty per cent (40%) for Contract Year 3 and each Contract Year thereafter;
“Target Service Availability Date”	in relation to each New Facility, the date shown as the Target Service Availability Date in Part 2 of Schedule 3 (Facilities) as adjusted in accordance with the terms of this Agreement;
“Tax”	any kind of tax, duty, levy or other charge (other than VAT) whether or not similar to any in force at the date of this Agreement and whether imposed by a local, governmental or other Relevant Authority in the United Kingdom or elsewhere;
“Template SRF Offtake Contract”	the template form of contract in the form set out in Schedule 31 (Template SRF Offtake Contract);
“Tender Costs”	the proper and reasonable costs of the Authority incurred in carrying out the Tender Process and/or in connection with any calculation of the Estimated Fair Value of the Agreement;

“Tender Process”	the process by which the Authority requests tenders from any parties interested in entering into a New Contract, evaluates the responses from those interested parties and enters into a New Contract with a new service provider, in accordance with clause 37.2.5;
“Tender Process Monitor”	a suitably qualified third party appointed by the Contractor in accordance with clause 37.2 (Retendering Procedure);
“Termination Date”	the date on which termination of this Agreement takes effect in accordance with its terms;
“Termination Date Discount Rate”	<p>a discount rate expressed as $[(1 + \text{real Base Case project IRR} + \text{Gilt B} - \text{Gilt A}) (1 + i) - 1]$, where:-</p> <p>“real Base Case project IRR” is the real pre-tax Project IRR as set out in the Base Case;</p> <p>“i” is the agreed assumed forecast rate of increase in the Inflation Index set out in the Agreement which, for the avoidance of doubt, is equal to the Bank of England’s prevailing long term inflation target;</p> <p>“Gilt A” is the real yield to maturity on a benchmark government Gilt instrument of the same maturity as the average life of the outstanding Senior Debt as shown in the Original Financial Model; and</p> <p>“Gilt B” is the real yield to maturity on a benchmark government Gilt instrument of the same maturity as the average life of the outstanding Senior Debt as shown in the Base Case as on the date of Termination;</p>
“Termination Notice”	a notice of termination issued in accordance with this Agreement;
“Termination Sum”	any compensation payable by the Authority to the Contractor on an early termination of this Agreement under clauses 35 (Compensation on Termination for Force Majeure), 36 (Compensation on Termination for Contractor Default), 37 (Compensation on Termination for Authority Default) and 38 (Compensation on Corrupt Gifts, Fraud and Refinancing Breaches) (excluding the Adjusted Highest Compliant Tender Price and any compensation payable as a result of a termination under clause 29.6 (Termination on Authority Default));
“Tests on Completion”	the tests which are set out in Schedule 6 (Service Availability Requirements) relating to each Waste Management Facility which must be passed before the issue of a Certificate of Service Availability in respect of a Waste Management Facility;
“Third Annual Reconciliation	the report setting out the draft calculation by the

Report”	Contractor of the Third Annual Reconciliation (as the same is defined in Schedule 5 (Payment Mechanism)) in each Contract Year, such report being in the form set out in the specimen Third Annual Reconciliation Report annexed at Schedule 36 (Reporting Proformas);
“Third Party Income”	the sum calculated in accordance with paragraph 7.10 of Schedule 5 (Payment Mechanism);
“Third Party Revenue”	revenue received by the Contractor for the receipt of Third Party Waste less any Allowable Third Party Revenue Cost;
“Third Party Shareholder”	a shareholder in the Contractor or HoldCo which is not a Sub-Contractor and is in the business of making equity investments and not in the business of waste management and/or disposal;
“Third Party Waste”	Waste received by or on behalf of the Contractor which has been authorised by the Authority as capable of being treated at the Resource Park and which is not Contract Waste;
“Threshold Equity IRR”	<i>(FIGURE REDACTED)</i>
“Title Deeds”	the registered/unregistered title of the Authority in respect of each of the Waste Management Facilities, the title numbers and epitomes of the title (as the case may be) for each Waste Management Facilities together with the relevant deeds and documents referred to therein being listed in Schedule 33;
"Title Defect"	any matters which have been identified and specified in Schedule 33;
“Tonnage”	the weight of Contract Waste measured in tonnes;
“Tonnage Based Element”	has the meaning given in Schedule 5 (Payment Mechanism);
“Trade Marks”	the marks set out in Schedule 28 (Trade Marks);
“Transfer Station”	each transfer station the subject of:- (a) the Distington TS Contract; and (b) the Flusco TS Contract;
“TS Contracts”	each of the Distington TS Contract and the Flusco TS Contract;
"TS Operator Default"	has the meaning given to "CWM Default" under the Flusco TS Contract and/or Distington TS Contract (as appropriate);

“TS Run Out Service”	the service which may be required to be provided by CWM following termination of the relevant TS Contract and described in clause 33 of each TS Contract;
“TUPE”	the Transfer of Undertakings (Protection of Employment) Regulations 2006, as amended;
“Unavoidable Fixed Costs”	<p>the fixed costs incurred by the Contractor which first fall due for payment by the Contractor during the period of indemnity but excluding:-</p> <ul style="list-style-type: none"> (a) costs which could have reasonably been mitigated or avoided by the Contractor; (b) payments to the Contractor’s Associated Companies; (c) payments which are not entirely at arm’s length; (d) payments to holders of equity in the Contractor, Subordinated Lenders and any other financing costs other than Senior Debt Service Costs; (e) indirect losses suffered or allegedly suffered by any person; (f) fines, penalties or damages for unlawful acts, breaches of contract or other legal obligations; (g) payments the Contractor can recover under contract or in respect of which the Contractor has a remedy against another person in respect of the same liability; (h) payments to the extent that the Contractor has available to it:- <ul style="list-style-type: none"> (i) reserves which the Contractor can draw upon without breaching the Senior Financing Agreement; (ii) standby or contingent facilities or funds of Senior Debt or equity which the Contractor is entitled to have available; (i) payments representing any profits of the Project (to the extent not already excluded in (e) above);
“Uninsurable”	<p>in relation to a risk set out in Schedule 12, either that:-</p> <ul style="list-style-type: none"> (a) insurance is not available to the Contractor in respect of the Project in the world-wide insurance market with reputable insurers of good standing in respect of that risk; or

	(b) the insurance premium payable for insuring that risk is at such a level that the risk is not generally being insured against in the world-wide insurance market with reputable insurers of good standing by Contractors in the United Kingdom;
“Uninsured Losses”	<p>losses arising from any risks against which the Contractor or any Contractor Related Party does not maintain insurance (where not required to maintain insurance for such risk under this Agreement or by law), provided that:-</p> <p>(a) the amount of any losses that would otherwise be recoverable under any Required Insurance but for the applicable uninsured deductible in respect of such insurance; and</p> <p>(b) any exclusion of loss of insurance proceeds to the extent caused by or contributed to by any act or omission of the Contractor or any Contractor Related Party,</p> <p>shall not be treated as Uninsured Losses;</p>
“Unsuitable Third Party”	<p>any of:-</p> <p>(a) any person whose activities are, in the reasonable opinion of the Authority, incompatible with the provision of waste management in the area; or</p> <p>(b) any person whose activities, in the reasonable opinion of the Authority, pose or could pose a threat to national security;</p>
“Utility”	electricity and/or gas;
“Utility Tariff”	the unit price payable for electricity or gas;
“Variation”	an Authority Change or a Contractor Change;
“VAT”	value added tax at the rate prevailing at the time of the relevant supply charged in accordance with the provisions of the Value Added Tax Act 1994;
“Waste”	has the definition set out in section 75 of the EPA;
“Waste Acceptance Protocol”	either of the protocols for the acceptance of Contract Waste at the HWRCs, Transfer Stations, Landfill Sites and Resource Parks respectively as set out in Schedule 32;
“Waste Analysis Report”	has the meaning given in Part 4 of Schedule 29 (Contract Waste Review Procedure);
“Waste Composition”	the composition of Contract Waste as determined in accordance with clause 6.5 and Appendix 1 of Schedule

29;

“Waste Derived Products”	all materials Recovered from Contract Waste and converted through processing by the Contractor for presentation to the market for beneficial use without further processing;
“Waste Management Facility”	the Existing Facilities and the New Facilities together with all amenities located at those sites all as the same may be varied, amended or supplemented from time to time in accordance with Schedule 27 (Change Protocol) and “Waste Management Facilities” shall be construed accordingly;
“Waste Management Licence”	a licence granted under section 35 of the EPA;
“WCA”	any one of the six District Councils or their successors responsible, as waste collection authorities, pursuant to section 30(3) of the EPA for the collection of Waste under the provisions of section 45 of the EPA;
“WCA Collection and Recycling Arrangements”	the arrangements in respect of the collection of Waste (including Contract Waste) specified in Schedule 37 (WCA Collection and Recycling Arrangements);
“WDA”	the Authority in its capacity as a waste disposal authority pursuant to section 30(2) of the EPA;
“Working Day”	Monday to Friday (inclusive) in each week excluding bank holidays and statutory holidays;
“Works”	all of the works (including design and works necessary for obtaining access to the New Facilities) to be undertaken in accordance with this Agreement in accordance with the Contractor Works Proposals and to satisfy fully the Output Specification, including (for the avoidance of doubt) the construction of the Service Road;
“Works Period”	the period from the Commencement Date to the last Service Availability Date; and
“Year”	the twelve (12) Month period from and including a day to (but not including) the day bearing the same number in the same Month of the following Year (or, in the case only of a period commencing on 29 February, ending on the next following 28 February).

1.2 **Interpretation**

In this Agreement except where the context otherwise requires:-

- 1.2.1 each gender includes all genders;
- 1.2.2 the singular includes the plural and vice versa;

- 1.2.3 a reference to any clauses, sub-clause, paragraph, Schedules or Annex is except where expressly stated to the contrary, a reference to such clause, sub-clause, paragraph, Schedule or Annex of and to this Agreement;
- 1.2.4 any reference to this Agreement or to any other document shall include any permitted variation, amendment or supplement to such document;
- 1.2.5 references to any enactment, order, regulation or other similar instrument, statute or statutory provisions shall be construed as a reference to the enactment, order, regulation or instrument as amended, replaced consolidated or re-enacted;
- 1.2.6 a reference to a person includes firms, partnerships and corporations and their successors and permitted assignees or transferees;
- 1.2.7 the schedule, clause, sub-clause and (where provided) paragraph headings and captions in the body of this Agreement do not form part of this Agreement and shall not be taken into account in its construction or interpretation;
- 1.2.8 words preceding "include", "includes", "including" and "included" shall be construed without limitation by the words which follow those words.

1.3 **Schedules**

The Schedules to this Agreement form part of this Agreement.

1.4 **Consents**

The right of a Party under this Agreement to give or withhold its approval, consent, agreement, confirmation or analogous endorsement shall in each case unless otherwise stated be subject to an obligation not to unreasonably withhold or delay the giving or withholding of any such endorsement.

1.5 **Precedence of Documentation**

In the event of any inconsistency between:-

- 1.5.1 the provisions of this Agreement and those of the Output Specification, the provisions of this Agreement will prevail;
- 1.5.2 the provisions of the Service Delivery Plan and those of the Output Specification, the provisions of the Output Specification will prevail.

2. **EXCLUSION OF LEGISLATION**

2.1 **Housing Grants, Construction and Regeneration Act**

This Agreement in accordance with the Construction Contracts (England and Wales) Exclusion Order 1998 is intended to be, and shall be excluded from Part II of the Housing Grants, Construction and Regeneration Act 1996.

2.2 **Third Party Rights**

No term of this Agreement is enforceable under the Contracts (Rights of Third Parties) Act 1999 by a person who is not a Party to this Agreement, except that clause 24.9 (Pensions) shall be enforceable by any Eligible Employee.

3. **COMMENCEMENT, DURATION AND CONDITIONS PRECEDENT**

3.1 This Agreement and the rights and obligations of the Parties shall take effect on the Commencement Date and (subject to the provisions for early termination set out in clause 29) shall continue until the Expiry Date.

3.2 **Conditional Matters**

This Agreement is entered into conditionally upon the following matters:-

- 3.2.1 execution of the Direct Agreement;
- 3.2.2 execution of the SRF Offtake Contract Direct Agreement;
- 3.2.3 the provision of a Collateral Warranty by:-
 - (a) the Building Contractor;
 - (b) each Principal Building Sub-Contractor; and
 - (c) the Operating Contractor;
- 3.2.4 execution of the Leases for each of the Existing Facilities and for the Northern Resource Park;
- 3.2.5 execution and completion of the Southern Resource Park Land Option Agreement;
- 3.2.6 execution and completion of the TS Contracts;
- 3.2.7 delivery to the Authority of:-
 - (a) a certified up to date copy of the Contractor's Memorandum and Articles of Association;
 - (b) certified copies of board resolutions of the Contractor authorising the entry of the Contractor into this Agreement; and
 - (c) certified copies of the Loan Agreement, the Building Contract, the Principal Building Sub-Contracts, the Operating Contract, the SRF Offtake Contract, the TS Contracts, and the EcoDeco Licence;
- 3.2.8 delivery to the Contractor and the Senior Lenders of evidence of certification of this Agreement and the Direct Agreement under the Local Government (Contracts) Act 1997.

3.3 **Reasonable Endeavours**

Each Party shall use its reasonable endeavours to achieve the satisfaction of the Conditions Precedent.

3.4 **Termination**

If by the date four weeks after the date of this Agreement the Conditions Precedent have not been satisfied, either Party shall be entitled to terminate this Agreement by notice in writing to the other and neither Party shall have any outstanding liability to the other.

4. **WARRANTIES AND INDEMNITIES**

4.1 **Contractor Warranty**

The Contractor warrants, represents and undertakes to the Authority that, as at the date of this Agreement:-

- 4.1.1 it is properly constituted and incorporated under the laws of England and Wales and has all necessary authority, power and capacity to enter into this Agreement;
- 4.1.2 it has the power to enter into and to exercise its rights and perform its obligations under the Project Documents;
- 4.1.3 the execution, delivery and performance by it of the Project Documents does not contravene any provision of:-
 - (a) any existing Legislation either in force, or enacted but not yet in force, which is binding on the Contractor;
 - (b) the Memorandum and Articles of Association of the Contractor;
 - (c) any order or decree of any court or arbitrator which is binding on the Contractor; or
 - (d) any obligation which is binding upon the Contractor or upon any of its assets or revenues;
- 4.1.4 the Contractor has not, other than in connection with the Project, traded at any time since its incorporation as a company pursuant to the Companies Act 2006 (as amended);
- 4.1.5 no claim is presently being assessed and no litigation, arbitration or administrative proceedings are presently in progress or, to the best of the knowledge of the Contractor, pending or threatened against it or any of its assets which will or might have a material adverse effect on the ability of the Contractor to perform its obligations under any Project Document;
- 4.1.6 it is not the subject of any other obligation, compliance with which will or is likely to have a material adverse effect on the ability of the Contractor to perform its obligations under any Project Document;
- 4.1.7 no proceedings or other steps have been taken and not discharged (nor, to the best of the knowledge of the Contractor, threatened) for its winding-up or

dissolution or for the appointment of a receiver, administrative receiver, administrator, liquidator, trustee or similar officer in relation to any of its assets or revenues;

- 4.1.8 the copies of the Project Documents 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; and
- 4.1.9 the information relating to the Contractor and its Affiliates set out in Schedule 21 (Warranted Data) is true and accurate;
- 4.1.10 there are no material facts or circumstances in relation to the financial position or operational constitution of the Contractor which have not been fully and fairly disclosed to the Authority and which if disclosed might reasonably have been expected to affect the decision of the Authority to enter into this Agreement;

and the Authority relies upon such warranties, representations and undertakings.

4.2 **Status of Warranties**

All warranties, representations, undertakings, indemnities and other obligations made, given or undertaken by the Contractor in this Agreement are cumulative and none shall be given a limited construction by reference to any other.

4.3 **Design Warranty**

The Contractor shall deliver to the Authority a collateral warranty from the Design Consultant within twenty (20) Working Days of the completion of the Design Consultant Appointment.

5. **BACKGROUND INFORMATION**

5.1 **No Warranty by Authority**

Save in relation to clause 7.5 (Replies to Enquiries Before Contract), and subject to clause 5.4 (Fraudulent Statements) the Authority does not give any warranty or undertaking as to the relevance, completeness, accuracy or fitness for any purpose of any of the Disclosed Data.

5.2 **No Liability to Contractor**

Other than where the Agreement expressly provides otherwise, neither the Authority nor any of its agents or servants shall be liable to the Contractor in contract, tort (including negligence or breach of statutory duty), statute or otherwise as a result of:-

- 5.2.1 any inaccuracy, omission, unfitness for any purpose or inadequacy of any kind whatsoever in the Disclosed Data; or
- 5.2.2 any failure to make available to the Contractor any materials, documents, drawings, plans or other information relating to the Project.

5.3 **Contractor's Warranty**

The Contractor warrants and represents to the Authority that it has conducted its own analysis and review of the Disclosed Data and that it has satisfied itself as to the accuracy, completeness and fitness for purpose of any Disclosed Data on which it places reliance.

5.4 **Fraudulent Statements**

Nothing in this clause 5 (Background Information) shall exclude any liability which the Authority or any of its agents or servants would otherwise have to the Contractor in respect of any statements made fraudulently prior to the Commencement Date.

5.5 **Contractor's Due Diligence**

Other than where this Agreement expressly provides otherwise, the Contractor shall subject to the terms of this Agreement, be deemed to have:-

- 5.5.1 satisfied itself as to the assets to which it will acquire rights and the nature and extent of the risks assumed by it under this Agreement; and
- 5.5.2 gathered all information necessary to perform its obligations under this Agreement and other obligations assumed, including:-
 - (a) information as to the nature, location and condition of the Waste Management Facilities (including environmental, hydrological, geological, geo-technical and sub-surface conditions);
 - (b) information relating to contamination, archaeological finds, areas of archaeological, scientific or natural interest, local conditions and facilities and the quality of existing structures;
 - (c) information as to the adequacy of rights of access to and through the Waste Management Facilities and any accommodation it may require for the purposes of fulfilling its obligations under this Agreement;

5.6 **No Relief**

Subject to clause 5.4 (Fraudulent Statements) the Contractor shall not in any way be relieved from any obligation under this Agreement nor shall it be entitled to claim against the Authority on grounds that any information, whether obtained from the Authority or otherwise (including information made available by the Authority) is incorrect or insufficient and shall make its own enquiries as to the accuracy of that information.

6. **CONTRACT WASTE**

6.1 **Exclusivity of Works and Services and Ownership of Contract Waste**

6.1.1 The Authority shall, subject to clause 6.1.5 and clause 6.2:-

- (a) direct and deliver or procure the delivery of all collected Contract Waste to the Contractor; and

- (b) prior to the Kendal Fell Expiry Date, direct and deliver or procure the delivery of such quantities of South Lakeland Waste as may reasonably be requested by the Contractor pursuant to clause 6.1.5(a);
- (c) make available to the Contractor all Contract Waste deposited by members of the public at the HWRCs;

in each case in accordance with the provisions of this Agreement.

6.1.2 The Contractor throughout the Contract Period (subject to the terms of this Agreement):-

- (a) shall accept all Contract Waste directed or made available to it at the Waste Management Facilities pursuant to clause 6.1.1; and
- (b) shall not be paid by the Authority for the treatment of any Non Contract Waste.

6.1.3 The Contractor shall have the sole and exclusive right throughout the Contract Period to:-

- (a) carry out any Additional HWRC Project which is approved in accordance with Schedule 27 (Change Protocol) ("Approved Project");
- (b) provide the HWRC Operational Service in relation to any Approved Project as agreed in accordance with Schedule 27 (Change Protocol);
- (c) provide the HWRC Operational Service to any other facility within the administrative area of the Authority which is acquired or leased by the Authority during the Contract Period to be used as an HWRC, such HWRC Operational Service to be agreed in accordance with Schedule 27 (Change Protocol);
- (d) design all aspects of works to be carried out at any other facility within the administrative area of the Authority which is acquired or leased by the Authority during the Contract Period to be used as an HWRC, such design works to be agreed in accordance with Schedule 27 (Change Protocol).

6.1.4 Contract Waste received by or in the possession of the Contractor shall thereupon become acquired by and in the ownership of the Contractor.

6.1.5

- (a) Until the Kendal Fell Expiry Date, Waste collected by South Lakeland District Council which is delivered to Kendal Fell TS shall be defined as "South Lakeland Waste". Prior to the Service Availability Date for the Southern Resource Park, save to the extent that the Contractor requests that such South Lakeland Waste be sent to the Southern Resource Park as Commissioning Waste (and in such event the responsibility for transportation of such waste from the Kendal Fell TS to the Southern Resource Park shall rest with the Contractor) the South Lakeland Waste shall be deemed to be Non Contract Waste and the Authority shall take full responsibility for the disposal of the South Lakeland Waste.

- (b) From the Service Availability Date for the Southern Resource Park the South Lakeland Waste shall thereupon become Contract Waste and the Contractor shall take delivery of such Contract Waste on removal by the Contractor of such Contract Waste from the Kendal Fell TS in accordance with the Service Delivery Plan. For the avoidance of doubt Kendal Fell TS is not a Waste Management Facility nor an Interface Site.
- (c) On the Kendal Fell Expiry Date the Kendal Fell TS will no longer be available for the delivery of the South Lakeland Waste to the Contractor and therefore prior to the Kendal Fell Expiry Date there shall be deemed to be an irrevocable Authority Change in accordance with Schedule 27 (Change Protocol) to allow for the delivery of the South Lakeland Waste to the Contractor immediately following the Kendal Fell Expiry Date.

6.2 **Excess Contract Waste**

6.2.1 If in any Contract Year either Party forecasts or the Parties agree that the Tonnage of Contract Waste received at the Resource Parks is likely to exceed one hundred and fifty eight thousand (158,000) tonnes per annum (such excess being the "Excess Contract Waste") then the relevant Party shall promptly notify the other Party and the Authority shall within thirty (30) Working Days of receipt or issue of such notice either:-

- (a) propose an Authority Change and serve an Authority Change Notice on the Contractor in accordance with Schedule 27 (Change Protocol); or
- (b) issue a written notice to the Contractor stating that the Authority does not require the Contractor to accept any Excess Contract Waste;

Provided always that where the Parties have not agreed arrangements for the receipt and disposal of the Excess Contract Waste in accordance with this clause 6.2 prior to such Excess Contract Waste being received by the Contractor then, until such arrangements are agreed, the Contractor shall receive and dispose of such Excess Contract Waste which shall be deemed to be a Compensation Event and the provisions of clause 15.5 shall apply. For the avoidance of doubt, the Contractor shall, prior to the agreement of the arrangements, be entitled to send all Excess Contract Waste to Landfill and such Excess Contract Waste shall be disregarded in determining whether any bonuses or deductions under paragraphs 8.6 to 8.10 (inclusive) and 9.4 to 9.6 (inclusive) of Schedule 5 (Payment Mechanism) have been achieved or exceeded.

6.2.2 In the event that the Authority fails to serve an Authority Change Notice in accordance with Schedule 27 (Change Protocol) and within the timescale set out in clause 6.2.1, then the Contractor shall be entitled within twenty (20) Working Days to serve a Contractor Change Notice in accordance with Part 5 of Schedule 27 (Change Protocol) or issue a written notice to the Authority stating that the Contractor shall not accept any Excess Contract Waste.

6.2.3 The Authority shall be entitled to propose such Authority Change in accordance with clause 6.2.1 so long as such Authority Change complies with the requirements of Part 1, paragraph 2.1(a), (d) and (g) of Part 1 of Schedule 27 (Change Protocol). For the avoidance of doubt and without prejudice to the Contractor's rights under clause 6.2.4(b), such Authority Change shall not be

required to comply with the remaining sub-paragraphs in paragraph 2.1 of Part 1 of Schedule 27 (Change Protocol).

- 6.2.4 In the event that the Authority serves an Authority Change Notice on the Contractor, the Contractor shall (acting in its absolute discretion) within the period specified in the Authority Change Notice either:-
- (a) issue the Authority with a Contractor Response in accordance with Schedule 27 (Change Protocol); or
 - (b) issue the Authority with a notice stating that the Contractor does not wish to proceed with the proposed Authority Change and shall not accept the Excess Contract Waste.
- 6.2.5 If the Authority fails to serve a Change Notice in accordance with Schedule 27 (Change Protocol) or does not agree to a Contractor Change Notice issued under clause 6.2.2 within sufficient time for the Contractor (acting reasonably) to put the necessary arrangements in place prior to the Excess Contract Waste arising, or the Contractor serves notice stating that it shall not accept the Excess Contract Waste then, in each case, the Contractor shall not be obliged to accept the Excess Contract Waste and the Authority may enter into arrangements with a third party for the disposal of all or any part of the Excess Contract Waste, and the Parties shall agree (acting reasonably) which part of the Contract Waste constitutes the Excess Contract Waste to be processed by such third party taking into account all relevant factors but so as to leave the Contractor in no better and no worse position.

6.3 **Minimum Tonnage**

If in any Contract Year either Party reasonably considers that the tonnage of Contract Waste received by the Contractor under this Agreement will fall below:-

6.3.1 *REDACTED – 4 lines*

6.3.2 *REDACTED – 4 lines*

being in each case the “Minimum Tonnage”, and such shortfall being termed the “Contract Waste Shortage”:-

- 6.3.3 subject to the provisions of clause 6.4.3 the Contractor shall use its reasonable endeavours to source and process on reasonable terms an amount of Third Party Waste that is at least equal to the anticipated Contract Waste Shortage for that Contract Year; and
- 6.3.4 to the extent that the Contractor receives Third Party Waste in accordance with clause 6.4.3, any Third Party Revenue (exclusive of VAT) actually received by the Contractor in respect of Third Party Waste up to an amount equal to the

Contract Waste Shortage for that Contract Year, multiplied by BP1 (as the same is defined in paragraph 2.4.1 and 3.5.1 (as the case may be) of Schedule 5 (Payment Mechanism)) shall reduce the Authority's obligations to pay the Tonnage Based Element of the Monthly Unitary Charge pursuant to paragraph 3 of Schedule 5 (Payment Mechanism) by an amount equal to ninety per cent (90%) of such Third Party Revenue (exclusive of VAT), such reduction being calculated as part of the First Annual Reconciliation; and

6.3.5 the ten per cent (10%) of the Third Party Revenue (exclusive of VAT) retained by the Contractor shall not be taken into account in any calculation of the Third Annual Reconciliation under paragraph 10 of Schedule 5 (Payment Mechanism).

6.4 **Commissioning Waste, Acceptance or Refusal of Contract Waste and Third Party Waste**

6.4.1 Following the relevant PC Date at either Resource Park, the Authority shall, upon a reasonable request by the Contractor, direct such quantities of Contract Waste to a Waste Management Facility as the Contractor may require which will be treated as Commissioning Waste under Schedule 5 (Payment Mechanism). The Contractor shall give a minimum notice period of five (5) Working Days to the Authority and the relevant WCA in respect of such direction and shall use all reasonable endeavours not to redirect any such Contract Waste to an alternative Interface Site once such notice has been given.

6.4.2 The Contractor shall be entitled to refuse to receive any load containing any Contract Waste that is not permitted to be received at the relevant Waste Management Facility and/or Interface Site in accordance with the Waste Acceptance Protocol or applicable Legislation.

6.4.3 Subject to clause 6.6, the Contractor shall be entitled to enter into arrangements to receive, handle and treat Third Party Waste at the Waste Management Facilities provided that such activities are carried out:-

(a) in accordance with Legislation, Guidance, Good Industry Practice and the provisions of any Waste Management Licence, EPs and other relevant Consents;

(b) so as to ensure that the acceptance of Third Party Waste does not impair the ability of the Contractor to handle Contract Waste at the Waste Management Facilities and the Contractor shall in all circumstances ensure the receipt, handling and treatment of all Contract Waste as a priority to Third Party Waste (and for the avoidance of doubt the Contractor shall not be entitled to include any amounts of Third Party Waste in establishing whether Waste being handled at the Waste Management Facilities constitutes Excess Contract Waste); and

(c) with the prior written approval of the Authority.

6.5 Waste Composition

6.5.1 Contract Waste Analysis

- (a) From the Service Availability Date of each Resource Park, the Contractor shall at its own cost monitor all Contract Waste treated at the relevant Resource Park, and shall on an annual basis carry out a Contract Waste Audit in accordance with the provisions of Schedule 29 (Contract Waste Review Procedure) including providing the Authority with a report (“the Waste Analysis Report”) showing the composition for each six (6) month period up to the end of September and March respectively in each Contract Year.
- (b) The Waste Analysis Report shall as a minimum include analysis of the following:-
 - (i) the BMW Input Assumption of Contract Waste;
 - (ii) the Waste Composition of Contract Waste.

Each Waste Analysis Report shall be carried out in accordance with the provisions of Schedule 29 (Contract Waste Review Procedure).

6.5.2 Review of BMW Input Assumption

Prior to the expiry of the third Contract Year and every third anniversary of such date thereafter, the Contractor and the Authority shall jointly review the most recent Waste Analysis Report, with a view to agreeing any revision to the BMW Input Assumption (agreed at the Commencement Date as 0.68) for the purposes of calculating BCWBT and BCWDT (as defined in Appendix 5 in the Payment Mechanism) for the following three (3) Contract Years. In the event that the Contractor and the Authority are unable to agree any such revision, then either party shall have the right to refer the matter to Dispute Resolution under clause 54 of this Agreement.

6.5.3 Changes to the Acceptable Parameters and Base Case Waste Composition

- (a) The WCA Collection and Recycling Arrangements being adopted by each WCA at the Commencement Date are set out in Schedule 37 (WCA Collection and Recycling Arrangements) and the Acceptable Parameters in terms of Waste Composition for Contract Waste delivered to the Resource Parks and the Base Case Waste Composition are set out in Appendix 1 of Schedule 29 (Contract Waste Review Procedure). The Authority undertakes to use reasonable endeavours to keep the Contractor informed of any change to the WCA Collection and Recycling Arrangements that it becomes aware of as soon as it becomes aware of them having been implemented.
- (b) If the Authority or the Contractor becomes aware that a WCA has implemented a material change or has implemented a series of cumulative changes which taken together amount to a material change to its WCA Collection and Recycling Arrangements then within six (6) Months of the date of becoming aware of such material change the Contractor shall have the right to commence the procedure set out in clause 6.5.3(c) below. Once

this six (6) Month period has elapsed, the Contractor shall not have the right to commence such procedure unless and until a further material change has taken place.

- (c) Subject to clause 6.5.3(d) if the Contractor reasonably considers (based on existing Waste Analysis Reports) that the average Waste Composition of Contract Waste delivered to any Resource Park is outside the Acceptable Parameters, and this is due to a material change (which may arise due to a series of minor changes to the WCA Collection and Recycling Arrangements over a period of time which taken together amount to a material change) to the WCA Collection and Recycling Arrangements, then the Contractor shall serve notice on the Authority confirming its intention to commission at its own cost an independent report which shall determine, taking account of seasonal factors, whether or not the average Waste Composition is within the Acceptable Parameters. This report (which shall be carried out on the same basis as for the obligation to provide Waste Analysis Reports) must be commissioned within two (2) Months of the date of service of the notice, and shall cover at least a three (3) Month period in terms of testing of Waste Composition. In the event that such report confirms the Waste Composition as being outside the Acceptable Parameters, the Contractor shall issue a written notice to the Authority confirming the actual Waste Composition for such three month period, and the Authority shall then have the right to obtain independent verification of the Contractor's report relevant to the written notice. In the event that the Authority disputes the finding of Waste Composition by the Contractor, the Authority shall serve notice on the Contractor within twenty (20) Working Days of receipt of such independent verification, and following issue of such notice, either party shall have the right to refer the matter to the Dispute Resolution Procedure.
- (d) In relation to changes to the WCA Collection and Recycling Arrangements affecting the quantities and/or composition of Industrial Waste, the Contractor shall be entitled (acting reasonably) to:-
 - (i) estimate the impact which the proposed or actual change in WCA Collection and Recycling Arrangements is likely to have and agree the Authority Change on the basis of such estimate in accordance with Schedule 27 (Change Protocol);
 - (ii) upon becoming aware that the WCA Collection and Recycling Arrangements have changed, commission the independent report referred to in clause 6.5.3(c); and
 - (iii) retrospectively reconcile the actual impact once the report has been issued and agreed.
- (e) The Authority shall:-
 - (i) in the event that it accepts the report detailed in clause 6.5.3(c); or
 - (ii) following determination of any dispute pursuant to clause 6.5.3(c) (in the event that such determination deems that the Waste Composition is outside the Acceptable Parameters),

be deemed to propose an Authority Change and shall serve an Authority Change Notice on the Contractor in accordance with Schedule 27 (Change Protocol). Such proposal for an Authority Change shall be considered by the Contractor on the basis that to the extent reasonably practicable the calculation of the Active Waste Standard (with particular reference to the ITS Reduction Factor) and the Biodegradable Contract Waste Landfill Tonnage Target (with particular reference to the BMW Reduction Factor) and a revision to the EPU Figure (as defined in Appendix 8 of Schedule 5 (Payment Mechanism)) shall be adjusted in priority to the Tonnage Based Element calculation in paragraph 3 of Schedule 5 but so that in any event the Contractor is left in no better and no worse position (by reference to that the Base Case Waste Composition) and the basis of any Contractor Response submitted by the Contractor in response to such Authority Change Notice shall take account of such consideration. The parties shall as part of the agreement of such Authority Change also agree revised Acceptable Parameters (the "Revised Parameters") and a revised Base Case Waste Composition, backdated to the start of the relevant six (6) Month rolling period.

- (f) For the avoidance of doubt the Authority shall not be entitled to withdraw any deemed Authority Change Notice issued under clause 6.5.3(e) and any dispute regarding the terms of the Authority Change will be determined in accordance with the Dispute Resolution Procedure.
- (g) From the date of issue of the notice by the Contractor under clause 6.5.3(c), the imposition of any deductions associated with the calculation of the Active Waste Standard being the Landfill Gate Fee Deduction and the Landfill Tax Deduction in so far as they relate to Industrial Waste received at the Resource Parks shall be deferred until resolution of the process set out in clauses 6.5.3(c) and 6.5.3(f) above.

6.6 HWRC Commercial Vehicle Permitting System

The Authority shall be entitled at any time during the Contract Period to request that the Contractor implements a permitting system (on terms which reflect the current licensing arrangements at individual HWRCs) for allowing commercial vehicles to deliver Waste to HWRCs and such a requirement shall be proposed as an Authority Change. If the terms of the permitting system are agreed by the Parties and an Authority Change is carried out by the Contractor, any such Waste delivered to the HWRCs under such permitting system shall thereafter be treated as Contract Waste. For the avoidance of doubt such permitting system proposal shall operate independently of the existing operational HWRC permitting system set out in Annex A to Part 1 of Schedule 1 (Output Specification).

6.7 Industrial Waste

The Authority shall be entitled at any time during the Contract Period to request that the Contractor accepts Industrial Waste arising within the boundaries of the Authority, and such a requirement shall be proposed as an Authority Change. If the terms are agreed by the Parties and an Authority Change is carried out by the Contractor, any such Waste shall thereafter be treated as Contract Waste.

6.8 **Data for WCA Bring Facilities**

The Authority every three Contract Months shall collate all necessary data from the WCAs in relation to the tonnage of Waste collected at those Bring Facilities which are situated at the HWRCs. Such data shall be used to calculate the Actual HWRC Recycling and Composting Rate achieved at the HWRCs. For the avoidance of doubt all such Waste shall belong to the WCAs and is not Contract Waste under the terms of this Agreement.

PART 2 - LAND ISSUES

7. NATURE OF LAND INTERESTS

7.1 Grant of Leases

7.1.1 The Authority shall (save where stated otherwise in the form of Lease annexed to this Agreement) grant, with full title guarantee to the Contractor, the Leases and the Contractor shall accept such Leases, in accordance with this clause 7. The Leases shall be granted subject to and with the benefit of the Restrictions and the matters contained or referred to in this Agreement (insofar as they are still subsisting and capable of taking effect) together with all matters referred or contained in clause 17 of this Agreement.

7.1.2 The Leases in respect of the Existing Facilities and in respect of the Northern Resource Park shall be granted on the date of this Agreement, the term of such Leases commencing on the Commencement Date.

7.2 Southern Resource Park, Barrow

Within twenty (20) Working Days after either:-

7.2.1 receipt of notification from the Contractor that Satisfactory Planning Permission (as defined in Schedule 10) has been granted; or

7.2.2 in the case of Unsatisfactory Planning Permission (as defined in Schedule 10) after an Authority Change has been exercised so as to render it a Satisfactory Planning Permission,

the Authority shall exercise the options to acquire the Southern Resource Park under the Southern Resource Park Land Option Agreements within 3 Working Days after receipt from the Contractor of a notice under paragraph 2.2 of Part 1 of Schedule 10 and thereafter, in respect of that area of land identified on the plan annexed to such notice, procure completion of the purchase and sale of the freehold land under the Southern Resource Park Option Agreement (Holker) and of the Southern Resource Park Headlease on the Completion Date. Within five (5) Working Days of the Completion Date, the Lease of the Southern Resource Park shall be granted by the Authority to the Contractor.

7.3 The Landlord and Tenant Act and the Regulatory Reform (Business Tenancies) (England And Wales) Order 2003

The Authority and the Contractor confirm that:-

7.3.1 the Authority served notices on the Contractor, as required by section 38A(3)(a) of the Landlord and Tenant Act 1954 ("the 1954 Act") and which applies to each tenancy to be created by each of the Leases before this Agreement was entered into; and

7.3.2 (*NAME REDACTED*), who was duly authorised by the Contractor to do so, made statutory declarations on various dates in accordance with the requirements of section 38A(3)(b) of the 1954 Act in respect of each of the Leases.

7.4 **Grant of Leases**

The grant of the Leases shall take place at the offices of the Contractor's Solicitors but subject to due compliance with the requirements imposed in clause 7.3 above. The terms of the Leases for the Existing Facilities and the Northern Resource Park shall commence on the Commencement Date.

7.5 **Replies to Enquiries Before Contract**

In respect of the Replies to Enquiries Before Contract:-

- 7.5.1 the Authority warrants that, as at the Commencement Date, the Replies to Enquiries Before Contract have been prepared after due and careful enquiry and are true, accurate and complete;
- 7.5.2 the Authority does not warrant the truth, accuracy or completeness of correspondence or documentation from any party other than the Authority in its capacity as estate owner which is annexed to the written enquiries and the written replies, including (by way of example but without limitation) index map search results, replies to enquiries provided to the Authority by previous owners and certificates of practical completion;
- 7.5.3 the provisions of the introduction set out on page 4 of the Commercial Property Standard Enquiries (CPSE.1 Version 2.9) annexed as part of the Replies to Enquiries Before Contract shall apply to all written replies given by the Authority or, where relevant, by the Authority's Solicitors forming part of the Replies to Enquiries Before Contract.

7.6 **Stamp Duty Land Tax**

The Contractor shall, within thirty (30) Working Days of completion of each of the Leases pay the Inland Revenue Stamp Duty Land Tax (if necessary) on the Leases in respect of the Existing Facilities, the Northern Resource Park, and the Southern Resource Park.

7.7 **Registration**

The Contractor shall apply for, and shall procure registration of each Lease at HM Land Registry as soon as reasonably practicable. The Authority shall use all reasonable endeavours to assist the Contractor in responding to any proper requisitions raised by HM Land Registry to the extent that the Authority is able to do so and where such documents are in the Authority's possession PROVIDED THAT the Contractor hereby acknowledges that it has received from the Authority before the date of this Agreement all necessary title details to the Waste Management Facilities and will accept the Authority's title to the Waste Management Facilities without further enquiry or requisition.

7.8 **Early Termination**

Within fourteen (14) days of the Termination Date the Contractor shall:-

- 7.8.1 deliver to the Authority the original of each Lease,
- 7.8.2 apply to the Chief Land Registrar to cancel the registered titles relating to the Leases. The Contractor shall take all steps as may be proper and reasonable

to cancel or assist in the cancellation of all entries at H M Land Registry and the Land Charges Registry in relation to the Leases.

7.9 **No Compensation**

To avoid doubt, the Contractor shall not be entitled to any compensation under the Landlord and Tenant Act 1954 Part 2 Section 37 in respect of any variation of the terms of a Lease or the unexpired part of its interest as tenant under a Lease on assignment or surrender or automatic determination in accordance with this clause.

7.10 **Compliance with the Title Deeds**

Save in accordance with the terms of this Agreement, the Direct Agreement and of the Leases where terms otherwise conflict the Contractor shall procure that:-

7.10.1 the carrying out of the Works and the provision of the Services at Waste Management Facilities by or on behalf of the Contractor (whether before, during or after the completion of the Works) shall be carried out in a manner which does not breach any provisions of the Title Deeds for that Waste Management Facility; and

7.10.2 there shall be no action, or omission to act by any Contractor Related Party, which shall give rise to a right for any person to obtain title to the Waste Management Facilities or any part of them.

7.11 **Planning and Permitting**

The Authority and the Contractor shall each observe and perform the obligations in its part set out in Schedule 10 (Planning and Permitting Obligations).

7.12 **Authority's Property Obligations**

The Authority agrees to grant to the Contractor a further lease of Barrow HWRC in the form of the lease set out in Schedule 4 (Lease) on the date of which the Contractor shall give not less than one (1) month's notice to the Authority and in any event on the twentieth (20th) anniversary of the Commencement Date such lease to be a term commencing on the twentieth (20th) anniversary of the Commencement Date and expiring on the twenty fifth (25th) anniversary of the Commencement Date. This provision is intended to operate so that the Contractor has the same rights to a leasehold interest for a period coterminous with the other leases that have been granted in respect of the other Existing Facilities and the fact of a grant of a lease for twenty (20) years and an agreement for lease of a reversionary lease for a further five (5) years will not be taken to impact otherwise on the rights of the Contractor or the Authority under this Agreement.

7.13 **Exclusion of Contractor Liability**

7.13.1 In respect of Frizington HWRC notwithstanding the provisions of clause 17.3.2(e) the Contractor shall not be required to comply with condition 3 (Reinstatement) of planning permission reference 04/08/9002 dated 26 March 2008.

7.13.2 In respect of Barrow HWRC notwithstanding the provisions of clause 17.3.2(e) the Contractor shall be deemed to be complying with condition 3 of planning permission reference 6/90/0080 dated 28 March 1990 (as amended by planning

permission reference 6/09/0987 dated 28 November 1990) if it uses reasonable endeavours to comply with the Litter Code of Practice.

- 7.13.3 In the event that the planning authority serves notice on the Contractor or Contractor Related Party for a failure to comply with either condition 3 referred to above, the Contractor shall be entitled to claim a Compensation Event in respect of the same provided that (with regard to Barrow HWRC) it has complied at all times with the obligation set out in clause 7.13.2.

PART 3 - CONSTRUCTION PHASE

8. THE WORKS

8.1 Obligation to Carry Out

Subject to the provisions of Schedule 10 (Planning Obligations) the Contractor shall or shall procure that the Building Contractor shall carry out the Works in accordance with the Output Specification, the Service Delivery Plan and Good Industry Practice so that:-

- 8.1.1 an Acceptance Certificate is issued in respect of each New Facility on or before the Target Service Availability Date for that New Facility;
- 8.1.2 the Works fully comply with and meet all the requirements of this Agreement, the Output Specification, the Service Delivery Plan, all applicable Authority's Policies, Good Industry Practice, Guidance, all Necessary Consents and all applicable Legislation;
- 8.1.3 all persons employed in connection with the performance of the Works will be careful, skilled and experienced in their relevant professions, trades and callings;
- 8.1.4 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 Agreement and having regard to the activities which are carried on at the Sites;
- 8.1.5 the Works are maintained in good order, kept in a safe condition and protected from damage, and working areas of the Sites are secure against trespassers and clean and tidy so far as practicable having regard to the nature of the Works; and
- 8.1.6 adequate retaining and supporting walls are provided to support any Adjoining Property and, where appropriate, any Existing Facilities during the carrying out of the Works.

8.2 Works Stipulations

During the carrying out of the Works the Contractor shall or shall procure that the Building Contractor shall:-

- 8.2.1 not deposit or manufacture or permit to be deposited or manufactured on the Sites or any land upon which the Works are being undertaken any materials which are not required for the carrying out of the Works;
- 8.2.2 not sell or dispose of any earth, clay, sand, gravel, chalk or other material from the Sites or any land upon which the Works are being undertaken or permit or suffer the same to be removed, except so far as shall be necessary for the proper execution of the Works, without the consent of the Authority which shall not be unreasonably withheld;
- 8.2.3 ensure that all vehicles leaving the Sites are adequately cleaned to prevent the deposit of waste materials and debris on the Adjoining Property and if any such material or debris is so deposited the Contractor shall forthwith employ such measures as shall be necessary to remove the material and debris and to clean

and reinstate the Adjoining Property to the reasonable satisfaction of the owners or occupiers of the Adjoining Property as the case may be;

- 8.2.4 not, in breach of any Legislation, permit any oil, grease or deleterious, dangerous, poisonous, explosive or radioactive matter to be discharged from the Sites into any rivers or any ditches or Conduits on the Sites and/or any Adjoining Property and shall not in breach of any Legislation, permit or suffer the blockage of any such rivers, ditches or Conduits by reason of anything done or omitted on the Sites or any land upon which the Works are being undertaken, and shall comply at the Contractor's expense with any requirements of the Environment Agency or any other Relevant Authority so far as such requirements relate to or affect the Works;
- 8.2.5 not gain access to and egress from the Sites except as contemplated by the Service Delivery Plan;
- 8.2.6 not without the written consent of the Authority erect or permit or suffer to be erected on the Sites any temporary structure except site accommodation usual in connection with works of a like nature to the Works or as contemplated by the Service Delivery Plan;
- 8.2.7 not erect or exhibit or permit or suffer to be erected or exhibited on any part of the Sites any signs or trade boards save those previously approved in writing by the Authority (such approval not to be unreasonably withheld or delayed); and
- 8.2.8 take all necessary steps in accordance with Legislation with regard to ensuring the health and safety of all:-
 - (a) occupants of the Sites;
 - (b) individuals invited onto the Sites; and
 - (c) occupants of Adjoining Properties,

is not adversely impacted upon the undertaking of the Works.

8.3 **Overall Responsibility**

To avoid doubt, the obligations in clause 8.1 are independent obligations. In particular:-

- 8.3.1 the fact that the Contractor has complied with the Output Specification but not the Service Delivery Plan shall not be a defence to an allegation that the Contractor has not satisfied the Service Delivery Plan, provided that the Output Specification shall take priority over the Service Delivery Plan in the event of any discrepancy or inconsistency between them; and
- 8.3.2 the fact that the Contractor has complied with the Service Delivery Plan but not the Output Specification insofar as the same relates to the Works shall not be a defence to an allegation that the Contractor has not satisfied the Output Specification insofar as the same relates to the Works.

8.4 **Services and Utilities to Sites**

Subject to clauses 8.5 and 8.6, the Contractor shall in relation to the services and utilities required as a result of carrying out the Works:-

- 8.4.1 be responsible for determining the location of such services and utilities as may be at the Sites and for the maintenance of such services and utilities at the Sites;
- 8.4.2 make and rely upon all necessary investigations and surveys as to such services and utilities at the Sites;
- 8.4.3 make provision for lawfully diverting, disconnecting or otherwise dealing as may be necessary with any services and utilities not within the Sites;
- 8.4.4 pay to all Relevant Authorities or undertakings all costs and expenses incurred in diverting, disconnecting or otherwise carrying out works in respect of such services and utilities within the Sites;
- 8.4.5 make connection into services and utilities outside the Sites; and
- 8.4.6 otherwise do all that is required in relation to the utilities required as a result of the carrying out of the Works.

8.5 Provisional Sum

- 8.5.1 REDACTED – 5 lines

- 8.5.2 Within sixty (60) Working Days of completing the Southern Resource Park Land Option Agreement the Contractor shall at its own cost carry out a survey to assess the extent of the remedial ground works required in order to carry out the Works at the Southern Resource Park in accordance with the requirements of Schedules 1 (Output Specification) and 2 (Services Delivery Plan) (the “Survey”). For the avoidance of doubt the cost of the Survey shall not be included within the Provisional Sum.
- 8.5.3 Within two (2) Working Days of receipt of the results of the Survey the Contractor shall provide a copy of the Survey to the Authority and within fifteen (15) Working Days of receipt of the results of the Survey the Contractor shall provide the Authority with a written notice (the “Ground Works Notice”) setting out the following:-
 - (a) the Building Contractor’s proposals as to the scope of the remedial ground works to be undertaken for completion of the Works (the “Ground Works”);
 - (b) the extent to which the survey has identified Adverse Ground Conditions and the costs associated with the remediation and accommodation of the same (including appropriate reinforcement or re-design of foundations) (the “Remedial Works”); and
 - (c) a fixed cost for completing the Ground Works (the “Quote”) including a detailed breakdown of all the proposed costs.
- 8.5.4 Within five (5) Working Days of receipt of a Ground Works Notice the Contractor shall arrange a meeting with the Authority and any third party which either the Authority or the Contractor reasonably requires the attendance of in order to

discuss the Quote. The Contractor and the Authority will consider the Quote in good faith and agree the overall cost to be incurred (the "Actual Cost"). In the event the Actual Cost is not agreed, then the matter shall be determined in accordance with the Dispute Resolution Procedure.

Within 3 Working Days after agreement or determination of the Actual Cost the Authority will serve a Waiver Notice as defined in and pursuant to clause 2.3 in each of the Southern Resource Park Land Option Agreements or otherwise confirm under each of the Southern Resource Park Land Option Agreements that the Condition (as defined in each of the Southern Resource Park Land Option Agreements) has been satisfied. Where any dispute as to Actual Cost is referred for determination under the Dispute Resolution Procedure the parties will act in good faith to have that dispute resolved within the period of six months after the date of the Southern Resource Park Land Option Agreements invoking Fast Track Dispute Resolution Procedure where necessary.

8.5.5 If the Actual Cost is greater than the Provisional Sum the Authority agrees to pay the Contractor one hundred per cent (100%) of the amount by which the Actual Cost exceeds the Provisional Sum (the "Excess") provided that such Excess relates solely to the Remedial Works. The Authority shall (at its own discretion) pay the Contractor the Excess (following the provision of satisfactory written evidence of such Excess having been incurred by the Contractor) either by means of:-

(a) where the Contractor has secured appropriate funding from the Senior Lenders an adjustment to the Annual Unitary Charge determined and made in accordance with clause 27 (Indexation and Financial Adjustments); or

(b) a lump sum payable within twenty (20) Working Days of the Contractor's invoice having been received by the Authority for such excess amount.

8.5.6 If the Actual Cost is less than the Provisional Sum the Contractor shall pay to the Authority one hundred per cent (100%) of the amount by which the Actual Cost is less than the Provisional Sum within twenty (20) Working Days of receipt of the Authority's invoice for such amount.

8.5.7 If there is no difference between the Actual Cost and the Provisional Sum then neither party shall be liable to the other for any adjustment payments in respect of the cost of the Ground Works.

8.6 **Utilities Works Provisional Sum**

8.6.1 *REDACTED – 5 lines*

8.6.2 Within sixty (60) Working Days of completing the Southern Resource Park Land Option Agreement the Contractor shall at its own cost carry out the survey required to assess the extent of the anticipated cost of the utility installation and connection costs required in order to carry out the Works at the Southern

Resource Park in accordance with the requirements of Schedules 1 (Output Specification) and 2 (Service Delivery Plan) (the "Utilities Survey"). For the avoidance of doubt the cost of the Utilities Survey shall be excluded from the Utilities Works Provisional Sum.

- 8.6.3 Within two (2) Working Days of receipt of the results of the Utilities Survey the Contractor shall provide a copy of the Utilities Survey to the Authority and within fifteen (15) Working Days of receipt of the results of the Utilities Survey the Contractor shall provide the Authority with a written notice (the "Utilities Works Notice") setting out the following:
- (a) the Building Contractor's proposals as to the scope of the utility installation and connection works to be undertaken for completion of the Works (the "Utilities Works");
 - (b) the extent to which the Utilities Survey has identified Adverse Ground Conditions and the costs associated with the same (the "Remedial Utilities Works"); and
 - (c) a fixed cost for completing such Utilities Works (the "Utilities Quote") including a detailed breakdown of all the proposed costs.
- 8.6.4 Within five (5) Working Days of receipt of a Utilities Works Notice the Contractor shall arrange a meeting with the Authority and any third party which either the Authority or the Contractor reasonably requires the attendance of in order to discuss the Utilities Quote. The Contractor and the Authority will consider the Utilities Quote in good faith and agree the overall cost to be incurred (the "Utilities Works Actual Cost"). In the event the Utilities Works Actual Cost is not agreed, then the matter shall be determined in accordance with the Dispute Resolution Procedure.
- 8.6.5 If the Utilities Works Actual Cost is greater than the Utilities Works Provisional Sum the Authority agrees to pay the Contractor one hundred per cent (100%) of the amount by which the Utilities Works Actual Cost exceeds the Utilities Works Provisional Sum (the "Utilities Works Excess") provided that such Utilities Works Excess relates solely to the Remedial Utilities Works. The Authority shall (at its own discretion) pay the Contractor the Utilities Works Excess (following the provision of satisfactory written evidence of such Utilities Works Excess having been incurred by the Contractor) either by means of:-
- (a) where the Contractor has secured appropriate funding from the Senior Lenders an adjustment to the Annual Unitary Charge determined and made in accordance with clause 27 (Indexation and Financial Adjustments); or
 - (b) a lump sum payable within (20) Working Days of the Contractor's invoice having been received by the Authority for such excess amount.
- 8.6.6 If the Utilities Works Actual Cost is less than the Utilities Works Provisional Sum the Contractor shall pay to the Authority one hundred per cent (100%) of the amount by which the Utilities Works Actual Cost is less than the Utilities Works Provisional Sum within twenty (20) Working Days of receipt of the Authority's invoice for such amount.

- 8.6.7 If there is no difference between the Utilities Works Actual Cost and the Utilities Works Provisional Sum then neither party shall be liable to the other for any adjustment payments in respect of the cost of the Utilities Works.
- 8.7 For the avoidance of doubt, and subject to the other provisions of this Agreement the Contractor accepts entire responsibility (including financial and other consequences) for carrying out the Utilities Works and Ground Works and the Target Services Availability Date in respect of the Southern Resource Park shall be unaffected by the Utilities Works and/or the Ground Works.
- 8.8 If the time reasonably required to carry out the Remedial Works and/or the Remedial Utilities Works exceeds the time allowed for in the Construction Programme and this additional time means that the construction of the Southern Resource Park cannot reasonably be completed before the Target Services Availability Date, then there shall be deemed to be an irrevocable Authority Change and the provisions of clause 46 (Change Protocol) shall apply.

9. **CONSTRUCTION PROGRAMME**

9.1 **Contractor to Follow Construction Programme**

- 9.1.1 Insofar as the carrying out of the Works affects or may affect the provision of the Services, the Contractor shall procure that the Works are carried out strictly in accordance with the Construction Programme and so (where applicable) as to minimise any disruption to the provision of the Services.
- 9.1.2 Without prejudice to the requirement of the Contractor to notify pursuant to clause 15 (Extensions of Time), if either:-
- (a) the Contractor becomes aware at any time that the actual progress of the Works may become or has been significantly delayed or has fallen behind the Construction Programme; or
 - (b) it appears to the Authority's Representative at any time that the actual progress of the Works has been significantly delayed or has fallen behind the Construction Programme (and the Authority's Representative requests the Contractor's Representative to do so),

the Contractor's Representative shall submit to the Authority's Representative a report identifying the reasons for the delay and (where the Authorities Representative requires the Contractor's Representative to do so) the Contractor's Representative shall produce and submit to the Authority's Representative a revised Construction Programme showing the manner and the periods in which the Works will be carried out to achieve the Target Services Availability Date and/or showing the steps which are to be taken to eliminate or reduce the delay.

10. **REPRESENTATIVES**

10.1 **Contractor's Representative**

The Contractor shall employ a representative the identity of whom will be subject to the prior approval of the Authority to act as the Contractor's Representative in connection

with the carrying out of the Works, the provision of the Services and generally in connection with this Agreement.

The Contractor's Representative (once appointed) shall be entitled (on written notice to the Authority) to appoint a deputy from time to time to represent the Contractor when the Contractor's Representative is unavailable. The deputy shall have the same rights and obligations under this Agreement as the Contractor's Representative.

10.2 **Authority of Contractor's Representative**

The Contractor's Representative shall have full authority to act on behalf of the Contractor for all purposes of this Agreement. Except as previously notified in writing before such act by the Contractor to the Authority, the Authority shall be entitled to treat any act of the Contractor's Representative in connection with this Agreement as being expressly authorised by the Contractor (save where the Contractor has notified the Authority that such authority has been revoked) and the Authority shall not be required to determine whether any express authority has in fact been given.

10.3 **Termination of Appointment**

The Contractor may by notice to the Authority change the Contractor's Representative. Where the Contractor wishes to do so it shall be written notice to the Authority propose a substitute for approval taking account of the need for liaison and continuity in respect of the Project. Such appointment shall be subject to the approval of the Authority.

10.4 **Authority's Representative**

The Authority's Representative shall be (*NAME REDACTED*) or such other person appointed pursuant to this clause. The Authority's Representative shall exercise the functions and powers of the Authority in relation to the Project which are identified in this Agreement as functions or powers to be carried out by the Authority's Representative. The Authority's Representative shall also exercise such other functions and powers of the Authority under this Agreement as may be notified to the Contractor from time to time. During any period when no Authority's Representative has been appointed (or when the Authority's Representative is unable through illness, incapacity or any other reason whatsoever to carry out or exercise his functions under this Agreement) the Authority shall carry out the functions which would otherwise be performed by the Authority's Representative.

10.5 **Authority's Representative Authorisation**

The Authority's Representative shall be entitled at any time, by notice to the Contractor, to authorise any other person to exercise the functions and powers of the Authority delegated to him pursuant to this clause, either generally or specifically. Any act of any such person shall, for the purposes of this Agreement, constitute an act of the Authority's Representative and all references to the "Authority's Representative" in this Agreement (apart from this clause) shall be taken as references to such person so far as they concern matters within the scope of such person's authority.

10.6 **Change of Authority's Representative**

The Authority may by notice to the Contractor change the Authority's Representative. The Authority shall (as far as practicable) consult with the Contractor prior to the appointment of any replacement for the Authority's Representative, taking account of the

need for liaison and continuity in respect of the Project. Such change shall have effect on the date specified in the written notice (which date shall, other than in the case of emergency, be such date as will not cause material inconvenience to the Contractor in the execution of its obligations under this Agreement).

10.7 **Authority of the Authority's Representative**

The Authority's Representative shall have full authority to act on behalf of the Authority for all purposes of this Agreement. The Contractor shall be entitled to treat any act of the Authority's Representative in connection with this Agreement as being expressly authorised by the Authority (save where the Authority has notified the Contractor that such authority has been revoked) and the Contractor shall not be required to determine whether any express authority has in fact been given.

10.8 **Notices etc**

Any notice, information, instructions or public communication given to:-

10.8.1 the Contractor's Representative shall be given in writing and shall be deemed to have been given to the Contractor; and

10.8.2 the Authority's Representative shall be given in writing and shall be deemed to have been given to the Authority.

11. **SITE MEETINGS**

The Contractor shall procure that the Authority's Representative is afforded a reasonable opportunity to attend site meetings with the Contractor and the Building Contractor relating to the Works and (whether or not such Representatives have attended) that a copy of the minutes of site meetings is promptly supplied to the Authority.

12. **COLLATERAL WARRANTIES**

12.1 The Contractor shall not engage any new Building Contractor or any new Operating Contractor(s) and shall procure that the Building Contractor shall not engage any Principal Building Sub-Contractor unless such person has delivered to the Authority a duly executed agreement substantially in the Agreed Form of the relevant Collateral Warranty duly executed as a deed and in each case such Collateral Warranty must be delivered to the Authority before such entity enters onto any Site.

12.2 The Contractor shall not engage any new SRF Offtaker, other than in accordance with clause 71.3 and 71.4 and shall procure that any SRF Offtaker has delivered to the Authority a duly executed SRF Offtake Contract Direct Agreement before any such SRF Offtake Contract comes into effect.

13. **DESIGN DEVELOPMENT**

13.1 **Obligation to Finalise Design**

The Contractor shall develop and finalise the design and specification of the Works and the Authority may review any SRP Design Data in accordance with the Review Procedure and the provisions of this clause 13.

13.2 **Submit SRP Design Data**

The Contractor shall submit any SRP Design Data and the design of any variations developed in accordance with clause 14 (Changes to the Service Delivery Plan and Construction Programme) to the Authority's Representative for review under the Review Procedure.

13.3 **No Construction Prior to Review**

The Contractor shall not commence or permit the commencement of the construction of the part or parts of the Works to which any SRP Design Data relate until it has submitted any SRP Design Data for review and either it is confirmed by the Authority's Representative (or it is deemed) that it is entitled to proceed in accordance with Schedule 8 (Review Procedure) or the Contractor is disputing the status of such SRP Design Data pursuant to paragraph 1.3 of Schedule 8 (Review Procedure). If the Contractor commences or permits the commencement of construction during such a dispute and it is subsequently determined that the Authority's comments and/or objections in relation to the any SRP Design Data were valid, then the Contractor shall forthwith, at its own costs, undo, remove from the Site(s) and replace (in a manner complying with the Agreement) any parts of the Works which it has been determined the Contractor was not entitled to construct.

13.4 **Review of Design Data**

The Contractor shall allow the Authority's Representative at any time a reasonable opportunity to view any items of SRP Design Data, which shall be made available to the Authority's Representative as soon as reasonably practicable following receipt of any written request from the Authority's Representative.

13.5 **Design Database**

The Contractor shall procure that the Building Contractor establishes and maintains a computerised design database which the Contractor's Representative and the Authority's Representative (subject, in relation to Design Data for the EcoDeco Plant, to the Authority complying with the terms of the EcoDeco Confidentiality Undertaking) may access remotely by computer to view drawings comprised within the Design Data and electronically store and print copies of such Design Data. In the event of the Authority's Representative being unable to access that design database, the Contractor shall procure that it is made available for inspection by the Authority's Representative or any person authorised by the Authority's Representative.

13.6 **Rectification of Service Delivery Plan**

If it should be found that the Service Delivery Plan does not fulfil the requirements of the sections of the Output Specification referred to in clause 13.6.1 below, the Contractor shall at its own expense amend the Service Delivery Plan and rectify the Works or any part affected. Such amendment and rectification shall have the effect that:-

13.6.1 the Service Delivery Plan shall satisfy the following parts of the Output Specification:-

- (a) Part 5 – Service Output 2 (S02) – Reception, Transfer, Treatment and Disposal of Waste;

- (b) Part 6 – Service Output 3 (SO3) – Household Waste Recycling Centres;
- (c) Part 7 – Service Output 4 (SO4) – Marketing of Reclaimed Materials and Waste Derived Products;
- (d) Part 8 – Service Output 5 (SO5) – Asset Management and Information; and
- (e) Part 9 – Service Output 6 (SO6) – Health and Safety and Welfare; and

13.6.2 following the amendment or rectification the structural, mechanical and electrical performance of the New Facilities will be of an equivalent standard of performance to that set out in the Service Delivery Plan prior to their amendment or rectification (for the purpose of comparison disregarding the fault which required the amendment or rectification to be made).

14. CHANGES TO THE SERVICE DELIVERY PLAN AND CONSTRUCTION PROGRAMME

14.1 Proposal to Vary Contractor’s Proposal

Subject to clause 13.6 (Rectification of the Service Delivery Plan) the Contractor shall be entitled to propose variations to the Service Delivery Plan or the Construction Programme by submitting the relevant variation to the Authority for review under Schedule 8 (Review Procedure).

14.2 Limitation

The Contractor shall not be entitled to propose a variation to the Service Delivery Plan or the Construction Programme (other than where necessitated by a Compensation Event, Authority Change or a Qualifying Change in Law or as a direct consequence of a variation to the Service Delivery Plan or the Construction Programme which is implemented at the request of the Authority) which would delay a Target Practical Completion Date and/or a Target Service Availability Date or would lead to an increase in the Annual Unitary Charge. Once consented to, a proposed variation will form part of the Service Delivery Plan or Construction Programme as the case may be.

14.3 Implementing a variation to the Service Delivery Plan

The Contractor shall not implement any variation to the Service Delivery Plan until the Authority consents or is deemed to have consented to the variation in accordance with the Review Procedure. Once consented to, a proposed variation will form part of the Service Delivery Plan as the case may be.

15. EXTENSIONS OF TIME

15.1 Notice

If at any time the Contractor becomes aware that there will be or is likely to be a delay to the Works such that a Start on Site Date or a Target Service Availability Date may not be achieved or (following either Target Service Availability Date having passed) a Longstop Date may not be achieved the Contractor shall as soon as reasonably practicable and in any event within twenty (20) Working Days give notice to the Authority to that effect specifying:-

- 15.1.1 the reason for the delay or likely delay; and

15.1.2 an estimate of the likely effect of the delay on the Start on Site Date, any Target Practical Completion Date and any Target Service Availability Date (taking into account any measures that the Contractor proposes to adopt to mitigate the consequences of the delay in accordance with clause 15.3).

15.2 **Supply of Information**

Following service of a notice by the Contractor pursuant to clause 15.1 the Contractor shall promptly supply to the Authority any further information relating to the delay which:-

15.2.1 is received by the Contractor and may impact on the matters referred to in the notice served under clause 15.1 (including potential further delay of the Works, the Start on Site Date, the Target Practical Completion Date or any Target Services Availability Date); or

15.2.2 is reasonably requested by the Authority.

15.3 **Duty to Mitigate**

The Contractor shall take all reasonable steps to mitigate the consequences of any delay which is the subject of a notice pursuant to clause 15.1.

15.4 **Time for Completion of the Works**

If any delay or anticipated failure to meet a Start on Site Date or a Target Service Availability Date (or, if the delay occurs after a Target Services Availability Date, a failure to meet a Longstop Date) is notified to the Authority by the Contractor as being in the Contractor's reasonable opinion attributable to:-

15.4.1 a Compensation Event, then the provisions of clause 15.5 shall apply;

15.4.2 a Force Majeure Event, then the provisions of clause 30 shall apply;

15.4.3 a Relief Event, then the provisions of clause 44 shall apply;

15.4.4 an Authority Change, then the provisions of clause 46 (Change Protocol) shall apply; or

15.4.5 a Qualifying Change in Law, then the provisions of clause 45 (Change in Law) shall apply.

15.5 **Delays due to a Compensation Event**

If, at any time during the Contract Period as a direct result of the occurrence of a Compensation Event the Contractor:-

15.5.1 will be unable to (in regard to either New Facility) commence the Works on or before the Start on Site Date;

15.5.2 will be unable to (in regard to either New Facility) achieve Services Availability at that New Facility on or before the Target Service Availability Date or, (following the Target Service Availability Date, a Longstop Date) or will be delayed in achieving Service Availability; and/or

15.5.3 is unable to comply with its obligations under this Agreement; and/or

15.5.4 incurs any Estimated Change in Project Costs and/or loss of revenue,

then the Contractor shall be entitled to apply for an extension of time to the Start on Site Date and/or relevant Target Practical Completion Date and/or Target Service Availability Date and/or (following the Target Service Availability Date) to a Longstop Date and/or claim relief from its obligations and/or claim any Estimated Change in Project Costs under this Agreement.

15.6 **Procedure for Relief**

Subject to clause 15.8 below, to obtain relief or claim compensation under clause 15.5 the Contractor must:-

15.6.1 as soon as practicable, and in any event within twenty (20) Working Days after it becomes aware that the Compensation Event has caused or is likely to cause delay, breach of an obligation under this Agreement and/or the Contractor to incur costs or lose revenue, give to the Authority a notice of its claim for an extension of time to the Start on Site Date and/or Target Practical Completion Date and/or Target Service Availability Date or (following the Target Service Availability Date) the Longstop Date payment of any Estimated Change in Project Costs and/or relief from its obligations under this Agreement;

15.6.2 within ten (10) Working Days of receipt by the Authority of the notice referred to in clause 15.6.1, give full details (as far as it is reasonably able and to the extent then known) of the Compensation Event and the extension of time and/or any Estimated Change in Project Costs claimed (including evidence, on an open book basis, of the calculation of any Estimated Change in Project Costs); and

15.6.3 demonstrate to the reasonable satisfaction of the Authority that:-

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

- (i) the Estimated Change in Project Costs, and/or loss of revenue; and/or
- (ii) any delay in the commencement of the Works on or before the Start on Site Date; and/or
- (iii) any delay in achievement of relevant the Services Availability Date on or before the relevant Target Services Availability Date or, (following the relevant Target Services Availability Date but before the relevant Longstop Date), any delay in the achievement of Services Availability; and/or
- (iv) breach of the Contractor's obligations under this Agreement; and

(b) the Estimated Change in Project Costs, loss of revenue, time lost, and/or relief from the obligations under this Agreement claimed, could not reasonably be expected to be mitigated or recovered by the Contractor acting in accordance with Good Industry Practice.

15.7 **Giving of Relief**

In the event that the Contractor has complied with its obligations under clause 15.6 (Procedure for Relief), then:-

- 15.7.1 in the case of delay, the Start on Site Date; and/or the relevant Target Practical Completion Date, Target Service Availability Date or, following the Target Service Availability Date, the relevant Longstop Date shall be postponed by such time as shall be reasonable for such a Compensation Event, taking into account the likely effect of delay;
- 15.7.2 in the case of any additional cost being incurred or revenue being lost by the Contractor:-
- (a) in relation to a New Facility on or before the Target Service Availability Date; or
 - (b) as a result of Capital Expenditure being incurred by the Contractor at any time;

the Authority shall compensate the Contractor for the actual Estimated Change in Project Costs as adjusted to reflect the actual Estimated Change in Project Costs incurred and, without double counting, for revenue actually lost (to the extent it would not reasonably have been mitigated), within thirty (30) Working Days of its receipt of a written demand by the Contractor supported by all relevant information;

- 15.7.3 in the case of a payment of compensation for the Estimated Change in Project Costs and/or, without double counting, loss of revenue that does not result in Capital Expenditure being incurred by the Contractor referred to in clause 15.7.2 the Authority shall compensate the Contractor for the actual Estimated Change in Project Costs incurred (to the extent that it could not reasonably have been mitigated) by an adjustment to the Annual Unitary Charge in accordance with clause 27.3; and/or
- 15.7.4 the Authority shall give the Contractor such relief from its obligations under this Agreement as is reasonable for such a Compensation Event.

15.8 **Late Provision of Information**

In the event that information is provided after the dates referred to in clause 15.6.2 (Giving of Relief), then the Contractor shall not be entitled to any extension of time, compensation, or relief from its obligations under this Agreement during the period for which the information is delayed.

15.9 **Disputes**

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

15.10 **TS Operator Default Compensation Event**

In determining whether the Contractor has mitigated any Estimated Change in Project Costs in relation to limb (g) of the definition of Compensation Event, the Contractor shall be required to demonstrate that:-

- 15.10.1 it has used best endeavours from the date of termination of the relevant TS Contract to require CWM to provide the TS Run Out Service in accordance with the obligations in regard thereto contained in the relevant TS Contract;
- 15.10.2 working together with the Authority it has used all reasonable endeavours to find an alternative transfer station from which a service comparable to the service provided in the relevant TS Contract could be provided at the earliest reasonable opportunity (and where applicable continues to do so);
- 15.10.3 working together with the Authority it is carrying out its obligations relating to the provision of an alternative transfer station and/or in relation to an alternative method of providing the service in accordance with the Service Delivery Plan current at that time.

16. CDM REGULATIONS

16.1 Responsibility for Design

As between the Contractor and the Authority, the Contractor shall be entirely responsible for the appointment of the designer and for the safety of any design which forms part of the Works and for the adequacy, stability and safety of all site operations and methods of construction.

16.2 Contractor as Only Client

In accordance with the CDM Regulations, the Authority and the Contractor have elected that the Building Contractor shall be and shall be treated as the only client in respect of the Works pursuant to Regulation 8 of the CDM Regulations. The Contractor shall ensure that the Building Contractor is aware of such election and shall not prior to the completion of the Works seek to withdraw, terminate or in any manner derogate from such declaration.

16.3 Duties under CDM Regulations

The Contractor shall observe, perform and discharge of the obligations, requirements and duties arising under the CDM Regulations in connection with the Works (other than those that remain with the Authority pursuant to Regulation 8 of the CDM Regulations) and shall, prior to the Target Services Availability Date for a New Facility, provide a certified copy of the final draft Health and Safety File (as defined in the CDM Regulations) for that New Facility to the Authority and, within thirty (30) Working Days of issue of the Acceptance Certificate for the New Facility or the relevant parts of the Works in accordance with clause 20 (Principal Obligations), a certified copy of the full and complete Health and Safety File. The Contractor shall ensure that the Health and Safety File is revised as often as may be appropriate to incorporate any relevant new information in relation either to the Works during the Contract Period.

16.4 Authority to Provide Information

The Authority shall provide to the Contractor such information and documents as may be in the Authority's possession pursuant to Regulations 5(1)(b), 10(1), 15 and 17(1) of the CDM Regulations.

17. **THE SITES**

17.1 **Access**

If at any time the Contractor requires access to or any interest in any land which does not form part of the Sites or any additional rights beyond those which the Contractor has in relation to any part of the Sites, the responsibility and cost of securing or acquiring such access or interest shall be entirely the responsibility of the Contractor.

17.2 **Use of Waste Management Facilities**

Subject to the express terms of this Agreement, the Site Conditions shall be the sole responsibility of the Contractor and accordingly the Contractor is deemed:-

17.2.1 to have satisfied itself in relation to:-

- (a) means of access to and through the Sites, the possibility of interference by any person with such access and the times and methods of working necessary to prevent any nuisance whether public or private to any third party;
- (b) the boundaries of the Sites;
- (c) the rights exercisable over or in relation to the Sites;
- (d) the Restrictions affecting the Sites; and
- (e) the extent and nature of work and materials necessary for conducting and completing the Works; and

17.2.2 in general to have obtained for itself all necessary information as to risks, contingencies and all other circumstances which may influence, delay or affect the Works.

17.3 **Consents and Planning Approval**

17.3.1 The Parties agree to be bound by the provisions to obtaining planning permission necessary for the Project as set out in Schedule 10 (Planning Obligations).

17.3.2 Subject to the express provisions of this Agreement, the Contractor shall or shall procure that its Sub-Contractors shall:-

- (a) at its own expense obtain and maintain all Necessary Consents which may be required for the performance of the Project;
- (b) at its own expense use all reasonable endeavours to assist the Authority to obtain all Necessary Consents that, as a matter of law, the Contractor is not eligible to obtain;
- (c) be responsible for implementing each Necessary Consent within the period of its validity in accordance with its terms;
- (d) supply free of charge to the Authority's Representative a copy of any application for a Necessary Consent (with a copy of all accompanying

drawings and other documents) and a copy of any Necessary Consent obtained;

- (e) comply with the conditions attached to any Necessary Consents and procure that no such Necessary Consent is breached by it or any person under its control and use all reasonable endeavours to procure that no Necessary Consent is revoked and that all Necessary Consents continue in full force and effect for such time as is necessary for the Contractor to carry out the Works and/or the Services.

17.3.3 The Contractor shall not (and shall use all reasonable endeavours to procure that any other person over whom it has control shall not) without the prior consent of the Authority under this Agreement (which consent shall not be unreasonably withheld or delayed) apply for or agree to any change, relaxation or waiver of any Necessary Consent (whether obtained before or after the date of the Agreement) or of any condition attached to it but, subject to the compliance by the Contractor with its obligations under this paragraph, references in this Agreement to Necessary Consents shall be construed as referring to the Necessary Consents as from time to time varied, relaxed or waived.

17.4 **No Warranty**

Subject to the express provisions of this Agreement, the Contractor shall take the Sites in their state and condition in all respects as at the date of this Agreement. Nothing in this Agreement or otherwise shall constitute or imply a warranty by or on the part of the Authority as to the fitness and suitability of the Sites or any part thereof for the Works or for any other purpose.

17.5 **Safety, Security and Cleaning**

The Contractor shall procure that at all times prior to the issue of an Acceptance Certificate in respect of any New Facility that those parts of the New Sites which are from time to time occupied by the Contractor, a Building Contractor or any of their sub-contractors for the purpose of carrying out the Works in question is maintained in a clean, orderly, safe and secure state provided that no act or omission on the part of the Authority or an Authority Related Party shall result in the Contractor being in breach of the provisions of this clause.

17.6 **Site Conditions**

Subject to the other terms of this Agreement, in respect of the Sites, the Contractor accepts entire responsibility (including any financial or other consequences which result whether directly or indirectly) for the ascertainment of and dealing with Site Conditions.

17.7 **Latent Defects**

Subject to clause 15.5 (Delays due to a Compensation Event), the Contractor accepts entire responsibility (including any financial or other consequences which result whether directly or indirectly) for the ascertainment of and dealing with any Latent Defects arising from the Works during the Contract Period.

17.8 **Fossils and Antiquities**

- 17.8.1 As between the Parties, all fossils, antiquities and other objects having artistic, historic or monetary value, human remains or unexploded ordinance which may be found on or at the Sites are or shall become, upon discovery, the absolute property of the Authority.
- 17.8.2 Upon the discovery of such item during the course of the Works, the Contractor shall:-
- (a) immediately inform the Authority's Representative of such discovery;
 - (b) take all steps not to disturb the object and, if necessary, cease any Works or Services insofar as the carrying out of such Works or Services would endanger the object or prevent or impede its excavation; and
 - (c) take all necessary steps to preserve the object in the same position and condition in which it was found.
- 17.8.3 The Authority shall procure that the Authority's Representative promptly, and in any event within five (5) Working Days, issues an instruction to the Contractor specifying what action the Authority's Representative requires to be taken in relation to such discovery. If no such instruction is forthcoming within such period, the Contractor may continue to carry out the Works or Services.
- 17.8.4 The Contractor shall promptly and diligently comply with any instruction issued by the Authority's Representative referred to in clause 17.8.3 at its own cost, except and to the extent that such instruction constitutes an Authority Change pursuant to clause 17.8.6 in which case the provisions of clause 46 (Change Protocol) shall apply.
- 17.8.5 If directed by the Authority's Representative, the Contractor shall allow representatives of the Authority to enter the Site for the purpose of removal or disposal of such discovery, provided that such entry shall be subject to the Authority complying with all relevant safety procedures, which shall include any relevant health and safety plans for the Site from time to time and any reasonable directions with regard to site safety that may be issued by or on behalf of the Contractor's Representative from time to time.
- 17.8.6 If any instruction or direction referred to in clause 17.8.3 includes a requirement for the Contractor to suspend the carrying out of the Works or Services and/or to carry out works or services at a Site (being any work of alteration, addition, demolition or extension or variation) which are not Works, suspension of Works or Services or suspension of Services which would be necessary for the purpose of compliance with law or any Necessary Consents, such suspension, services and/or works shall be deemed to be an Authority Change and the provisions of clause 46 (Change Protocol) shall apply.
- 17.8.7 The Authority shall act promptly and diligently in dealing with its obligations hereunder in relation to any find so as to mitigate any effect on the Contractor, the Works and/or the Services.

18. **MONITORING AND INSPECTION**

18.1 **Right of Inspection**

The Contractor shall procure that the Authority's Representative shall have, at all reasonable times and upon giving reasonable notice, the right (but not so as to delay or impede the progress of the Works) to enter any of the New Sites in order to inspect and view the state and progress of the Works and to ascertain whether they are being executed in accordance with this Agreement.

18.2 **Supply of Information**

The Contractor shall supply to the Authority and the Authority's Representative visiting any of the New Sites pursuant to clause 18.1 such information in respect of the Works as may reasonably be required.

18.3 **Right to Open Up**

18.3.1 Subject to clause 18.3.2, the Authority's Representative shall have the right at any time prior to the relevant Service Availability Date to request the Contractor to open up and inspect any part or parts of the Works where the Authority's Representative reasonably believes that such part or parts of the Works is or are defective and the Contractor shall comply with such request.

18.3.2 Prior to exercising his right pursuant to clause 18.3.1 above, the Authority's Representative shall notify the Contractor of his intention to exercise such right, setting out detailed reasons.

18.3.3 If, following the exercise by the Authority's Representative of his right pursuant to clause 18.3.1, the inspection shows that the relevant part or parts of the Works are not defective, any delay caused to the Works by the exercise of such rights shall, subject to (and in accordance with) the provisions of clause 15.5, be treated as a Compensation Event.

18.3.4 If, following the exercise by the Authority's Representative of his right pursuant to clause 18.3.1, the inspection shows that the relevant part or parts of the Works is or are defective, the Contractor shall rectify and make good such defect(s) and any consequence of such rectification and/or making good defect(s) shall be carried out by the Contractor at no cost to the Authority and the Contractor shall not be entitled to any extension of time in relation to such rectification and making good of the Works.

18.3.5 If, following the exercise by the Authority's Representative of his right pursuant to clause 18.3.1, the Authority's Representative is of the opinion that the inspection shows that the relevant part or parts of the Works is or are defective and the Contractor does not agree with such opinion, the matter shall be determined in accordance with the Dispute Resolution Procedure.

18.3.6 Without prejudice to the rights of the Authority's Representative pursuant to this clause 18 the Parties acknowledge that the exercise of such rights shall not in any way affect the obligations of the Contractor under this Agreement save as expressly set out in this clause 18.

18.4 **Damages**

If the Authority or an Authority Related Party causes material damage to either of the New Sites in exercising any right under this clause, then the Authority shall be liable to the Contractor for the Direct Losses directly caused by such damage.

18.5 **Health and Safety Requirements**

The Authority Representative shall at all times comply with all relevant health and safety procedures relevant to the construction of the New Facilities which shall include any relevant health and safety plans for the construction of the New Facilities and any reasonable directions with regard to site safety that may be issued by or on behalf of the Contractor from time to time when exercising its rights under this clause 18 (Monitoring and Inspection).

19. **NOTIFICATION OF SERVICE AVAILABILITY FOR NEW FACILITIES**

19.1 **Inspection of a New Facility**

The Contractor shall give the Authority and the Independent Certifier not less than five (5) Working Days notice of the date when it proposes to inspect a New Facility and carry out the Tests on Completion with a view to issuing a Certificate of Service Availability in respect of that New Facility and the Authority Representative and the Independent Certifier shall be entitled to make a joint inspection and attend the performance of the Tests on Completion.

19.2 **Dates on which Service Availability Dates May Occur**

The Service Availability Date for any New Facility shall be the date on which an Acceptance Certificate is issued in respect of that New Facility PROVIDED THAT such date shall be no earlier than the relevant Target Service Availability Date.

19.3 **Authority Representations**

The Contractor shall have due and proper regard of any representations made by the Authority or the Independent Certifier regarding the condition of a New Facility and whether the Services Availability Requirements have been met in relation to the New Facility in respect of which a Certificate of Service Availability is proposed to be issued by the Contractor and any defects or items to be included on a Snagging List.

19.4 **Issue of Statement**

Immediately following the issue of any Certificate of Service Availability the Contractor shall send a true and complete certified copy of such certificate to the Authority and the Independent Certifier.

19.5 **Issue of Acceptance Certificate**

Following receipt by the Independent Certifier of a certified copy of the Certificate of Service Availability pursuant to clause 19.4 in respect of a New Facility and provided that the Independent Certifier acting reasonably is satisfied that:-

19.5.1 in relation to the relevant New Facility the Service Availability Requirements have been met; and

19.5.2 all Snagging Items detailed in the Snagging List will be carried out within thirty (30) Working Days (or such longer period as the Independent Certifier shall determine) of the issue of such written statement in accordance with the terms of this Agreement;

then the Independent Certifier shall within five (5) Working Days issue an Acceptance Certificate in respect of the relevant New Facility. If the Independent Certifier fails to issue an Acceptance Certificate in accordance with this clause 19.5 or the Independent Certifier's Deed of Appointment, and the Contractor wishes to challenge the same the matter shall be determined under the Dispute Resolution Procedure. The Parties agree that the Acceptance Certificate shall be final, binding and enforceable upon the Parties except in the case of fraud, collusion, bias or manifest error (in which case the matter shall be referred for determination under the Dispute Resolution Procedure within ten (10) Working Days of the issue of the Acceptance Certificate or objection notice).

19.6 Effect of Issue of Acceptance Certificate

19.6.1 The issue of an Acceptance Certificate shall indicate only that the Independent Certifier is of the opinion that the relevant New Facility appears to be in compliance with the Services Availability Requirements and shall in no way lessen or affect the obligations of the Contractor under this Agreement in relation to that New Facility or any other part of the Works or the Services or signify the Authority's approval of the means of delivery of the Services, and the Contractor shall following the date of issue of the Acceptance Certificate carry out and complete such (if any) of the Snagging Items as have not been so completed on the date of issue of the Acceptance Certificate.

19.6.2 In the event that the Contractor fails to complete the Snagging Items within the timescale set for their completion by the Independent Certifier, then the Authority shall be entitled to effect such repairs as may be necessary and recover the costs of doing so from the Contractor as a debt.

19.7 Independent Certifier

The Independent Certifier's Deed of Appointment specifies the duties of the Independent Certifier owed to the Authority and the Contractor.

19.8 Issue of an Objection Notice

The Parties shall procure that where the Independent Certifier reasonably considers that in relation to the relevant New Facility the Services Availability Requirements for that New Facility have not been met it shall within four (4) Working Days of its inspection pursuant to clause 19 issue to the Authority and the Contractor a notice (an "Objection Notice") detailing all outstanding matters which are required to be attended to before the relevant New Facility can be considered to have met the Services Availability Requirements for that New Facility. The Contractor shall attend to such matters and shall give the Authority and the Independent Certifier further Certificates of Services Availability in accordance with this clause 19 (but dealing only with matters raised in the Objection Notice) so that the procedures in clause 19 are repeated as often as necessary to ensure that all outstanding matters in relation to the relevant New Facility are attended to and an Acceptance Certificate can be issued in accordance with clause 19.5 (Issue of Acceptance Certificate).

19.9 **Site Clearance**

The Contractor shall, as soon as is reasonably practicable following issue of an Acceptance Certificate for a New Facility, clear from the relevant Site to the reasonable satisfaction of the Authority all temporary structures, rubbish and all building and surplus material and equipment and in default the Authority shall be entitled to employ an alternative contractor to clear them and shall be entitled to be reimbursed by the Contractor for any costs reasonably incurred in clearing or procuring the clearing of them provided that the Authority shall not be entitled to exercise such right for a period of twenty (20) Working Days following the date of the Acceptance Certificate for that New Facility.

19.10 **Issue of Final Acceptance Certificate**

As soon as practicable following the issue by the Independent Certifier of the Acceptance Certificate specified in clauses 19.5, the Independent Certifier shall (provided that the Contractor has complied with its obligations to remedy any Works listed in any Snagging List) issue a Final Acceptance Certificate to the Contractor in respect of the relevant New Facility.

PART 4 - THE SERVICES

20. PRINCIPAL OBLIGATIONS

20.1 Provision of Services

Subject to clause 20.5, the Contractor shall provide to the Authority or procure the provision to the Authority of the Services in accordance with the Output Specification, the relevant parts of the Service Delivery Plan, Good Industry Practice and all applicable Authority's Policies at each Waste Management Facility on the terms of this Agreement with effect from the following:-

20.1.1 in respect of a New Facility, from the Service Availability Date for that New Facility;

20.1.2 in respect of an Existing Facility, from the Commencement Date;

20.1.3 in respect of the Transfer Stations, from the date of Practical Completion for the first Resource Park to achieve Practical Completion.

20.2 Standard of Performance

The Contractor will at all times ensure that the Waste Management Facilities and Transfer Stations are operated by appropriately qualified and trained personnel in accordance with Good Industry Practice and in accordance with the Contractor's Service Proposals.

20.3 Service Delivery Proposals

For the avoidance of doubt, the Output Specification shall at all times have priority over the Contractor's Service Proposals and the Contractor shall be obliged to comply with the Output Specification and provide the Services in accordance with the Output Specification. Any changes to the Contractor's Service Proposals may only be made in accordance with Schedule 8 (Review Procedure).

20.4 Cost of Services Consumed

Without prejudice to the provisions of paragraph 5 of Schedule 5 (Payment Mechanism) the Contractor shall pay, or procure the payment, to the suppliers all charges for electricity, water, gas, telecommunications and other services consumed or used at or in relation to the Waste Management Facilities by the Contractor, including meter rents and standing charges, and shall comply with the lawful requirements and regulations of their respective suppliers.

20.5 CWM Policies

20.5.1 CWM shall be required to comply in all respects with the CWM Policies (and not the Authority Policies) in carrying out its obligations as a Sub-Contractor, and the Contractor shall not be liable to the Authority to the extent that CWM (as a Sub-Contractor to the Contractor) has failed to comply with the Authority Policies provided that at all times CWM has complied with the CWM Policies.

20.5.2 In the event that CWM is replaced as a Sub-Contractor, any such replacement Sub-Contractor shall be required to comply in all respects with the Authority

Policies in the course of providing the Services in respect of which it is contracted.

21. **CONDITION OF THE FACILITIES/INTERFACE SITES**

21.1 **Maintenance**

The Contractor shall ensure that the maintenance and operating procedures set out in the Contractor's Service Proposals comply with Good Industry Practice and are and remain sufficient to ensure that:-

- 21.1.1 the HWRCs and Interface Sites are available for reception of Contract Waste at all times during Opening Hours;
- 21.1.2 the Waste Management Facilities and all plant and equipment are kept in good structural and operational order (subject to fair wear and tear) in accordance with this Agreement and the Output Specification and the Contractor's Service Proposals;
- 21.1.3 it can continuously deliver the Services in accordance with this Agreement and the Output Specification and the Contractor's Service Proposals; and
- 21.1.4 the Waste Management Facilities are handed back to the Authority on the Expiry Date in a condition complying with the Handback Requirements.

21.2 **Surveys**

- 21.2.1 If the Authority reasonably believes that the Contractor is in breach of its obligations under clause 21.1 then it may carry out or procure the carrying out of a survey of the Waste Management Facilities believed to be non-compliant to assess whether the Waste Management Facilities have been and are being maintained by the Contractor in accordance with its obligations under clause 21.1. This right may not be exercised in relation to any individual Waste Management Facility more often than once every two years.
- 21.2.2 The Authority shall notify the Contractor in writing a minimum of five (5) Working Days in advance of the date it wishes to carry out the survey. The Authority shall consider any reasonable requests by the Contractor for the survey to be carried out in good faith on a different date if such request is made at least two (2) Working Days prior to the notified date and the Contractor is able to demonstrate that carrying out the survey on the notified date would materially prejudice the Contractor's ability to provide the Services.
- 21.2.3 When carrying out any survey, the Authority shall cause the minimum disruption reasonably practicable to the provision of the services by the Contractor. The cost of the survey, except where clause 21.2.4 applies, shall be borne by the Authority. The Contractor shall give to the Authority any reasonable assistance required by the Authority from time to time during the carrying out of any survey.
- 21.2.4 If a survey shows that the Contractor has not complied or is not complying with its obligations under clause 21.1, the Authority shall:-
 - (a) notify the Contractor of the standard that the condition of the relevant Waste Management Facilities should be in to comply with its obligations under clause 21.1;

- (b) specify a reasonable period within which the Contractor must carry out such rectification and/or maintenance work; and
- (c) be entitled to be reimbursed by the Contractor for the cost of the survey and any administrative costs incurred by the Authority in relation to the survey.

21.2.5 The Contractor shall at its own cost carry out such rectification or maintenance work within the period specified by the Authority pursuant to and in accordance with clause 21.2.4(b).

21.3 **Programmed Works**

The Contractor shall undertake maintenance of the Waste Management Facilities in accordance with the Asset Management Plan.

21.4 **Bunding and Drainage**

Until the date that the Authority and the Contractor shall have agreed the scope of the HWRC Works (as defined in Schedule 23 (Asset Management Plan)) in accordance with the provisions of paragraph 4.1 of Schedule 23 (Asset Management Plan) (and the Authority confirms that the scope of such HWRC Works shall include reasonable provision for compliance with the relevant EP requirements in relation to bunding of oil tanks and drainage at the HWRCs), the Contractor shall not be liable for any non-compliance of the bunding and/or drainage at any of the HWRCs with the relevant EP. In the event that the Contractor is prevented from operating a HWRC where a Stop Notice under section 183 of the Town and Country Planning Act 1990 (or other appropriate notice) is served on the Contractor or a Contractor Related Party by a Relevant Authority due to non-compliance of either the bunding and/or drainage at any HWRC, then the Contractor shall use all reasonable endeavours to comply with the terms of such notice. The Contractor shall be entitled to claim a Compensation Event in relation to the consequences of such Stop Notice (or other appropriate notice) from the date of receipt by the Contractor (or a Contractor Related Party, as appropriate) of the Stop Notice (or other appropriate notice).

22. **HAZARDOUS SUBSTANCES AND SAFETY**

22.1 **Security**

22.1.1 The Contractor shall take all necessary measures to comply with any Authority risk management policies introduced from time to time as an Authority Change. The Contractor shall take all reasonable measures, by the display of notices or other appropriate means, to ensure that all persons employed on any work in connection with this Agreement have notice that any such Authority risk management policies apply to them.

22.1.2 Without prejudice to the provisions of clause 22.1.1 the Contractor shall provide security services such that the Contractor shall take all reasonable steps to:-

- (a) keep the Works and the Waste Management Facilities in a safe condition;
- (b) keep working areas of the Waste Management Facilities secure against trespassers;

- (c) ensure the safety of all plant and equipment and personnel necessary to provide the Services; and
- (d) be responsible for the safety of all visitors to any of the Works and the Waste Management Facilities.

22.1.3 Unless otherwise specifically stated in this Agreement the Contractor shall be responsible for any damage caused to any Works, the Waste Management Facilities and plant and equipment in or on any of the Waste Management Facilities during the Contract Period save to the extent that such damage is caused by the act or omission of any Authority Related Party.

22.1.4 The Contractor shall:-

- (a) co-operate with any investigations relating to security which is carried out by or on behalf of the Authority;
- (b) use its reasonable endeavours to make any of its staff and/or its Sub-Contractors' staff identified by the Authority available to be interviewed by the Authority for the purposes of the investigation; and
- (c) (subject to clause 49 (Freedom of Information and Confidentiality)) provide copies of all documents, records or other material of any kind which may reasonably be required by the Authority for the purposes of the investigation.

22.1.5 The Authority shall, in so far as is practical, inform the Contractor of any specific or general security information which would reasonably be expected to affect the security of the Contractor, its staff or property.

22.2 **Storage**

The Contractor shall ensure that any Hazardous Materials or equipment used or intended to be used in the provision of the Services are kept under control and in safe keeping in accordance with all relevant Legislation, and Good Industry Practice and shall ensure that all such materials are properly and clearly labelled on their Containers.

22.3 **COSHH Register**

The Contractor shall maintain a COSHH Register in relation to each Waste Management Facility and shall ensure that a copy of each register is held at the relevant Waste Management Facility, at the Contractor's registered office and that a copy is given to the Authority.

23. **PERFORMANCE MONITORING**

23.1 **Contractor Monitoring**

The Contractor shall monitor its performance in the delivery of the Services in accordance with the Performance Measuring Framework set out in Part 2 of the Output Specification.

23.2 **Authority Monitoring**

The Authority may elect, at its own cost, to undertake its own performance monitoring at any stage during the Contract Period for any purpose including in order to ensure that the Services are being provided in accordance with this Agreement. The Contractor will use its reasonable endeavours to assist the Authority in such an exercise. The Authority shall be entitled to notify the Contractor of the outcome of the performance monitoring exercise, and the Contractor shall have due regard to the Authority's comments in relation to the future provision of the Services.

23.3 Without prejudice to the Authority's rights under clause 29.3 and to any other express rights under this Agreement, where the Contractor has been found to:-

23.3.1 be fraudulent in the submission of completed draft Reporting Proformas (as set out in Schedule 36 (Reporting Proformas)) or claims for payment under clause 26; or

23.3.2 have submitted at least two (2) materially inaccurate completed draft Reporting Proformas (as set out in Schedule 36 (Reporting Proformas))⁷, within a three (3) month period,

the Authority may by notice to the Contractor increase the level of its monitoring of the Contractor, or (at the Authority's option), of the Contractor's monitoring of its own performance of its obligations under this Agreement in respect of the relevant Service or Services the subject of such fraudulent or materially inaccurate reporting until such time as the Contractor shall have demonstrated to the reasonable satisfaction of the Authority that it will perform (and is capable of performing) its obligations under this Agreement.

23.4 For the purposes of clause 23.3, the Authority acknowledges that if the Contractor has otherwise failed to have demonstrated to the reasonable satisfaction of the Authority as required by clause 23.3 but:-

23.4.1 if the Contractor has removed the person or persons responsible for the fraudulent reporting; or

23.4.2 (under clause 23.3.2), if in the following three (3) month period following the Authority notice (if it has not already been established) there have been no further erroneous reports of any kind;

23.4.3 this shall be regarded as sufficient demonstration that the Contractor will perform and is capable of performing its obligations.

23.5 If the Authority issues a notice under clause 23.3, the Contractor shall bear its own costs and indemnify and keep the Authority indemnified at all times from and against all reasonable costs and expenses incurred by or on behalf of the Authority in relation to such increased level of monitoring arising due to circumstances under clause 23.3.1.

24. **EMPLOYEES**

24.1 **Employees : New Facilities and Existing Facilities**

The Parties agree that the commencement of the provision of the Services by the Contractor at each New Facility with effect from the Service Availability Date shall not constitute a Relevant Transfer for the purposes of TUPE or the ARD. The Parties further agree that the arrangements created by this Agreement are not and shall not be deemed

to constitute a Relevant Transfer (for the purposes of TUPE or the ARD) on the Commencement Date in respect of any employees engaged by CWM at any Existing Facility.

24.2 **TUPE Indemnity**

In the event that TUPE is deemed to apply in respect of provision of the Services by a court or employment tribunal in relation to any employee engaged by the Authority, the Authority shall indemnify and keep indemnified in full the Contractor (for itself and for the benefit of each relevant Sub-Contractor) against all Direct Losses incurred by the Contractor or any relevant Sub-Contractor as a result of a Relevant Transfer in respect of any employees engaged by the Authority.

24.3 **Emoluments and Outgoings**

The Contractor shall be responsible or shall procure that any relevant Sub-Contractor and other sub-contractor of the Contractor (and/or any Sub-Contractor) is responsible for all remuneration, benefits, entitlements and outgoings in respect of any employee who is or will be employed or engaged by the Contractor, any Sub-Contractor (or other sub-contractor of the Contractor (and/or any Sub-Contractor)) in connection with the provision of any of the Services, including without limitation all wages, holiday pay, bonuses, commission, payment of PAYE, national insurance contributions, pension contributions and otherwise for the period during which such employee is so employed or engaged by the Contractor or a Sub-Contractor (or other sub-contractor of the Contractor (and/or any Sub-Contractor) as may be appropriate).

24.4 **Indemnities**

The Contractor shall indemnify and keep indemnified in full the Authority, and at the Authority's request each and every Future Service Provider against:-

24.4.1 all Direct Losses incurred by the Authority or any Future Service Provider in connection with or as a result of any claim or demand against the Authority or any Future Service Provider by any person who is or has been employed or engaged by the Contractor or any Sub-Contractor in connection with the provision of any of the Services to the extent that such claim arises as a result of any act, fault or omission of the Contractor and/or any Sub-Contractor occurring during such employment or engagement by the Contractor or Sub-Contractor;

24.4.2 all Direct Losses incurred by the Authority or any Future Service Provider in connection with or as a result of a breach by the Contractor or any Sub-Contractor of its obligations under clause 24.3 above; and

24.4.3 all Direct Losses incurred by the Authority or any Future Service Provider in connection with or as a result of any claim by any trade union or staff association or employee representative (whether or not recognised by the Contractor and/or the relevant Sub-Contractor in respect of all or any of the employees) arising from or connected with any failure by the Contractor and/or any Sub-Contractor to comply with any legal obligation to such trade union, staff association or other employee representative whether under regulations 13 and 14 of TUPE, under the ARD or otherwise and, whether any such claim arises or has its origin on, before or after the Commencement Date until the Return Date (as defined in clause 24.6.3 below). This indemnity shall not apply to any Direct Losses incurred by the Authority or any Future Service Provider to the extent

that they arise directly out of any breach by the Authority and/or Future Service Provider of any statutory obligations.

24.5 **Code of Practice on Workforce Matters and the Gender Equality Duty and Race Equality Duty**

- 24.5.1 The Authority and the Contractor shall have regard to the Code in interpreting and applying the Code Obligations. The terms of clause 24.5.2 have been agreed on the basis that in interpreting the Code Obligations, the Parties have agreed that harmonisation of terms and conditions shall be the most important factor in determining the approach to be taken with offering appropriate terms and conditions to New Employees. In the event that there is deemed (such as by a decision of the independent person under stage 3 of the Code Dispute Resolution Procedure set out in Schedule 25 (Code Dispute Resolution Procedure) to be any conflict between the obligation on the Parties to have regard to the Code, and the obligation contained in clause 24.5.2 below, the provisions of clause 24.5.2 shall take precedence.
- 24.5.2 The Contractor shall procure that any New Employees engaged at the Existing Facilities (whether by the Contractor or any Sub-Contractor) shall be employed on terms and conditions which are overall fair and reasonable and overall no less favourable (other than as set out in clause 24.5.4 below) than those enjoyed by the majority of employees (be they CWM Employees and/or employees of a sub-contractor of CWM) who:
- (a) are engaged in the provision of the Services at the time of the New Employee's recruitment;
 - (b) are working alongside the New Employee;
 - (c) and hold the same or a substantially similar position to that of the New Employee.
- 24.5.3 The Contractor shall and shall procure that any Sub-Contractor shall consult with the recognised trade unions and where there is no recognised trade union any other relevant employee representative body on the terms to be offered to such New Employees.
- 24.5.4 In accordance with the Code, the Contractor shall procure that such New Employees are (at the option of the Contractor) offered either:-
- (a) membership of the LGPS where the employer has Admitted Body status within the LGPS and makes the requisite contribution; or
 - (b) membership of a good quality employer pension scheme, being either:-
 - (i) a contracted-out final salary based defined benefit scheme, or
 - (ii) a defined contribution scheme under which the employer must match employee contributions up to six percent (6%); or
 - (c) a stakeholder pension scheme, under which the employer matches employee contributions up to at least six percent (6%).

- 24.5.5 During the term of this Agreement, the Contractor shall on request by the Authority provide or procure that the Authority is provided with such accurate and complete information as reasonably requested by the Authority as soon as reasonably practicable, including the terms and conditions of employment of the employees engaged in relation to the Services (or any part thereof) where this is required to monitor the Contractor's compliance with its Code Obligations provided that any or all such information can be provided in accordance with the DPA.
- 24.5.6 The Contractor shall and shall procure that any relevant Sub-Contractor shall support any central Government sponsored review and monitoring programme on the impact of the Code and on request by the Authority provide the Authority with such accurate and complete information as reasonably requested by the Authority as soon as reasonably practicable in order to assist the Authority in doing this.
- 24.5.7 The Authority and the Contractor shall in the first instance seek to resolve by discussions between them any complaints from any employee or any recognised trade union in relation to compliance by the Contractor and any Sub-Contractor with its Code Obligations.
- 24.5.8 Where it appears to the Authority or the Contractor that it is not possible to resolve the matter by continuing discussions between them pursuant to clause 24.5.7 or where an employee of the Contractor, any Sub-Contractor or any recognised trade union writes to the Authority to confirm that it has been unable to resolve its complaint directly with the Contractor or any Sub-Contractor in relation to the Contractor's Code Obligations:-
- (a) the Authority shall first write to the Contractor to seek an explanation for the alleged failure by the Contractor to comply with its Code Obligations. The Contractor shall or shall procure that the relevant Sub-Contractor provide such an explanation in writing within five (5) Working Days of receipt of the request from the Authority;
 - (b) if the response provided by the Contractor or any Sub-Contractor satisfies the Authority that the Code Obligations have been met, then the Authority will inform the complainant of this and the matter will be deemed to have been concluded;
 - (c) in the event that the Authority is not satisfied with the response provided by the Contractor or any Sub-Contractor the Authority shall write to the Contractor within five (5) Working Days to require the Contractor to take immediate action to resolve this dispute; and
 - (d) if, following such a request by the Authority the Contractor still appears to the Authority not to be complying with its Code Obligations, the matter shall be dealt with in accordance with the Code Dispute Resolution Procedure in Schedule 25 (Code Dispute Resolution Procedure) which shall be applied subject to the provisions of clause 24.5.1.
- 24.5.9 The Contractor shall and shall procure that any relevant Sub-Contractor shall comply at all times with the principles set out in the Gender Equality Duty (under the Sex Discrimination Act 1975 s76A(1)) and the Race Equality Duty (under the Race Relations Act 1976 (s71(1)) and the Disability Equality Duty (under the

Disability Discrimination Act 1995 s49A) (together the “Duties”) which apply to the Authority and shall implement employment practices which satisfy the principles enshrined in the Duties.

24.6 **Termination of Agreement**

- 24.6.1 On the expiry or termination of this Agreement, in whole or in part, leading to the termination of the provision of any Services under this Agreement, the Authority and the Contractor agree that it is their intention that TUPE shall apply in respect of the provision thereafter of any service equivalent to a Service but the position shall be determined in accordance with law at the date of expiry or termination as the case may be and this clause 24.6.1 is without prejudice to such determination.
- 24.6.2 On expiry or termination of this Agreement, in whole or in part, for any reason, the Contractor shall and shall procure that each Sub-Contractor shall provide (subject to applicable data protection legislation) all necessary information and all reasonable assistance to the Authority or Future Service Provider to facilitate the orderly transfer of the Services back to the Authority or to any Future Service Provider.
- 24.6.3 For the purposes of this clause 24 “Returning Employees” shall mean those employees wholly or mainly engaged in the provision of the Services as the case may be immediately before the expiry or full or partial termination of this Agreement whose employment transfers to the Authority or a Future Service Provider pursuant to TUPE. Upon expiry or such termination of this Agreement for whatever reason (such date being termed the “Return Date”), the provisions of this clause 24.6 will apply:-
- (a) the Contractor shall or shall procure that all wages, salaries and other benefits of the Returning Employees and other employees or former employees of the Contractor or the Sub-Contractors (who had been engaged in the provision of the Services) and all PAYE tax deductions and national insurance contributions relating thereto in respect of the employment of the Returning Employees and such other employees or former employees of the Contractor or Sub-Contractors up to the Return Date are satisfied;
 - (b) the Contractor shall or shall procure that any Sub-Contractor shall comply with the requirements of TUPE and (to the extent set out in this clause 24) the Code;
 - (c) without prejudice to clause 24.6.3(a), the Contractor shall:-
 - (i) remain (and procure that Sub-Contractors shall remain) (as relevant) responsible for all the Contractor’s or Sub-Contractor’s employees (other than the Returning Employees) on or after the time of expiry or termination of this Agreement and shall indemnify the Authority and any Future Service Provider against all Direct Losses incurred by the Authority or any Future Service Provider resulting from any claim whatsoever whether arising before on or after the Return Date by or on behalf of any of the Contractor’s or Sub-Contractor’s employees who do not constitute the Returning Employees;

- (ii) in respect of those employees who constitute Returning Employees the Contractor shall indemnify the Authority and any Future Service Provider against all Direct Losses incurred by the Authority or any Future Service Provider resulting from any claim whatsoever by or on behalf of any of the Returning Employees in respect of the period on or before the Return Date (whether any such claim, attributable to the period up to and on the Return Date, arises before, on or after the Return Date) including but not limited to any failure by the Contractor or any Sub-Contractor to comply with any of its or their obligations under regulations 11, 13 and/or 14 of TUPE and/or article 7 of the ARD as if such legislation applied, even if it does not in fact apply save to the extent that any such failure to comply arises as a result of an act or omission of the Authority or any Future Service Provider, including without limitation any failure by the Authority or any Future Service Provider to comply with Regulation 13(4) of TUPE.
- (d) the Authority shall or shall procure that all wages, salaries and other benefits of the Returning Employees and all PAYE tax deductions and national insurance contributions relating thereto in respect of the employment of the Returning Employees after the Return Date are satisfied;
- (e) without prejudice to clause 24.6.3(a), in respect of those employees who constitute Returning Employees the Authority shall indemnify the Contractor and any Sub-Contractor against all Direct Losses incurred by the Contractor or any Sub-Contractor resulting from any claim whatsoever by or on behalf of any of the Returning Employees:-
 - (i) to the extent that such claims relate to the period after the Return Date, including, for the avoidance of doubt, claims pertaining to pension rights in respect of any period after the Return Date; or
 - (ii) in respect of any failure by the Authority or any Future Service Provider to comply with its or their obligations under TUPE and/or the ARD (as if such legislation applied, even if it does not in fact apply) save to the extent that any such failure to comply arises as a result of an act or omission of the Contractor or any Sub-Contractor.

24.6.4 The Authority shall be entitled to assign the benefit of the terms of clause 24.6.3(a), 24.6.3(b) and 24.6.3(c) to any Future Service Provider.

24.6.5 Each Party shall provide to the other and procure that its respective contractors and sub-contractors shall provide in sufficient time such information as is necessary to enable that Party (and its respective contractors and sub-contractors) to comply with all of their obligations to inform and if necessary consult with the appropriate employee representatives (within the meaning of TUPE) and the Contractor and the Authority shall procure that its sub-contractors or Future Service Provider (as appropriate) shall carry out such consultation with appropriate employee representatives as is or may be required of it or them by TUPE or the ARD.

24.6.6 The Authority shall indemnify and hold the Contractor and its Sub-Contractors harmless in respect of all Employment Claims arising out of or in connection

with any claims or proceedings by any Trade Union, elected employee representative or staff association which arises from or is connected with any failure of the Authority or any Future Service Provider fully to comply with the provisions of Regulation 13 of TUPE save to the extent that failure to do so is attributed to default or failure to comply with that Regulation on the part of the Contractor or its Sub-Contractor.

24.6.7 The Authority shall and shall procure that the relevant Future Service Provider shall indemnify and keep indemnified the Contractor and its Sub-Contractors from and against all Employment Costs arising from claims brought by or on behalf of any of the Returning Employees in respect of the employment of the Returning Employees by the Authority or the Future Service Provider from the Return Date except in so far as such matters relate to matters arising before the Return Date and continuing thereafter, in which event liability for Employment Costs arising from such claims shall be shared between the Contractor and the Authority on the following basis:-

- (a) the Contractor shall be responsible for meeting such proportion of the Employment Costs as relate to the period up to and including the Return Date as a result of the acts or omissions of the Contractor and/or any Sub-Contractor;
- (b) the Contractors shall be responsible for meeting such proportion of the Employment Costs as arise after the Return Date as a result of the acts or omissions of the Contractor and/or any Sub-Contractor; and
- (c) subject to sub-clause 24.6.7(b) above, the Authority shall be responsible for meeting such proportion of the Employment Costs as relate to the period after the Return Date.

24.6.8 The Authority indemnifies and shall keep the Contractor and its Sub-Contractors indemnified fully in respect of any claims by any Returning Employees in respect of any Employment Claims arising from any breach of the Data Protection Act 1998 by the Authority or a Future Service Provider.

24.6.9 With effect from the Return Date, the Authority or the Future Service Provider as the case may be, and not the Contractor or any of its Sub-Contractors shall be the employer of all the Returning Employees and the Authority or the Future Service Provider (as the case may be) shall be responsible for all duties and liabilities arising under or in connection with the contracts of employment of such persons and shall not be entitled to claim any reimbursement from the Contractor in respect of the cost of employment of any such person including (but not limited to) salaries, wages, PAYE, National Insurance contributions, pension contributions, training costs, insurance, sickness, long term disability and other benefits, holiday pay and maternity and paternity benefit in so far as it relates to the period after the Return Date and the Authority shall and shall procure that the Future Service Provider shall indemnify the Contractor and its Sub-Contractors in respect of the same.

24.7 **Sub-Contractors**

24.7.1 In the event that the Contractor enters into any Sub-Contract in connection with this Agreement, it shall impose obligations on its Sub-Contractors in the same terms as those imposed on it pursuant to clauses 24.3 and 24.4 and shall

procure that the Sub-Contractor complies with such terms. The Contractor shall indemnify and keep the Authority indemnified in full against all Direct Losses, incurred by the Authority or any Future Service Provider as a result of or in connection with any failure on the part of the Contractor to comply with this clause and/or the Sub-Contractor's failure to comply with such terms.

24.7.2 For the avoidance of doubt any reference to any Sub-Contract and/or any Sub-Contractor in this clause 24 (other than in this clause 24.7.2) shall be deemed to refer to any sub-contractor whatsoever engaged directly or indirectly by the Contractor under any contract for the purposes of carrying out the Services or any part thereof (whether or not the sub-contractor is engaged or the contract is entered into in accordance with the terms of this Agreement).

24.8 **Retendering / Termination**

24.8.1 The Contractor shall (and shall procure that any Sub-Contractor shall) (subject to applicable data protection legislation) within the period of six (6) months immediately preceding the expiry of this Agreement or following service of notice to terminate this Agreement or as a consequence of the Authority notifying the Contractor of its intention to retender this Agreement:-

- (a) within a period of twenty eight (28) days from receiving a request from the Authority provide full and accurate details regarding the identity, number, age, sex, length of service, job title, grade and terms and conditions of employment and any other information referred to in regulation 11 of TUPE (together "the Retendering Information") in respect of any person engaged or employed by the Contractor or any Sub-Contractor in the provision of the Services at any New Facility or any Existing Facility ("the Assigned Employees") who it is reasonably expected, if they remain in the employment of the Contractor or of any Sub-Contractor as the case may be until immediately before the expiry or termination of this Agreement, would be Returning Employees;
- (b) provide the Retendering Information promptly and at no cost to the Authority;
- (c) notify the Authority forthwith in writing of any material changes to the Retendering Information promptly as and when such changes arise and in any event, fourteen (14) days before the expiry or termination of this Agreement;
- (d) authorise the Authority to use or disclose such information to any Future Service Provider and to such other third parties as the Authority may reasonably consider necessary for the purposes of putting the continued provision of the Services or the relevant part of the Services out to tender and, if requested by the Authority to do so, liaise with and provide such information directly to any Future Service Provider or other third parties as the Authority may reasonably direct;
- (e) be precluded from making any increase or decrease in the numbers of Assigned Employees save in the normal course of business or save with the Authority's prior written consent (not to be unreasonably withheld or delayed);

- (f) be precluded from making any increase in the remuneration or other change in the terms and conditions of the Assigned Employees (except where such change is required by law) other than in the ordinary course of business or with the Authority's prior written consent (not to be unreasonably withheld or delayed). The Contractor shall, if it or a Sub-Contractor fails to abide by the provisions of this clause 24.8, indemnify the Authority and any Future Service Provider for any differential which results in any change of remuneration and which consequently results in any extra financial liability for the Authority or any Future Service Provider;
- (g) be precluded from transferring any of the Assigned Employees to another part of its business or moving other employees from elsewhere in its or their business who have not previously been employed or engaged in providing the Services to provide the Services save in the normal course of business or save with the Authority's prior written consent (not to be unreasonably withheld or delayed); and
- (h) not encourage or procure any employee who would otherwise be a Returning Employee to elect not to transfer to the Authority or any Future Service Provider under Regulation 4(7) of TUPE. For the avoidance of doubt, nothing in this clause shall prevent the Contractor or any Sub-Contractor from considering the application of any Assigned Employee received in response to a general recruitment advertisement published generally and not targeted at the individual, or received from a recruitment agency, in either case without solicitation from the Contractor or a Sub-Contractor.

24.8.2 The Contractor shall indemnify and shall keep indemnified in full the Authority and at the Authority's request any Future Service Provider against all Direct Losses arising from any claim by any Party as a result of the Contractor or Sub-Contractor failing to provide or to provide within a reasonable time, the Authority with any Retendering Information or to provide full Retendering Information or as a result of any material inaccuracy in or omission from the Retendering Information.

24.9 **Pensions**

24.9.1 Contractor to become an Admitted Body

Where the Contractor or a Sub-Contractor employees any Eligible Employees and wishes to offer those Eligible Employees membership of the LGPS, the Contractor shall or shall procure that:-

- (a) it and/or each relevant Sub-Contractor shall become an Admitted Body with effect from the Relevant Transfer Date by executing and procuring that each relevant Sub-Contractor executes an Admission Agreement which will have effect from and including the Relevant Transfer Date;
- (b) any Eligible Employee who was an active member of the LGPS immediately prior to the Relevant Transfer Date is informed no later than fourteen days after the Relevant Transfer Date that their membership of the LGPS has not been affected by the Relevant Transfer and will continue until such time as the Eligible Employee opts out of the LGPS, ceases to be an Eligible Employee, or otherwise ceases to be eligible to be a member of the LGPS;

- (c) Eligible Employees who were not active members of the LGPS immediately prior to the Relevant Transfer Date are informed no later than fourteen days after the Relevant Transfer Date that they continue to be entitled to (re)commence active membership of the LGPS; and
 - (d) the costs of each Party necessarily and reasonably incurred in connection with the Admission Agreement and/or any other matters associated with complying with clauses 24.9.1 to 24.9.5 shall be borne by that Party.
- 24.9.2 Without prejudice to the generality of clauses 24.9.1 to 24.9.5, and subject to clauses 24.9.6 to 24.9.10 (Contractor Scheme), the Contractor agrees to indemnify the Authority from and against all Direct Losses suffered or incurred by it or them which arise from any breach by the Contractor or any Sub-Contractor of the terms of the Admission Agreement to the extent that such liability arises before or as a result of the termination or expiry of this Agreement (howsoever caused).
- 24.9.3 If required by the Authority, the Contractor shall procure that it and each relevant Sub-Contractor which employs any Eligible Employee on the Relevant Transfer Date shall obtain the indemnity or bond referred to in the Admission Agreement in the form, for the amount of (if any) and within the time limit referred to in the Admission Agreement.
- 24.9.4 The Contractor undertakes to the Authority that no action shall be taken or omitted to be taken by the Contractor and/or any Sub-Contractor which would materially affect the benefits under the LGPS of any Eligible Employees without the prior written agreement of the Authority such agreement not to be unreasonably withheld or delayed provided that the Contractor and/or such Sub-Contractor will be so entitled without the requirement of consent to give effect to any pre existing contractual obligations to any Eligible Employees.
- 24.9.5 If the Contractor or any Sub-Contractor employs any Eligible Employees from a Relevant Transfer Date and:
- (a) the Authority, the Contractor or any relevant Sub-Contractor are of the opinion that it is not possible to comply with and/or operate the provisions of clauses 24.9.1 to 24.9.5 (Contractor to become an Admitted Body); or
 - (b) for any reason after the Relevant Transfer Date the Contractor or relevant Sub-Contractor ceases to be an Admitted Body other than on the date of termination or expiry of this Agreement or because it ceases to employ any Eligible Employees,
- then the provisions of clauses 24.9.1 to 24.9.5 (Contractor to become an Admitted Body) shall not apply (without prejudice to any rights of the Authority under those clauses) and the provisions of clauses 24.9.6 to 24.9.10 (Contractor Scheme) shall apply in respect of the relevant Eligible Employees.
- 24.9.6 The Authority shall have the right to set off against any payments due to the Contractor under this Agreement an amount equal to any overdue employer or employee contributions and other payments (and interest payable under the terms of the Admission Agreement and/or LGPS Regulations) due from the Contractor or from any relevant Sub-Contractor under the Admission Agreement.

24.9.7 Contractor Scheme

Where this clause 24.9.7 applies pursuant to clause 24.9.5 above, or where the Contractor or Sub-Contractor employs Eligible Employees and wishes to offer these Eligible Employees membership of an occupational pension scheme instead of the LGPS, the Contractor shall, and shall procure that any relevant Sub-Contractor shall, not later than the Relevant Transfer Date or the Cessation Date (as the case may be) nominate to the Authority in writing the occupational pension scheme or schemes which it proposes shall be the "Contractor Scheme" for the purposes of this clause 24.9.7. Such pension scheme or schemes must be:

- (a) established within three (3) months of the Relevant Transfer Date or Cessation Date (as the case may be);
- (b) registered under section 153 of the Finance Act 2004, or any subsequent enactment thereof; and
- (c) from the Relevant Transfer Date or the Cessation Date (as the case may be) and until the expiry or earlier termination of this Agreement, certified by the Government Actuary's Department or an actuary nominated by the Authority in accordance with the relevant guidance produced by the Government Actuary's Department as providing benefits which are broadly comparable to those provided by the LGPS.

24.9.8 The Contractor undertakes to the Authority that it shall and shall procure that any relevant Sub-Contractor shall procure that the Eligible Employees shall by three (3) months before the Relevant Transfer Date or the Cessation Date (as the case may be) be offered membership of the Contractor Scheme with effect from and including the Relevant Transfer Date or Cessation Date (as the case may be).

24.9.9 The Contractor Scheme shall provide benefits in respect of the Eligible Employees' periods of service on and after the Relevant Transfer Date or Cessation Date (as the case may be) which the Government Actuary's Department or the actuary nominated by the Contractor in accordance with the relevant guidance produced by the Government Actuary's Department shall certify to be broadly comparable to the benefits which the Eligible Employees would have been entitled to under the LGPS had they continued in membership of the LGPS.

24.9.10 If the Contractor Scheme is terminated for any reason whatsoever, the Contractor or relevant Sub-Contractor as the case may be shall procure that a replacement pension scheme shall be provided with immediate effect for those Eligible Employees who are still employed wholly or partly in connection with the Services. The replacement arrangement(s) must comply with clauses 24.9.6 to 24.9.10 (Contractor Scheme) as if it were the Contractor Scheme.

24.9.11 Change in Law relating to Pension Protection for Eligible Employees

In the event that, on or before the Relevant Transfer Date there has been a Change in Law since the Commencement Date the substance of which amounts to a change to the extent, type or level of pension protection to be secured for the Eligible Employees, the Authority shall notify the Contractor

and/or any relevant Sub-Contractor of the appropriate extent, type or level of pension protection to be secured for the Eligible Employees and the Contractor shall provide, from the later of the Relevant Transfer Date and the effective date of the Change in Law, such pension protection for the Eligible Employees. Such notification shall serve to vary this clause 24.9.11.

24.9.12 Discretionary Benefits

- (a) Where the Contractor or Sub-Contractor is an Admitted Body, the Contractor shall and/or shall procure that any relevant Sub-Contractor shall award benefits (whether permitted) to the Eligible Employees under the Compensation Regulations and/or the LGPS in circumstances where the Eligible Employees would have received such benefits had they still been employed by the Authority; and
- (b) Where the Contractor and/or a Sub-Contractor is not an Admitted Body, the Contractor shall and/or procure that any Sub-Contractor shall award benefits to the Eligible Employees which are identical to the benefits the Eligible Employees would have received under the Compensation Regulations and/or the LGPS in circumstances where the Eligible Employees would have received such benefits had they still been employed by the Authority;
- (c) Under clause 24.9.12(a) and 24.9.12(b) where such benefits are of a discretionary nature, they should be awarded on the basis of the Authority's written policy in relation to such benefits at the time of the Relevant Transfer Date or the Cessation Date (as the case may be) (which the Authority shall provide upon request). Where the payment of such benefits is not, for whatever reason, possible the Contractor shall and/or shall procure that any relevant Sub-Contractor shall compensate the Eligible Employees in a manner which is broadly comparable or equivalent in cash terms.

24.9.13 Transfer to Another Employer

Save on expiry or termination of this Agreement, if the employment of any Eligible Employee transfers to another employer (by way of a transfer under TUPE) the Contractor shall and shall procure that any relevant Sub-Contractor shall:-

- (a) consult with and inform those Eligible Employees of the pension provisions relating to the transfer; and
- (b) procure that the employer to which the Eligible Employees are transferred (the "New Employer") complies with the provisions of this clause 24.9 provided that references to the "Sub-Contractor" will become references to the New Employer, references to the "Relevant Transfer Date" will become references to the date of the transfer to the New Employer and references to the "Eligible Employees" will become references to the Eligible Employees so transferred to the New Employer.

24.10 **Conduct of Staff**

Subject to clause 20.5, the Contractor shall comply with the Authority's Policies and shall ensure that its employees, servants, agents and Sub-Contractors (in each case, to the extent that they are undertaking the Services) do likewise. The Contractor shall take and/or procure appropriate disciplinary action against any person employed by the Contractor and/or any Sub-Contractor who transgresses any such rules, regulations and requirements (which may include the removal from work in or about the provision of the Services of any such person).

24.11 **Contractor's Employees**

24.11.1 Other than as expressly provided in this Agreement, the Contractor shall be entirely responsible for the employment and conditions of service of the Contractor's employees and shall procure that any Sub-Contractor is likewise responsible for its employees.

24.11.2 The Contractor shall at all times use reasonable endeavours to ensure that employees of the Contractor or any Sub-Contractor who regularly interface with members of the public are appropriately vetted and that any criminal convictions (except to the extent that such convictions are "spent" under the Rehabilitation of Offenders Act 1974) are disclosed to the Authority.

25. **OPERATING MANUAL**

25.1 **Maintenance of Manual**

The Contractor shall throughout the Contract Period maintain and update an operating and maintenance manual setting out the procedures for providing the Services at the Waste Management Facilities ("the Operating Manual").

25.2 **Access to Manual**

The Contractor shall at the request of the Authority provide the Authority with access to the Operating Manual in order to demonstrate that the Contractor has complied with its obligation to maintain and update the Operating Manual under clause 25.1.

25.3 **Copy on Termination**

On termination of this Agreement (howsoever arising including expiry) the Contractor shall within ten (10) Working Days provide a copy of the Operating Manual to the Authority.

25A. **QUALITY ASSURANCE**

25A.1 The Contractor shall or shall procure that all aspects of the Works and the Services are the subject of, and are conducted in accordance with the approved quality assurance systems as set out in clause 25A.2 and 25A.3 below.

25A.2 Not later than:-

25A.2.1 twenty (20) Working Days following the Commencement Date, the Contractor shall submit to the Authority's Representative a proposed quality assurance system for the Works;

25A.2.2 twenty (20) Working Days following the Commencement Date, the Contractor shall submit to the Authority's Representative a proposed quality assurance system for the Services; and

in each case consistent with BSEN ISO 9001 or 9002.

25A.3 The Contractor shall procure that the Building Contractor, the Operating Contractor, Hanson and EcoDeco S.r.l. shall maintain, in relation to the Works and Services respectively, quality management systems which shall be reflected in appropriate quality plans, the standard of which shall be consistent with BSEN ISO 9001 or 9002 (as the case may be) or any equivalent standard which is generally recognised as having replaced them (or either of them).

25A.4 The Contractor shall ensure that it shall carry out its own obligations in relation to monitoring and performance consistent with BSEN ISO 9001 or 9002 and shall, as part of the Service Delivery Plan, set out its proposals for quality assurance in that regard.

25A.5 The Contractor shall appoint (or shall procure the appointment of) as soon as reasonably practicable following the Commencement Date a quality manager, who may be directly involved in the day-to-day performance of the Works and the Services, and who shall in respect of the Works:-

25A.5.1 ensure the effective operation of and implementation of the aforementioned quality assurance system;

25A.5.2 audit the aforementioned quality assurance system at regular intervals and report the findings of such audit to the Contractor and the Authority;

25A.5.3 review the aforementioned quality assurance system at intervals agreed with the Authority to ensure their continued suitability and effectiveness; and

25A.5.4 liaise with the Authority on all matters relating to quality assurance.

25A.6 The Authority may carry out periodic audits of the aforementioned quality assurance systems approximate intervals of three (3) months and may carry out other periodic monitoring, spot checks and auditing of the Contractor's quality systems. The Contractor shall procure that the Authority shall have a like right in respect of any relevant Sub-Contractors. The Contractor shall co-operate and shall procure that any relevant Sub-Contractor co-operates with the Authority including providing it with all information and documentation which it reasonably requires in connection with its right under this clause 25A.

PART 5 - PAYMENT

26. PAYMENT PROVISIONS

26.1 Monthly Reporting Process

26.1.1 At least twenty five (25) Working Days before the first Working Day of the fourth Contract Month, and of each Contract Month thereafter, the Contractor shall provide to the Authority a Monthly Monitoring Report in the form set out in Schedule 36 (Reporting Proformas) setting out the calculation of the Monthly Unitary Charge claimed by the Contractor for the fourth, and each subsequent, Contract Month.

26.1.2 For the first three (3) Contract Months, the Contractor shall prior to the Commencement Date provide to the Authority a Monthly Monitoring Report in the form set out in Schedule 36 (Reporting Proformas) together with a valid VAT invoice setting out the calculation of the Monthly Unitary Charge for each of those Contract Months calculated in accordance with Schedule 5 (Payment Mechanism), taking into particular consideration the provisions (where applicable) of Appendix 10 of Schedule 5 (Payment Mechanism).

26.1.2A *REDACTED – 4 lines*

26.1.3 Where the Contractor is submitting a Monthly Monitoring Report for April in any Contract Year, it shall have the right to adjust the calculation of the Monthly Unitary Charge subsequent to issuing the said Monthly Monitoring Report to reflect any changes to the RPIx, DFI or AEI indices (as the same are defined in Schedule 5 of this Agreement) published for the immediately preceding February, provided that such adjustment is made within ten (10) Working Days of the publication of such indices. Where such changes are published subsequent to an invoice submitted in accordance with clause 26.7.1, the Contractor shall be entitled to an adjustment to the Monthly Unitary Charge for the following Contract Month to reflect any overpayment or underpayment in April as a result of such changes.

26.2 SRF Reconciliation Reporting Process

From 1 April 2018, the Contractor shall, within twenty (20) Working Days after the end of each SRF Gainshare Period, provide to the Authority an SRF Six Monthly Reconciliation Report in the form set out in Schedule 36 (Reporting Proformas) setting out the calculation of the SRF Gainshare calculated in accordance with paragraph 7 of Schedule 5 (Payment Mechanism) in respect of the relevant six (6) month period.

26.3 First Annual Reconciliation Reporting Process

The Contractor shall, within twenty (20) Working Days after the end of each Contract Year, provide to the Authority a First Annual Reconciliation Report in the form set out in Schedule 36 (Reporting Proformas) setting out the calculation of the First Annual Reconciliation calculated in accordance with paragraph 8.2 of Schedule 5 (Payment Mechanism) in respect of the relevant Contract Year.

26.4 **Second Annual Reconciliation Reporting Process**

The Contractor shall, within twenty (20) Working Days after the end of each LATS Trading Year during the Contract Period, provide to the Authority a Second Annual Reconciliation Report for the immediately preceding Contract Year in the form set out in Schedule 36 (Reporting Proformas) setting out the calculation of the Second Annual Reconciliation Payment calculated in accordance with paragraph 9.2 of Schedule 5 (Payment Mechanism) in respect of the immediately preceding Contract Year.

26.5 **Third Annual Reconciliation Reporting Process**

The Contractor shall, within twenty (20) Working Days of each Distribution Date, provide to the Authority a Third Annual Reconciliation Report for the immediately preceding Contract Year in the form set out in Schedule 36 (Reporting Proformas) setting out the calculation of the Third Annual Reconciliation Payment calculated in accordance with paragraph 10.2 of Schedule 5 (Payment Mechanism) in respect of the immediately preceding Contract Year.

26.6 **Invoicing Arrangements**

26.6.1 Save in relation to the Third Annual Reconciliation Report, where any PM Report shows:-

- (a) a net amount owing by the Authority to the Contractor, it shall be accompanied by a draft VAT invoice from the Contractor to the Authority in the amount properly chargeable to VAT, and the Authority shall pay such amount to the Contractor in accordance with clause 26.11; or
- (b) a net amount owing by the Contractor to the Authority, it shall be accompanied by a draft VAT invoice in the amount properly chargeable to VAT and the invoiced amount shall be carried forward to the next Contract Month in reduction of amounts which would otherwise have been owed by the Authority to the Contractor (and the Contractor shall ensure that the next PM Report shall take account of such reduction).

26.6.2 In relation to the Third Annual Reconciliation Report, where the Third Annual Reconciliation Report shows that an amount is payable to the Authority under paragraph 10.6 of Schedule 5 (Payment Mechanism), when the Contractor is entitled to make a transfer to the Distribution Account under the Senior Financing Agreements in respect of a Distribution Date, the Contractor shall be obliged to pay to the Authority the amount (if any) which is payable to the Authority under paragraph 10.6 of Schedule 5 (Payment Mechanism) and shall provide a draft VAT invoice to the Authority in respect of the same as soon as practicable.

26.7 **Authority to Reply by Issuing the Authority Response**

26.7.1 Subject to clause 26.7.2, within ten (10) Working Days of receiving any PM Report the Authority shall provide to the Contractor a response to any PM Report (“the Authority Response”) which shall be presented in the form set out in the relevant Appendix entitled “Authority Response” in each of the Reporting Proformas included in Schedule 36 (Reporting Proformas) and which shall state:-

- (a) whether or not the Authority agrees with the PM Report and if the Authority does agree with the PM Report, the Contractor shall provide a valid VAT invoice in the amount properly chargeable to VAT within five (5) Working Days; or
- (b) if the Authority does not agree with the PM Report, the nature of such disagreement and the amount which in the Authority's opinion is due to the Contractor for such Contract Month together with sufficient evidence to support such opinion.

26.7.2 The Authority shall approve the Monthly Monitoring Reports for the first three (3) Contract Months and the draft invoices accompanying such reports, on or before the Commencement Date.

26.8 Authority may delay payment if no PM Report is delivered

If the Contractor does not deliver a PM Report within the specified period set out in clause 26.1 to 26.5 above, the Authority may delay payment of any invoice relating to such PM Report for the same period as the PM Report is delayed by the Contractor.

26.9 Deemed Consent

If the Authority does not deliver the Authority Response within the specified period set out in clause 26.7, the Authority shall be deemed to have approved the relevant PM Report.

26.10 Dispute

If the Contractor does not agree with all or any of the statements made in the Authority Response pursuant to clause 26.7.1(b), the Contractor has five (5) Working Days to advise the Authority of the basis on which it disagrees with such Response. If the Contractor does not respond within five (5) Working Days, it shall be deemed to have accepted the Authority Response. In the event that the Contractor notifies the Authority appropriately that it does not accept the Authority Response then the Parties have five (5) Working Days to resolve any disputed sums, and agree the sums due following which period either Party shall have the ability to request that the matter be referred to the Fast Track Dispute Resolution Procedure under clause 54.

26.11 Authority to pay Undisputed Amounts

26.11.1 Notwithstanding any such dispute in respect of any PM Report referred to in clause 26.10, the Authority shall pay the undisputed part of any amount shown on any PM Report, provided that the Authority has received a valid VAT invoice in respect thereof, by the later of ten (10) Working Days from receipt of such invoice and the last Working Day of the Contract Month preceding the Contract Month to which the invoice submitted with the PM Report relates.

26.11.2 The provisions of clause 26.11.1 of this Agreement shall apply, mutatis mutandis, to invoices submitted by the Authority to the Contractor.

26.12 Determination of Dispute

26.12.1 If the determination of any dispute conducted pursuant to clause 26.10 shows that:-

- (a) the Authority has withheld any amount which the Contractor was entitled to be paid; or
- (b) the Contractor has claimed any amount which it was not entitled to be paid

the Authority shall pay such amount to the Contractor or the Contractor shall repay such amount to the Authority with interest in each case on that amount at the Prescribed Rate calculated on a daily basis and compounded quarterly from the date on which payment should have been made (in the case of failure to pay by the Authority) or from the date on which over payment was made (in the case of excessive claims by the Contractor) until all relevant monies have been paid in full and whether before or after judgement.

26.12.2 The provisions of clause 26.12.1 shall apply, mutatis mutandis, to invoices submitted by the Authority to the Contractor.

26.13 **Rights of Set-Off**

The Contractor shall not be entitled to retain or set off any amount due by the Authority to it, but the Authority may (subject to clause 41.2) retain or set off any amount owed to it by the Contractor under this Agreement which has fallen due and payable against any amount due to the Contractor under this Agreement.

26.14 **Set-Off and Disputed Amounts**

If the payment or deduction of any amount referred to in clause 26.13 above is disputed then any undisputed element of that amount shall be paid and the disputed element shall be dealt with in accordance with clause 54 (Dispute Resolution Procedure).

26.15 **VAT**

26.15.1 All amounts due under this Agreement are exclusive of VAT.

26.15.2 If any supply made or referred to in this Agreement is or becomes chargeable to VAT then the person receiving the supply ("the Recipient") shall in addition pay the person making the supply ("the Supplier") the amount of that VAT against receipt by the Recipient from the Supplier of a proper VAT invoice in respect of that supply.

26.15.3 Where under this Agreement any amount is calculated by reference to any sum which has or may be incurred by any person, the amount shall include any VAT in respect of that amount only to the extent that such VAT is not recoverable as input tax by that person (or a member of the same VAT group), whether by set-off or repayment.

26.15.4 The Contractor shall provide the Authority with any information reasonably requested by the Authority from time to time in relation to the amount of VAT chargeable in accordance with this Agreement and payable by the Authority to the Contractor.

26.16 **Payment Mechanics**

All payments to be made by either Party to the other Party under this Agreement shall be made by bank transfer (in immediately available funds) to such bank account as such relevant Party may from time to time direct.

26.17 **Taxation Risk Sharing Mechanism**

All payments to be made pursuant to Schedule 34 (Tax Risk Sharing Mechanism) shall be made independently of any payments due and payable under Schedule 5 (Payment Mechanism) but in respect of any payment under Schedule 34, the provisions of clauses 26.12 to 26.16 inclusive shall apply.

26.18 **Final Contract Year**

The provisions of this clause 26 shall, to the extent required to give effect to any payment to be made by the Authority which is calculated by reference to the final Contract Year of the Contract Period, survive termination of this Agreement on the Expiry Date.

27. **INDEXATION AND FINANCIAL ADJUSTMENTS**

27.1 **Indexation**

27.1.1 *REDACTED – 3 lines*

27.1.2 *REDACTED – 8 lines.*

27.1.3 *REDACTED – 7 lines*

27.2 **Updating the Base Case**

Whenever a Relevant Event occurs, the financial consequence shall be determined in accordance with this clause 27 and where a Party pursuant to any provision of this Agreement requires the Base Case to be generated, this shall be carried out by the Contractor, in consultation with the Authority, to reflect the overall impact of the Relevant Event and any prior Relevant Event not already reflected in the Base Case. The Base Case generated shall include:-

27.2.1 operating and Capital Expenditure and revenues of the Contractor (including a change to the cost of financing where required to meet Capital Expenditure and where new funding is required so as to meet that Capital Expenditure);

27.2.2 reasonable economic assumptions prevailing at the time;

- 27.2.3 changes in the Technical Assumptions (as the same are defined in the Loan Agreement) and performance of the Project arising as a result of the Relevant Event;
- 27.2.4 the Contractor's assets and liabilities at the time and forecast assets and liabilities including amounts held in Project accounts and amounts outstanding under the Financing Agreements; and
- 27.2.5 an assumption that the tax law remains unaltered and tax rates would remain at the rates in force at the time subject in either case to any changes announced prior to that date;

PROVIDED THAT the Base Case shall reflect those risks which the Contractor bears under the terms of this Agreement, in relation to (to the extent so borne by the Contractor under this Agreement) changes in VAT rates, taxation rates, RPIx and the impact of Performance Deductions, Additional Mileage Deductions and any deductions made under paragraphs 8 and 9 of Schedule 5 (Payment Mechanism) AND FURTHER PROVIDED THAT this proviso shall not affect the application of the provisions of clause 26.17 (Taxation Risk Sharing Mechanism).

27.3 **Application of the Base Case**

Where, pursuant to this Agreement, either Party is entitled to payment of any sum the assessment of which properly requires reference to the Base Case, with the exception of payment of the Authority's Refinancing Share, the adjustment to the elements of the Monthly Unitary Charge set out in paragraphs 3 to 5 inclusive of Schedule 5 (Payment Mechanism), shall be that required to ensure that the Contractor is left in no better and no worse position than under the version of the Base Case applicable immediately prior to the relevant adjustment and shall be ascertained by determining the adjustment to the basis for calculation of those elements of the Monthly Unitary Charge that are required to maintain the financial position of the Contractor with that in which it would have been under the version of the Base Case applicable immediately prior to the relevant adjustment. The adjustment to the Base Case shall also be reflected in an adjustment to the Annual Unitary Charge, taking into account the operation of Schedule 5 (Payment Mechanism).

27.4 **No Better and No Worse**

Any reference in this Agreement to "no better and no worse" or to leaving the Contractor in a "no better and no worse position" shall be construed by reference to the Contractor's:-

- 27.4.1 rights, duties and liabilities under or arising pursuant to performance of this Agreement, the Leases, the Financing Agreements the Building Contract, the Operating Contract, the Management Services Agreement and SRF Offtake Contract respectively; and
- 27.4.2 ability to perform its obligations hereunder and exercise its rights under this Agreement, the Leases, the Financing Agreements the Building Contract, the Operating Contract, the Management Services Agreement and the SRF Offtake Contract respectively so as to ensure that:-
 - (a) the Contractor can meet the cost of additional subordinated and equity especially where the cost of that has changed from Financial Close;

- (b) the Contractor is left in a position which is no better and no worse by reference to those areas of the Project unaffected by the Relevant Event;
- (c) the updated Base Case meets the Key Ratios (as defined in clause 27.6.2 below) imposed as a condition to the provision of funding to implement the Relevant Event which, for the avoidance of doubt, may be different to those prevailing in the version of the Base Case applicable immediately prior to the Relevant Event;
- (d) the ability of the Contractor to comply with the Output Specification and/or the Service Delivery Plan is not adversely affected or improved as a consequence of the Relevant Event; and
- (e) in taking into consideration any rights, duties, liabilities and obligations in the context of the SRF Offtake Contract, the parties shall (for the avoidance of doubt) take cognisance of the operation (if applicable) of the SRF Gainshare Mechanism described in paragraph 7 of Schedule 5 (Payment Mechanism).

27.5 Replacement of Base Case

Any Base Case produced following adjustments in accordance with this clause 27 (Indexation and Financial Adjustments) shall, when it is approved by the Authority (such approval not to be unreasonably withheld), and the Senior Lenders, become the Base Case for the purposes of this Agreement until its further amendment in accordance with this Agreement.

27.6 Amendments to Logic and/or Formulae

27.6.1 Where it is necessary to amend the logic or formulae incorporated in the Base Case to permit adjustments to be made, this shall be done to the extent necessary and in accordance with generally accepted accounting principles and the approval of the Senior Lenders.

27.6.2 Where any amendment is made to the logic or formulae incorporated in the Base Case, the Base Case shall first be run as at the date immediately prior to amendment to ensure that the Key Ratios (being the minimum debt service cover ratio, the average debt service cover ratio, Base Case Equity IRR, minimum loan life cover ratio and average loan life cover ratio) from the Base Case are maintained at no lower or no higher levels than the Key Ratios immediately post the amendment, and the difference in the blended internal rate of return after and immediately prior to amendment does not differ by more than five (5) basis points (being zero point zero five percent (0.05%) as shown in the resulting figure). PROVIDED THAT if additional funding has been obtained in order to fund the cost of the Relevant Event, and this requires an amendment to the Key Ratios and/or the blended internal rate of return, and such amendments have already been agreed by the Authority through the operation of Schedule 27 (Change Protocol), then the Authority shall not be entitled to rely on the provisions of this clause 27.6 to maintain the Key Ratios and/or blended internal rate of return at the levels specified in the current Base Case.

27.7 Copies of the Revised Base Case

Following any change to the Base Case under the provisions of this clause 27 (Indexation and Financial Adjustments), the Contractor shall promptly deliver a copy of the revised Base Case to the Authority in the same form as is established at the date of the Agreement or in such other form as may be agreed between the Parties.

27A. BENCHMARKING

27A.1 Specific Waste Items

The Contractor shall undertake a benchmarking exercise (the "Benchmarking Exercise") at the Contractor's cost three (3) months before any Benchmarking Review Date in relation to the handling and disposal of Specific Waste Items unless the Authority otherwise directs.

27A.2 Each Benchmarking Exercise will be undertaken to ascertain the relative quality and competitiveness of each element of the handling and disposal of Specific Waste Items. The Benchmarking Exercise will be undertaken in good faith by the Contractor (and with the reasonable co-operation of the Authority) and on the basis of an objective and like for like comparison by comparing the standards and costs of handling and disposal of the Specific Waste Items with the standards and costs of handling and disposal in similar circumstances provided by reputable organisations possessing an appropriate degree of skill, resources, reputation and financial standing relative to the provision of the service.

27A.3 The Contractor will make the results of any Benchmarking Exercise available to the Authority by the date occurring two (2) months before the relevant Benchmarking Review Date with a view to the Authority and the Contractor agreeing the appropriate adjustments to the unit costs for the handling and disposal of the Specific Waste Items. The results shall indicate the extent to which (if at all) the charges ("Market Costs") made by reputable organisations possessing an appropriate degree of skill, resources, reputation and financial standing relative to the provision of the service differ (in percentage terms) from the then current costs of handling and disposal of Specific Waste Items (taking account of the extent to which the prices for Specific Waste Items may have been adjusted as a result of being RPIx Indexed or as a result of previous adjustments made pursuant to this clause 27A).

27A.4 The Parties shall endeavour to agree any change to the prices for Specific Waste Items to reflect the changes in the Market Costs.

27A.5 If no agreement is reached one month prior to the Benchmarking Review Date, either Party shall have the right to refer the determination of the prices to Dispute Resolution.

27A.6 Utilities

In respect of each Utility the relevant Utility Tariff for each Contract Year shall be agreed by the Contractor with a relevant Utility supplier no later than one month prior to the commencement of the relevant Contract Year in accordance with the following provisions of this clause 27A.6.

27A.7 The Contractor shall be responsible, at its own cost, for entering into such agreements as are necessary to purchase the Utilities ("the Purchase Agreements") provided that:-

27A.7.1 the Purchase Agreements shall be of no more than thirty six (36) Contract Months in duration unless the consent of the Authority is obtained in writing for a longer duration; and

27A.7.2 the Contractor in entering into the Purchase Agreements shall endeavour to obtain best value for the Authority.

27A.8 If requested by the Contractor, and to the extent that the Contractor considers that it will represent best value to the Authority, the Authority shall use its reasonable endeavours to assist the entering into of Purchase Agreements by the Contractor through the Authority's purchasing arrangements.

27A.9 Prior to entering into a Purchase Agreement the Contractor shall carry out a benchmark of the price of the relevant Utility:-

27A.9.1 at its own cost;

27A.9.2 in a manner which ensures that the benchmark is completed at least one Month prior to the renewal date of any Purchasing Agreement;

27A.9.3 on an open book basis; and

27A.9.4 with a view to entering into Purchasing Agreements following the benchmark which represent best value to the Authority.

27A.10 Following the benchmark the Contractor shall enter into those Purchasing Agreements which it, in its reasonable opinion, considers represent best value to the Authority. The Authority shall have the right to audit any prices for the Utility obtained by the Contractor as part of the benchmark and the Purchasing Agreements to be entered into by the Contractor following the benchmark.

27A.11 The Parties acknowledge and agree that the Operating Contractor may enter into utilities agreements in relation to any Waste Management Facility in place of the Contractor in accordance with this Clause 27A and that such agreements shall be treated as Purchase Agreements for the purposes of this Clause 27A and for the purposes of Schedule 5 (Payment Mechanism).

27B. MARKET REVIEW AND MARKET TESTING

27B.1 Market Review

27B.1.1 The Parties acknowledge that the contracts in respect of the Landfill Service are entered into as sub-contracts to the Operating Contract. The Contractor shall procure that the Operating Contractor undertakes a market review (the "Market Review Exercise") at the Contractor's cost at least one hundred and twenty (120) Working Days (but not more than one hundred and fifty (150) Working Days) before any Market Testing Review Date in relation to the Landfill Service.

27B.1.2 As part of the Market Review Exercise, the Contractor will, at least one hundred and twenty (120) Working Days before any relevant Market Testing Review Date, provide the Authority with a report setting out a summary of the outcome of its market review and indicating so far as the Operating Contractor is able to ascertain comparative pricing for the Landfill Services from potential sub-contractors, and including a fixed price per tonne or fixed prices per tonne at which potential Sub-Contractors and the Operating Contractor's current Sub-

Contractor is willing to provide Landfill Services for the period from the upcoming Market Testing Review Date to the following Market Testing Review Date (each "a Contractor Offered Price"). For each Contractor Offered Price, the Contractor is to specify the location of the proposed Landfill Sites from which the relevant Services will be provided together with a summary of relevant terms for the provision of Landfill Services, which shall be in compliance with the Delivery Requirements.

27B.1.3 Following receipt by the Authority of the Contractor Offered Price(s) and the related market report, the Contractor and the Authority will consult regarding the terms of the Contractor Offered Price(s) and, if it is accepted by the Authority, the consequential adjustments to the Monthly Unitary Charge on the basis set out in clause 27B.4 (Adjustments to the Unitary Charge).

27B.1.4 If the Authority does not accept any Contractor Offered Price by the date falling ninety (90) Working Days prior to the Market Testing Review Date, the Contractor shall undertake Market Testing in relation to the Landfill Service.

27B.2 Any Market Testing shall be carried out in accordance with the procedure described in clause 27B.3 below.

27B.3 Where this Agreement requires Market Testing, the following procedure shall apply:-

27B.3.1 at least ninety (90) Working Days before each Market Testing Review Date the Parties shall endeavour to agree:-

- (a) the number and identity of prospective tenderers that will be invited to prepare and submit tenders for the Landfill Service provided that any prospective tenderer shall possess an appropriate degree of skill, resources, reputation and financial standing relative to the provision of the Landfill Service (and any dispute as to the selection of a prospective tenderer shall be determined in accordance with clause 54 (Dispute Resolution)); and
- (b) the form and contents of the tender documents (which shall include the Output Specification to the extent that it relates to the Landfill Service) to be delivered to prospective tenderers (the "Tender Documents") and the contract terms applicable to the relevant Market Testing reflecting the Output Specification and the Delivery Requirements (and any dispute as to the terms of the Tender Documents shall be determined in accordance with clause 54 (Dispute Resolution)). For the avoidance of doubt the Tender Documents shall not include the Waste Acceptance Protocol in respect of the Landfill Service as set out in Part 3 of Schedule 32 (Landfill Waste Acceptance Protocol) as no Waste Acceptance Protocol shall apply in respect of the Landfill Service from the First Landfill Market Testing Review Date;

27B.3.2 no later than seventy five (75) Working Days before each Market Testing Review Date, the Contractor shall prepare and deliver to the Authority a draft market testing proposal (the "Market Testing Proposal") describing in detail whether the Landfill Service is divided into separate parts or into particular groupings and the Contractor's proposed tenderers and the Tender Documents for the Landfill Service in question, and the Market Testing Proposal shall incorporate all of the matters agreed by the Parties;

27B.3.3 if the Parties are unable to agree any of the matters set out in the Market Testing Proposal or if the Authority reasonably considers that the Contractor has made a material error or omission in the Market Testing Proposal, the Parties shall refer the matter to dispute resolution in accordance with clause 54 (Dispute Resolution);

27B.3.4 the Contractor shall manage the Market Testing tendering process in accordance with the agreed Market Testing Proposal;

27B.3.5 each Party shall bear all of its own costs, fees and expenses associated with the Market Testing;

27B.3.6 the Party carrying out the Market Testing process shall provide to the other as soon as reasonably practicable a copy of the Tender Documents and each response to the Tender Documents (by way of an accurate summary form if provided by the Authority to the Contractor);

27B.3.7 subject to clause 27B.3.8 below, following the expiry of the tender period for the return of responses to the Tender Documents the Party carrying out the Market Testing shall determine, following consultation with the other Party, which tender to select in respect of the Landfill Service;

27B.3.8 the Party carrying out the Market Testing shall select:-

- (a) in respect of tenders for the provision of the Landfill Service, the most economically advantageous tender received in respect of the provision of the Landfill Service; and
- (b) in respect of tenders for the provision of separate elements of the Landfill Service, the tenders which, taken as a whole, are the most economically advantageous tender received in respect of the provision of the Landfill Service,

provided that nothing in this clause 27B.3.8 shall oblige the Party carrying out the Market Testing to accept the lowest tender and the Party carrying out the Market Testing shall, if applicable, take into account related transportation costs in determining the most economically advantageous tender in relation to the Landfill Service; and

27B.3.9 the Authority shall have the right to object to the selection of a tenderer where the tenderer has committed a Prohibited Act and such tenderer shall not be selected.

27B.4 Adjustments to Monthly Unitary Charge

27B.4.1 The Monthly Unitary Charge shall be adjusted by:-

- (a) replacing the LGFA element of the Monthly Unitary Charge calculation (as described in paragraph 4.5 of Schedule 5) with the Market Testing Tender Price or Contractor Offered Price (as applicable); and
- (b) *REDACTED – 4 lines*

27B.4.2 Any dispute under clauses 27B shall be determined in accordance with clause 54 (Dispute Resolution).

27B.5 Basis for Calculation of Contractor Offered Price, Market Testing Base Price and Market Testing Tender Price

27B.5.1 For the avoidance of doubt, the Contractor Offered Price and the Market Testing Tender Price shall be calculated on the basis of a price per tonne for the Landfill Service (including gate fee and transportation costs).

27B.5.2 Any Contractor Offered Price or Market Testing Tender Price shall include, as an additional charge, rates for direct delivery by the Authority or an Authority Related Party to any Landfill Site outside of the Opening Hours for that Landfill Site (for the purposes of paragraph 5.5 and Appendix 3 of Schedule 5 (Payment Mechanism)).

28. BEST VALUE

28.1 Authority's Best Value Duty

28.1.1 The Contractor acknowledges that:-

- (a) the Authority is subject to the Best Value Duty; and
- (b) the provisions of this clause 28 are intended to assist the Authority in discharging its Best Value Duty in relation to the Services.

28.1.2 The Contractor shall, throughout the Contract Period, but only to the extent of its obligations in this Agreement, make arrangements to secure continuous improvement in the way in which the Service is provided, having regard to a combination of economy, efficiency and effectiveness.

28.1.3 The Contractor shall undertake or refrain from undertaking such actions as the Authority shall reasonably request to enable the Authority to comply with Part 1 of the 1999 Act, including:-

- (a) supporting and assisting the Authority in preparing Best Value Performance Plans and conducting Best Value Reviews in relation to the Services;
- (b) complying with requests for information, data or other assistance made by the Authority in pursuance of its Best Value Duty including to:-
 - (i) enable the Authority to prepare a Best Value Performance Plan;
 - (ii) enable the Authority to conduct a Best Value Review;
 - (iii) facilitate the audit of the Authority's Best Value Performance Plan by the Authority's auditor pursuant to section 7 of the 1999 Act;
 - (iv) facilitate the Authority preparing any statement, in response to an Authority's auditor's report, pursuant to section 9 of the 1999 Act;
 - (v) facilitate any inspection undertaken by any Relevant Authority in connection with the Best Value Duty in respect of the Service, including any inspection undertaken with a view to verifying the

- Authority's compliance with its Best Value Duty pursuant to sections 10 and 11 of the 1999 Act;
- (vi) assist the Authority in relation to any action taken by the Secretary of State under section 15 of the 1999 Act; and
 - (vii) enable the Authority to comply with the Publication of Information Direction 2000 (England and Wales);
- (c) complying with all requests by the Authority to procure the attendance of specific officers or employees of the Contractor or any Sub-Contractor (or any of their Sub-Contractors) at any meetings of the Authority at which the Services are to be discussed (but not, otherwise than in exceptional circumstances, more than four times in any one Year);
- (d) permitting any Best Value Inspector, in connection with the exercise of his statutory powers and duties, at all reasonable times and upon reasonable notice, access to:-
- (i) the Waste Management Facilities; and
 - (ii) any document or data relating to the Service;
 - (iii) any Sub-Contractor, agent or employee of the Contractor.

28.2 **Annual Service Report**

- 28.2.1 Without prejudice to any other provision in this Agreement the Contractor shall no later than twenty (20) Working Days from 1 April in any one Contract Year, in each Year of the Contract Period, at its own cost, provide to the Authority a written report (the "Annual Service Report") in a form intimated by the Authority (from time to time) and agreed by the Contractor both Parties acting reasonably.
- 28.2.2 The Contractor shall upon a written request from the Authority promptly provide such written evidence or other supporting information as the Authority may reasonably require to verify and audit the information and other material contained in the Annual Service Report.
- 28.2.3 If, in the Authority's reasonable opinion, the provision, performance or delivery of the Service (or any part) may be more effective, efficient and economic having regard to the Annual Service Report, and the Best Value Duty, then the Authority may serve a written notice upon the Contractor (a "Best Value Service Change Notice") stating the nature and timing of the changes to the provision, performance or delivery of the Service (or the relevant part) which the Authority desires.
- 28.2.4 The Contractor shall, within twenty (20) Working Days of the date of receipt of a Best Value Service Change Notice, provide the Authority at its own cost with a written statement (the "Annual Service Plan") containing the Service Delivery Plan to achieve the change to the Service (or the relevant part) in accordance with the Best Value Service Change Notice.
- 28.2.5 As soon as practicable after the Authority receives the Annual Service Plan the Parties shall discuss and agree the issues set out in the Annual Service Plan. In such discussions the Authority may modify the Best Value Service Change

Notice, in which case the Contractor shall, as soon as practicable, and in any event not more than fifteen (15) Working Days after the receipt of such modification, notify the Authority of any consequential changes to the Annual Service Plan.

- 28.2.6 If the Parties cannot agree on the contents of the Annual Service Plan then the dispute will be determined in accordance with the Disputes Resolution Procedure.
- 28.2.7 As soon as practicable after the content of the Annual Service Plan has been agreed or otherwise determined pursuant to the Disputes Resolution Procedure the Authority shall:-
- (a) confirm in writing the Annual Service Plan; or
 - (b) withdraw the Best Value Service Change Notice.
- 28.2.8 If the Authority does not confirm the Annual Service Plan within twenty (20) Working Days of the Annual Service Plan having been agreed or otherwise determined pursuant to the Dispute Resolution Procedure then the Annual Service Plan shall be deemed to have been withdrawn.
- 28.2.9 If the Authority confirms the Annual Service Plan the Authority shall propose a change in the Service in accordance with Schedule 27 (Change Protocol).
- 28.2.10 To the extent that the implementation of the proposals in the Annual Service Plan will result in a decrease in the costs of the provision of the Service of the Contractor, the Annual Unitary Charge shall be adjusted in accordance with clause 27 to reflect a sharing in the decrease in costs 50:50 as to the Authority and the Contractor respectively.
- 28.2.11 To the extent that the implementation of the proposals in the Annual Service Plan will result in an increase in the costs of the Contractor, the Annual Unitary Charge shall be adjusted to reflect the whole of such increase in accordance with clause 27.
- 28.2.12 The Contractor shall take all reasonable steps to mitigate any costs arising as a consequence of a Best Value Service Change Notice and an Authority Change Notice served pursuant to clause 28.2.9.

28.3 **Best Value Reviews**

- 28.3.1 On or before each Best Value Review Date the Authority may instigate a Best Value Review in relation to the Service and thereafter the following provisions of this clause 28.3 shall apply.
- 28.3.2 The Parties agree that any such Best Value Review shall be carried out in accordance with the applicable Legislation.
- 28.3.3 The Authority shall carry out the Best Value Review at its own cost.
- 28.3.4 In carrying out the Best Value Review, the Authority may take into account the results of any Annual Service Reports and shall consult with the Contractor on any proposals to change the Service to enable the Authority to comply with its Best Value Duty.

- 28.3.5 If in the Authority's reasonable opinion the results of the Best Value Review disclose that the provision, performance or delivery of the Service (or any part) may be more efficient, effective or economic having regard to the Best Value Duty then the Authority may serve a Best Value Service Change Notice on the Contractor stating the nature and timing of the changes to the provision, performance or delivery of the Service (or the relevant part) which the Authority desires.
- 28.3.6 The Contractor shall, within fifteen (15) Working Days of the date of receipt of a Best Value Service Change Notice, at its own cost provide the Authority with a written statement (the "Best Value Review Plan") containing the Service Delivery Plan to achieve the change to the Service (or the relevant part) in accordance with the Best Value Service Change Notice.
- 28.3.7 As soon as practicable after the Authority receives the Best Value Review Plan the Parties shall discuss and agree the issues set out in the Best Value Review Plan. In such discussions the Authority may modify the Best Value Service Change Notice, in which case the Contractor shall, as soon as practicable, and in any event not more than fifteen (15) Working Days after the receipt of such modification, notify the Authority of any consequential changes to the Best Value Review Plan.
- 28.3.8 If the Parties cannot agree on the contents of the Best Value Review Plan then the dispute will be determined in accordance with the Disputes Resolution Procedure.
- 28.3.9 As soon as practicable after the content of the Best Value Review Plan has been agreed or otherwise determined pursuant to the Disputes Resolution Procedure the Authority shall:-
- (a) confirm in writing the Best Value Review Plan; or
 - (b) withdraw the Best Value Service Change Notice.
- 28.3.10 If the Authority does not confirm the Best Value Review Plan within ten (10) Working Days of the Best Value Review Plan having been agreed or determined in accordance with the Disputes Resolution Procedure then the Best Value Service Change Notice shall be deemed to have been withdrawn.
- 28.3.11 If the Authority confirms the Best Value Review Plan the Authority shall propose a change in the Service in accordance with clause 46 (Change Protocol).
- 28.3.12 To the extent that the implementation of the proposals contained in the Best Value Review Plan will result in a decrease in the costs of the Contractor, the Annual Unitary Charge shall thereafter be adjusted downwards in accordance with clause 27, to reflect a sharing in the decrease in costs 50:50 as to the Authority and Contractor respectively.
- 28.3.13 To the extent that if the implementation of the proposals contained in the Best Value Review Plan will result in an increase in the costs of the Contractor, the Annual Unitary Charge shall thereafter be adjusted upwards in accordance with clause 27.

28.3.14 The Contractor shall take all reasonable steps to mitigate any costs arising as a consequence of a Best Value Service Change Notice and an Authority Change Notice served pursuant to clause 28.3.12.

PART 6 - TERMINATION

29. TERMINATION OF THIS AGREEMENT

The provisions set out in this Part 6 are subject to the Direct Agreement.

29.1 Voluntary Termination by the Authority

29.1.1 The Authority may terminate this Agreement at any time on or before the Expiry Date by complying with its obligations under clauses 29.1.2 (Voluntary Termination by the Authority).

29.1.2 If the Authority wishes to terminate this Agreement under this clause 29.1.2 (Voluntary Termination by the Authority), it must give a Termination Notice to the Contractor stating:-

- (a) that the Authority is terminating this Agreement under this clause 29.1 (Voluntary Termination by the Authority);
- (b) that this Agreement will terminate on the date falling twenty (20) Working Days after the date of receipt of the notice; and
- (c) whether the Authority has chosen to exercise its option under clause 39 (Assets).

29.1.3 This Agreement will terminate on the date falling twenty (20) Working Days after the date of receipt of the Termination Notice referred to in clause 29.1.2 (Voluntary Termination by the Authority) above.

29.2 Termination on Authority Default

29.2.1 If an Authority Default has occurred and the Contractor wishes to terminate this Agreement, the Contractor must serve a termination notice (the "Contractor Termination Notice") on the Authority within thirty (30) Working Days of becoming aware of the Authority Default.

29.2.2 The Contractor Termination Notice must specify the type of Authority Default which has occurred entitling the Contractor to terminate.

29.2.3 This Agreement will terminate on the day falling thirty (30) Working Days after the date the Authority receives the Contractor Termination Notice, unless the Authority rectifies the Authority Default within thirty (30) Working Days of receipt of the Contractor Termination Notice.

29.3 Termination on Contractor Default

Subject to clause 29.4 (Rectification), the Authority shall be entitled to terminate this Agreement by notice in writing to the Contractor if a Contractor Default has occurred.

29.4 Rectification

29.4.1 If a Contractor Default has occurred and the Authority wishes to terminate this Agreement, it must serve a Termination Notice on the Contractor.

29.4.2 The Termination Notice must specify:-

- (a) the type and nature of the Contractor Default that has occurred, giving reasonable details; and
- (b) that in the case of any Contractor Default falling within limbs (a), (g), (h) and (n) this Agreement will terminate on the day falling forty (40) Working Days after the date the Contractor receives the Termination Notice, unless:-
 - (i) in the case of a breach under limb (a) of the definition of Contractor Default the Contractor puts forward an acceptable rectification programme within twenty (20) Working Days after the date the Contractor receives the Termination Notice (and implements such programme in accordance with its terms and rectifies the Contractor Default in accordance with the programme); or
 - (ii) in the case of any Contractor Default (a), (g), (h) and (n) of the definition of Contractor Default, the Contractor rectifies the Contractor Default within forty (40) Working Days after the date the Contractor receives the Termination Notice; or
- (c) in the case of any Contractor Default falling within the remaining limbs of the definition of Contractor Default this Agreement will, subject to the terms of the Direct Agreement, terminate on the date falling forty (40) Working Days after the Contractor receives the Termination Notice.

29.4.3 If the Contractor either rectifies the Contractor Default within the time period specified in the Termination Notice, or implements the rectification programme, if applicable, in accordance with its terms, the Termination Notice will be deemed to be revoked and this Agreement will continue.

29.4.4 If the Contractor fails to rectify the Contractor Default within the time period specified in the Termination Notice (or in accordance with any accepted rectification programme), this Agreement will, subject to the terms of the Direct Agreement, terminate on the date falling forty (40) Working Days after the date of receipt of the Termination Notice.

29.4.5 If the Contractor fails to implement any rectification programme in accordance with its terms, this Agreement will, subject to the terms of the Direct Agreement, terminate on the date falling forty (40) Working Days after the date of notification by the Authority to the Contractor.

29.5 **Termination for Persistent Breach**

If a particular breach (other than any breach relating to the carrying out of the Works or any breach of the terms of the Output Specification or the provisions contained in Part 3 of this Agreement or for which Deductions could have been made or which relate to any failure to meet Key Targets) has continued for more than 20 days or has occurred in three or more Months in any six (6) Month period then the Authority may serve a notice on the Contractor:-

29.5.1 specifying that it is a formal warning notice;

29.5.2 giving reasonable details of the breach; and

29.5.3 stating that the breach is a breach which, if it recurs frequently or continues, may result in a termination of this Agreement.

29.6 **Final Notice**

If, following service of a warning notice the breach specified has continued for more than thirty (30) days or recurred in three (3) or more Months in both cases within the six (6) Month period after the date of service, then the Authority may serve another notice (a "Final Warning Notice") on the Contractor:-

29.6.1 specifying that it is a Final Warning Notice;

29.6.2 stating that the breach specified has been the subject of a warning notice served within the six (6) Month period prior to the date of service of the Final Warning Notice; and

29.6.3 stating that if the breach continues for sixty (60) days or recurs in any three Months within the six Month period after the date of service of the Final Warning Notice, this Agreement may be terminated.

29.7 **Currency of Warning Notices**

A warning notice may not be served in respect of any breach in respect of which a separate warning notice has already been served until a period of twelve (12) Months has elapsed since the date of service of the previous warning notice or Final Warning Notice.

29.8 **Termination by the Authority for Breach of the Refinancing Provisions**

29.8.1 Termination

- (a) If the Contractor wilfully breaches clause 48.1 then the Authority may terminate the Agreement at any time on or before its Expiry Date by complying with its obligations under paragraphs (b) to (d) below.
- (b) If the Authority wishes to terminate the Agreement under this clause, it must give notice to the Contractor stating:-
 - (i) that the Authority is terminating the Agreement under this clause 29.8 (Termination by the Authority for breach of the Refinancing provisions);
 - (ii) that the Agreement will terminate on the date falling thirty (30) Working Days after the date of receipt of the notice;
 - (iii) whether the Authority has chosen to exercise its option under paragraph (c) below.
- (c) On termination, the Authority shall have the option to require the Contractor to transfer to the Authority all of its rights, title and interest in and to the Assets.
- (d) The Agreement will terminate on the date falling thirty (30) Working Days after the date of receipt of the notice referred to in paragraph (b) above.

30. **TERMINATION FOR FORCE MAJEURE**

30.1 **Relief from Obligations**

No Party shall be entitled to bring a claim for a breach of obligations under this Agreement by the other Party or incur any liability to the other Party for any losses or damages incurred by that other Party to the extent that a Force Majeure Event occurs and it is prevented from carrying out obligations by that Force Majeure Event. For the avoidance of doubt, the Authority shall not be entitled to terminate this Agreement for a Contractor Default if such Contractor Default arises from a Force Majeure Event (but without prejudice to clauses 30.7 and 30.8).

30.2 **Ability to Make Deductions**

Nothing in clause 30.1 (Relief from Obligations) shall affect any entitlement to make Deductions in the period during which the Force Majeure Event is subsisting.

30.3 **Notify**

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.

30.4 **Consultation**

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 Agreement.

30.5 **Unable to Agree**

If no such terms are agreed on or before the date falling one hundred and eighty (180) Working Days after the date of the commencement of the Force Majeure Event and such Force Majeure Event is continuing or its consequence remains such that the Affected Party is unable to comply with its obligations under this Agreement for a period of more than one hundred and eighty (180) Working Days, then, subject to clause 30.9, either Party may terminate this Agreement by giving twenty (20) Working Days' written notice to the other Party.

30.6 **No Waste Management Facilities or Transfer Stations Affected**

Where a Force Majeure Event prevents the Contractor from providing the Services at one or more of the Waste Management Facilities and/or Transfer Stations, the Authority may after one hundred and fifty (150) Working Days after the date of the commencement of the Force Majeure Event propose a change to the Output Specification and/or the Service Delivery Plan under which the affected Waste Management Facilities and/or Interface Sites cease to be subject to this Agreement.

30.7 **Consequences of Termination**

If this Agreement is terminated under clause 30.5 (Unable to Agree) or 30.8 (Notice to Continue):-

30.7.1 compensation shall be payable by the Authority in accordance with clause 38 (Compensation on Termination for Force Majeure); and

30.7.2 the Contractor shall if required by the Authority transfer its title, interest and rights in and to any Assets to the Authority.

30.8 **Notice to Continue**

If the Contractor gives notice to the Authority under clause 30.5 that it wishes to terminate this Agreement, then the Authority has the option either to accept such notice or to respond in writing on or before the date falling ten (10) Working Days after the date of its receipt stating that it requires this Agreement to continue. If the Authority gives the Contractor such notice, then:-

30.8.1 the Authority shall pay to the Contractor the Annual Unitary Charge from the day after the date this Agreement would have terminated under clause 30.5 as if the Service was being fully provided; and

30.8.2 this Agreement will not terminate until expiry of written notice (of at least thirty (30) Working Days) from the Authority to the Contractor that it wishes this Agreement to terminate.

30.9 **Mitigation**

The Parties shall at all times following the occurrence of a Force Majeure Event use all reasonable endeavours to prevent and mitigate the effects of any delay and the Contractor shall at all times during which a Force Majeure Event is subsisting take all steps in accordance with Good Industry Practice to overcome or minimise the consequences of the Force Majeure Event.

30.10 **Cessation of Force Majeure Event**

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 Agreement. Following such notification this Agreement shall continue to be performed on the terms existing immediately prior to the occurrence of the Force Majeure Event provided that there shall be no obligation on the Contractor to reinstate all or any of the Facilities or the Assets damaged by the Force Majeure Event.

31. **CONSEQUENCES OF TERMINATION**

31.1 **Compensation Provisions**

If this Agreement is terminated pursuant to:-

31.1.1 clause 29.3 (Termination on Contractor Default), the provisions of clause 37 (Compensation on Termination for Contractor Default) shall apply;

31.1.2 clause 29.1 (Voluntary Termination by the Authority), the provisions of clause 35 (Compensation on Termination for Authority Default) shall apply;

31.1.3 clause 29.2 (Termination on Authority Default/Voluntary Termination), the provisions of clause 35 (Compensation on Termination for Authority Default)/Voluntary Termination shall apply;

31.1.4 clause 29.8 (Termination for Breach of the Refinancing Provisions), the provisions of clause 36 (Compensation on Corrupt Gifts, Fraud and Refinancing Breaches) shall apply.

31.2 **Accrued Rights**

31.2.1 Notwithstanding clause 41.3 (Exclusivity of Remedy) the termination of this Agreement howsoever arising is without prejudice to the rights, duties and liabilities of either Party accrued prior to termination.

31.2.2 The clauses of this Agreement which expressly or impliedly have effect after termination will continue to be enforceable notwithstanding termination.

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

32.1 **Final Survey**

No later than the date twenty four (24) months prior to the Expiry Date, the Authority shall be entitled to carry out or procure the carrying out of a final survey of the Waste Management Facilities to assess whether they have been and are being maintained by the Contractor in accordance with its obligations under clause 21.1 (Maintenance).

32.2 **Notification of Survey**

The Authority shall notify the Contractor in writing a minimum of twenty (20) Working Days in advance of the date it wishes to carry out or procure the carrying out of the final survey. The Authority shall consider in good faith any reasonable request by the Contractor for the final survey to be carried out on a different date if such request is made at least ten (10) Working Days prior to the notified date and the Contractor (acting reasonably) is able to demonstrate that carrying out the final survey on the notified date would materially prejudice the Contractor's ability to provide the Services.

32.3 **Minimisation of Disruption**

Where the Authority carries out or procures the carrying out of the final survey, the Authority shall use best endeavours to minimise any disruption caused to the provision of the Services by the Contractor. The Contractor shall afford the Authority or any person carrying out the survey (free of charge) any reasonable assistance required by the Authority during the carrying out of the final survey.

32.4 **Results of Survey**

If the final survey shows that the Contractor has not complied with or is not complying with its obligations under clause 21.1.4 (Maintenance) the Authority shall:-

32.4.1 notify the Contractor of the rectification and/or maintenance work which is required to bring the condition of the Waste Management Facilities to the standard they would have been in if the Contractor had complied or was complying with its obligations under clause 21.1.4 (Maintenance) (the "Required Standard");

32.4.2 specify a reasonable period within which the Contractor must carry out such rectification and/or maintenance work; and

32.4.3 recover the cost of the survey from the Contractor by means of a withdrawal from the Retention Fund Account or Deduction from the next payment of the Monthly Unitary Charge.

32.5 **Maintenance Work**

The Contractor shall carry out such rectification and/or maintenance work notified pursuant to clause 32.4.1 (Results of Survey) (the "Outstanding Work") in order to reach the Required Standard within the period specified and any costs it incurs in carrying out the Outstanding Work shall be at its own expense.

32.6 **Retention Fund**

If the Contractor has been notified under clause 32.4.1 (Results of Survey) that rectification and/or maintenance work is required, then twelve (12) months prior to the Expiry Date the Authority shall (to the extent the Outstanding Work have not been carried out by the Contractor in the interim) deduct the costs of that work as quantified by the survey referred to in clause 32.1 (Final Survey) from the next following instalment (or, if the amount of such instalment is insufficient, the next instalments as necessary) of the Monthly Unitary Charge and pay such amount into an interest bearing account (the "Retention Fund Account") until this Agreement has expired or terminated (subject to clause 32.7).

32.7 **Costs**

If and to the extent that the Contractor carries out the Outstanding Work, the Authority, to the extent that then or subsequently there are funds standing to the credit of the Retention Fund Account, shall reimburse the Contractor's costs of so doing by withdrawing amounts from the Retention Fund Account and paying these to the Contractor. If the aggregate of the amounts from time to time paid into the Retention Fund Account are insufficient to cover the Contractor's costs the Contractor shall bear the balance of such costs itself.

32.8 **Failure to Carry Out Work**

If and to the extent that the Contractor fails to carry out the Outstanding Work within the period specified in clause 32.4.2, the Authority shall be entitled to carry out itself, or procure, such rectification and/or maintenance work at the Contractor's expense and shall make withdrawals from the Retention Fund Account or, where there is insufficient funds in the Retention Fund Account, make subject to clause 26.13 (Rights of Set-off) Deductions from any subsequent payment of Monthly Unitary Charge to pay for such rectification and/or maintenance work or recover such amounts from the Contractor as a debt payable on demand.

32.9 **Balance of Fund**

If:-

32.9.1 all the rectification and/or maintenance work identified by the Authority or the person the Authority procures to carry out the final survey has been carried out to the Required Standard;

32.9.2 all such rectification and/or maintenance work has been paid for by the Contractor; and

32.9.3 no termination notice given in accordance with this Agreement is outstanding,

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

33. TRANSITION TO ANOTHER CONTRACTOR

33.1 Duty to Co-operate

During the final twenty four (24) months of the Contract Period (where this expires by effluxion of time) or during the period of any Termination Notice of this Agreement or of any of the Services, and in either case for a period of 6 Months thereafter, the Contractor shall co-operate fully with the transfer of responsibility for the Services (or any of the Services) to any new Contractor of such services the same or similar to the Services ("New Contractor"), and for the purposes of this clause 33 the meaning of the term "co-operate" shall include:-

33.1.1 liaising with the Authority and/or any New Contractor, and providing reasonable assistance and advice concerning the Services and their transfer to the Authority or to such New Contractor, including assistance with the gathering of information for the Authority to procure the retendering of the contract;

33.1.2 allowing any such New Contractor access (at reasonable times and on reasonable notice) to the Waste Management Facilities but not so as to interfere with or impede the provision of the Services; and

33.1.3 (without prejudice to the obligations of the Contractor pursuant to clause 25) and subject to clause 49 (Freedom of Information and Confidentiality) providing to the Authority and/or to any New Contractor all and any information concerning the Waste Management Facilities and the Services which is required for the efficient transfer of responsibility for their performance.

33.2 Transfer of Responsibility

The Contractor shall use all reasonable endeavours so as to facilitate the smooth transfer of responsibility for the Services to a New Contractor or to the Authority, as the case may be, and the Contractor shall take no action at any time during the Contract Period or thereafter which is calculated or intended, directly or indirectly, to prejudice or frustrate or make more difficult such transfer.

PART 7 - COMPENSATION ON TERMINATION

34. NOT USED

35. COMPENSATION ON TERMINATION FOR AUTHORITY DEFAULT/VOLUNTARY TERMINATION

35.1 On termination of this Agreement pursuant to clauses 29.1 (Voluntary Termination by the Authority) or 29.2 (Termination on Authority Default), the Authority shall pay the Contractor the Authority Default Termination Sum in accordance with clauses 41 (Miscellaneous Compensation Provisions) and 42 (Method of Payment) on the Termination Date. Subject to clauses 35.3 to 35.5 below, the Authority Default Termination Sum shall be an amount equal to the aggregate of:-

35.1.1 the Base Senior Debt Termination Amount;

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

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

35.2 On payment of the amount referred to in clause 35.1 above, the Authority shall have the option to require the Contractor to transfer its right, title and interest in and to the Assets to the Authority or as directed by the Authority.

35.3 If the aggregate of the amounts referred to in clause 35.1.1 and clause 35.1.3 is less than the Revised Senior Debt Termination Amount, then the Authority Default Termination Sum shall be increased so that it is equal to the aggregate of the Revised Senior Debt Termination Amount and the amount referred to in clause 35.1.2 provided always that:-

35.3.1 the amount referred to in clause 35.1.2 shall only be paid to the extent that the Contractor has demonstrated to the reasonable satisfaction of the Authority that the amount will not be paid in payment (in whole or in part) of any Distribution; and

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

35.4 If a Distribution is made whilst any Additional Permitted Borrowing is outstanding and the Contractor has wilfully, or through gross negligence, failed to comply with its obligations under clause 11.4 of the Direct Agreement then in addition to the Deduction of the Distribution referred to in paragraph (b) (v) of the definition of Revised Senior Debt Termination Amount, the Authority shall be entitled to set off the value of that Distribution a second time against the Authority Default Termination Sum, provided that the amount of the Authority Default Termination Sum will never be less than the Revised Senior Debt Termination Amount.

35.5 If the Contractor has wilfully or through gross negligence failed to comply with its obligations under clause 11.4.4 of the Direct Agreement and there has been an overstatement of the cash balances by the Contractor as at that date which has caused the Authority to reasonably believe that it would be required to pay a lesser sum at the Termination Date than it actually is required to pay under the terms of this clause 35 (Compensation for Termination on Authority Default), then the Authority Default Termination Sum shall be reduced by the amount of such overstatement (to the extent such overstatement is still applicable at the Termination Date), provided that the amount of the Authority Default Termination Sum will never be less than the Revised Senior Debt Termination Amount.

36. COMPENSATION ON CORRUPT GIFTS, FRAUD AND REFINANCING BREACHES

On termination of this Agreement in accordance with clauses 29.8 (Termination for Breach of Refinancing Provisions) or 69.2 (Termination for Corrupt Gifts and Fraud) the Authority shall pay the Contractor an amount equal to the Revised Senior Debt Termination Amount. Such amount shall be determined and paid in accordance with clauses 41 (Miscellaneous Compensation Provisions) and 42 (Method of Payment).

37. COMPENSATION ON TERMINATION FOR CONTRACTOR DEFAULT

37.1 Retendering Election

37.1.1 Subject to clause 37.1.2 (Retendering Election), the Authority shall be entitled to:-

- (a) retender the provision of the Project in accordance with clause 37.2 (Retendering Procedure); or
- (b) require an expert determination in accordance with clause 37.3 (No Retendering Procedure).

37.1.2 The Authority shall be entitled to elect to retender the provision of the Project in accordance with clause 37.2 (Retendering Procedure) if:-

- (a) the Authority notifies the Contractor on or before the date falling twenty (20) Working Days after the Termination Date; and
- (b) there is a Liquid Market and either:-
 - (i) the Senior Lenders have not exercised their rights to step-in under clause 5 of the Direct Agreement; or
 - (ii) the Contractor or the Senior Lenders have not procured the transfer of the Contractor's rights and liabilities under this Agreement to a Suitable Substitute Contractor and have failed to use all reasonable efforts to do so

but otherwise the Authority shall not be entitled to re-tender the provision of the Services and clause 37.3 shall apply.

37.2 Retendering Procedure

If the Authority elects to retender the provision of the Project under clause 37.1 (Retendering Election), then the following provisions shall apply:-

- 37.2.1 The objective of the retendering procedure shall be to establish and pay to the Contractor the Adjusted Highest Compliant Tender Price, as a result of the Tender Process.
- 37.2.2 The Authority shall (subject to any legal requirements preventing it from doing so) use its reasonable endeavours to complete the Tender Process as soon as practicable.
- 37.2.3 The Authority shall notify the Contractor of the Qualification Criteria and the other requirements and terms of the Tender Process, including the timing of the Tender Process, but shall act reasonably in setting such requirements and terms and, in particular the Authority shall:-
- (a) be obliged to exercise its rights of step-in under the SRF Offtake Contract Direct Agreement in accordance with the terms of the SRF Offtake Contract Direct Agreement if no Acceptance Certificate has been issued in respect of either of the New Facilities;
 - (b) if an Acceptance Certificate has been issued in respect of either of the New Facilities, only be obliged to exercise its rights of step-in under the SRF Offtake Contract Direct Agreement in accordance with the terms of the SRF Offtake Contract Direct Agreement if based on information provided to the Authority in relation to the relevant SRF Offtake Contract(s) it is agreed or determined that the Authority will be able to:-
 - (i) make the annual required tonnage of On-Specification SRF (as defined in the relevant SRF Offtake Contract) available for collection by the relevant SRF Offtaker;
 - (ii) (in complying with any relevant obligations contained in the relevant SRF Offtake Contract(s)) at all times act in accordance with Legislation and Good Industry Practice; and
 - (c) structure the Tender Process so that:-
 - (i) bidders are required to price their bid on a basis that involves both the transfer of the SRF Offtake Contract(s) and no transfer of the SRF Offtake Contract(s); and
 - (ii) to the extent that the Authority has in connection with the termination of this Agreement exercised step-in rights or otherwise accepted a transfer of any other contracts relating to the individual Services (including Landfill, the operation of HWRCs and contracts involving Third Party Revenue or Third Party Income but excluding for the avoidance of doubt the SRF Offtake Contract(s)), structure the Tender Process in a way that allows bidders to price their bid on a basis that involves the transfer of some or all of such relevant contracts to the bidder in addition to bidders being able to price their bid on a basis that involves no transfer of any relevant contract.

For the avoidance of doubt, when determining the Highest Compliant Tender Price, such price shall be the higher of the two prices which each bidder is required to submit in accordance with clause 37.2.3(c).

- 37.2.4 The Contractor authorises the release of any information by the Authority under the Tender Process which would otherwise be prevented under clause 48 (Freedom of Information and Confidentiality) that is reasonably required as part of the Tender Process.
- 37.2.5 The Contractor may, at its own cost, appoint a person (the "Tender Process Monitor") to monitor the Tender Process for the purpose of monitoring and reporting to the Contractor and the Senior Lenders on the Authority's compliance with the Tender Process and making representations to the Authority. The Tender Process Monitor will not disclose any Confidential Information to the Contractor or any other person (and shall provide an undertaking to the Authority to such effect as a condition of its appointment) but shall be entitled to advise the Contractor as to whether it considers that the Authority has acted in accordance with the Tender Process, and correctly determined the Adjusted Highest Compliant Tender Price.
- 37.2.6 Subject to the Tender Process Monitor entering into a confidentiality agreement with the Authority in a form acceptable to the Authority, the Tender Process Monitor shall enter into a confidentiality agreement with the Authority in a form acceptable to the Authority and shall be entitled to attend all meetings relating to the Tender Process, inspect copies of the tender documentation and bids and shall be required to make written representations to the Authority regarding compliance with the Tender Process. All representations shall be made by the Tender Process Monitor in a timely manner as the Tender Process proceeds. The Authority shall not be bound to consider or act upon such representations but acknowledges that such representations may be referred to by the Contractor in the event that the Contractor refers a dispute relating to the Adjusted Highest Compliant Tender Price to dispute resolution in accordance with the Dispute Resolution Procedure.
- 37.2.7 For all or any part of a Month, falling within the period from the Termination Date to the Compensation Date, the Authority shall pay to the Contractor:-
- (a) the Post Termination Service Amount for that Month, on or before the date falling ten (10) Working Days after the end of that Month; and
 - (b) the Post Termination Service Amount for the period ending on the Compensation Date, on or before the date falling twenty (20) Working Days after the Compensation Date.
- 37.2.8 If any Post Termination Service Amount is less than zero, then it shall be carried forward and shall be set off against any future positive Post Termination Service Amounts. If any such Post Termination Service Amount has not been set off on or before the Compensation Date then it shall be taken into account in the calculation of the Adjusted Highest Compliant Tender Price.
- 37.2.9 The Authority shall require bidders to bid on the basis that they will receive the benefit of any outstanding claims under material damage insurance policies and amounts (if any) standing to the credit of the Joint Insurance Account on the date that the New Contract is entered into.
- 37.2.10 As soon as practicable after tenders have been received, the Authority shall (acting reasonably) determine the Compliant Tenders and shall notify the Contractor of the Adjusted Highest Compliant Tender Price.

- 37.2.11 If the Contractor refers a dispute relating to the Adjusted Highest Compliant Tender Price to the Dispute Resolution Procedure the Authority shall be entitled to enter into a New Contract. The Authority shall pay to the Contractor the Adjusted Highest Compliant Tender Price on or before the date falling twenty (20) Working Days after it has been determined under the Dispute Resolution Procedure and the Authority shall pay interest to the Contractor at the Senior Debt Rate on any amount of Adjusted Highest Compliant Tender Price which has been withheld from the date specified in clause 37.2.12 below until the date specified in this clause 37.2.11.
- 37.2.12 Subject to clauses 37.2.11 (Retendering Procedure) and 37.2.15 (Retendering Procedure), the Authority shall pay to the Contractor an amount equal to the Adjusted Highest Compliant Tender Price no later than the date falling twenty (20) Working Days after the date of the New Contract.
- 37.2.13 The discharge by the Authority of its payment obligation in clauses 37.2.11 (Retendering Procedure) and/or 37.2.12 (Retendering Procedure) above shall be in full and final settlement of all the Contractor's claims and rights against the Authority for breaches and/or termination of this Agreement and the Project Documents whether under contract, tort, restitution or otherwise, save for any liability of the Authority which arose prior to the Termination Date that has not already been taken into account in determining the Adjusted Highest Compliant Tender Price.
- 37.2.14 Subject to clauses 37.2.15 (Retendering Procedure) and 37.2.18 (Retendering Procedure), if the Authority has not paid an amount equal to the Adjusted Highest Compliant Tender Price to the Contractor on or before the date falling two Years after the Termination Date then the provisions of this clause 37.2 (Retendering Procedure) shall not apply to that termination and the provisions of clause 37.3 (No Retendering Procedure) shall apply instead.
- 37.2.15 If the Adjusted Highest Compliant Tender Price is zero or a negative number then the Authority shall have no obligation to make any payment to the Contractor and with effect from the time that the Authority gives notice of that event to the Contractor, the Authority shall be released from all liability to the Contractor for breaches and/or termination of this Agreement and any other Project Document whether under contract, tort, restitution or otherwise save for any antecedent liability of the Authority which arose prior to the Termination Date (but not from the termination itself) that has not already been taken into account in determining the Adjusted Highest Compliant Tender Price.
- 37.2.16 If the Adjusted Highest Compliant Tender Price is less than zero then an amount equal to the Adjusted Highest Compliant Tender Price shall be due and payable by the Contractor to the Authority on the date of the New Contract.
- 37.2.17 The Authority may elect at any time prior to the receipt of a Compliant Tender to follow the no retendering procedure under clause 37.3 (No Retendering Procedure) by notifying the Contractor that this election has been made.
- 37.2.18 If the Authority has received all bids from bidders under the Tender Process and has received a Compliant Tender but decides not to complete the Tender Process, it shall notify the Contractor of this decision and pay to the Contractor an amount equal to the Adjusted Highest Compliant Tender Price within twenty (20) Working Days of such notification.

37.2.19 If no Compliant Tenders are received, the No Retendering Procedure under clause 37.3 shall apply.

37.3 **No Retendering Procedure**

If either the Authority is not entitled to retender the provision of the Project under clause 37.1 (Retendering Election), or the Authority elects to require an expert determination in accordance with this clause 37.3 (No Retendering Procedure), then the following procedure shall apply:-

37.3.1 Subject to clause 37.3.2 (No Retendering Procedure) below, the Contractor shall not be entitled to receive any Post Termination Service Amount.

37.3.2 If the Authority elects to require an expert determination in accordance with this clause 37.3 (No Retendering Procedure) after it has elected to follow the procedure under clause 37.2 (Retendering Procedure), then the Authority shall continue to pay to the Contractor each Post Termination Service Amount until the Compensation Date, in accordance with clause 37.2 (Retendering Procedure).

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

- (a) all forecast amounts including all costs which may be incurred in generating third party income shall be calculated in nominal terms at current prices, recognising the adjustment for indexation in respect of forecast inflation between the date of calculation and the forecast payment date(s) as set out in this Agreement;
- (b) the total of all future payments of the full Annual Unitary Charge (without Deductions) forecast to be made and any estimated third party income forecast to be made shall be calculated and discounted to the Termination Date at the Termination Date Discount Rate;
- (c) the total of all costs forecast to be incurred by the Authority as a result of termination shall be calculated and discounted at the Termination Date Discount Rate and deducted from the payment calculated pursuant to clause 37.3.3(b) (No Retendering Procedure), such costs to include (without double counting):-
 - (i) a reasonable risk assessment of any cost overruns that will arise, whether or not forecast in the relevant Base Case;
 - (ii) the costs of the service forecast to be incurred by the Authority in providing the Project to the standard required Provided that in relation to the costs of SRF disposal, such costs shall be calculated on the basis of the lower of:
 - (A) the costs incurred by the Authority on the basis that it had exercised its step-in rights under the SRF Offtake Contract Direct Agreement and was operating the SRF Offtake Contract(s) until the expiry of the same; and

- (B) the costs incurred by the Authority on the basis that it was not operating the SRF Offtake Contract(s) but including any costs and liabilities which fall to the Authority associated with the termination of such SRF Offtake Contract(s);

PROVIDED THAT in each case the Authority shall not include in such amount the costs it would otherwise have incurred pursuant to the operation of the SRF Gainshare Mechanism set out in paragraph 7 of schedule 5 (Payment Mechanism); and

- (d) (without double counting in respect of costs of SRF disposal falling under 37.3.3(c)(ii)) any Rectification Costs required to deliver the Project to the standard required (including any costs forecast to be incurred by the Authority to complete construction or development work and additional operating costs required to restore operating services standards);

in each case such costs to be forecast at a level that will deliver the full Annual Unitary Charge referred to in clause 37.3.3(b) (No Retendering Procedure).

37.3.4 If the Parties cannot agree on the Adjusted Estimated Fair Value of the Contract on or before the date falling twenty (20) Working Days after the date on which the Authority elected to require an expert determination in accordance with this clause 37.3 (No Retendering Procedure), then the Estimated Fair Value of the Contract shall be determined in accordance with the Dispute Resolution Procedure.

37.3.5 The Authority shall pay to the Contractor an amount equal to the Adjusted Estimated Fair Value of the Contract on the date falling sixty (60) Working Days after the date on which the Adjusted Estimated Fair Value of the Contract has been agreed or determined in accordance with this clause 37.3 (No Retendering Procedure).

37.3.6 The discharge by the Authority of its obligation in clause 37.3.5 (No Retendering Procedure) is in full and final settlement of all the Contractor's claims and rights against the Authority for breaches and/or termination of this Agreement or other Project Document whether in contract, tort, restitution or otherwise, save for any liability that arose prior to the Termination Date (but not from the termination itself) that has not been taken into account in determining the Adjusted Estimated Fair Value of the Contract.

37.3.7 To the extent that the Adjusted Estimated Fair Value of the Contract is less than zero, then an amount equal to the Adjusted Estimated Fair Value of the Contract shall be due and payable by the Contractor to the Authority on the Compensation Date.

38. COMPENSATION ON TERMINATION FOR FORCE MAJEURE

38.1 Amount

On termination of this Agreement under clauses 30.5 (Notification for Force Majeure), or clause 53.3.1(b) (Uninsurable Risks) the Authority shall pay to the Contractor the Force Majeure Termination Sum in accordance with clauses 41 (Miscellaneous Compensation Provisions) and 42 (Method of Payment). Subject to clauses 38.1.3 to 38.1.4 below the Force Majeure Termination Sum shall be an amount equal to the aggregate of:-

- 38.1.1 the Base Senior Debt Termination Amount;
 - 38.1.2 the Junior Debt less an amount equal to the aggregate of payments of interest made by the Contractor under the Subordinated Financing Agreements;
 - 38.1.3 all amounts paid to the Contractor by way of subscription for shares in the capital of the Contractor less dividends and other Distributions paid to the shareholders of the Contractor (save to the extent deducted under clause 38.1.2 above); and
 - 38.1.4 redundancy payments for employees of the Contractor that have been or will be reasonably incurred by the Contractor as a direct result of termination of this Agreement and any Sub-Contractor Breakage Costs.
- 38.2 If the amounts referred to in clauses 38.1.2 and/or 38.1.3 are less than zero, then, for the purposes of the calculation in clause 38.1 they shall be deemed to be zero.
- 38.3 If the aggregate of the amounts referred to in clauses 38.1.1, 38.1.2 and 38.1.3 is less than the Revised Senior Debt Termination Amount, then the Force Majeure Termination Sum shall be increased so that it is equal to the aggregate of the Revised Senior Debt Termination Amount and the amount referred to in clause 38.1.4 provided always that:-
- 38.3.1 the amount referred to in clause 38.1.4 shall only be paid to the extent that the Contractor has demonstrated to the reasonable satisfaction of the Authority that the amount will not be paid in repayment (in whole or in part) of any Distribution; and
 - 38.3.2 if, at the time of termination, there are any Additional Permitted Borrowings outstanding, no Sub-Contractor Breakage Costs shall be paid in respect of any Sub-Contract in circumstances where there is an event of default under such Sub-Contract which would entitle the Contractor to terminate such Sub-Contract.
- 38.4 If a Distribution is made whilst any Additional Permitted Borrowing is outstanding and the Contractor has wilfully, or through gross negligence, failed to comply with its obligations under clause 11.4.4.1 of the Direct Agreement then in addition to the Deduction of the Distribution referred to in paragraph (v) of the definition of Revised Senior Debt Termination Amount, the Authority shall be entitled to set off the value of that Distribution a second time against the Force Majeure Termination Sum, provided that the amount of the Force Majeure Termination Sum will never be less than the Revised Senior Debt Termination Amount.
- 38.5 If the Contractor has wilfully or through gross negligence failed to comply with its obligations under clause 11.4.4.2 of the Direct Agreement and there has been an overstatement of the cash balances by the Contractor as at that date which has caused the Authority to reasonably believe that it would be required to pay a lesser sum at the Termination Date than it actually is required to pay under the terms of this clause 38 (Compensation on Termination for Force Majeure), then the Force Majeure Termination Sum shall be reduced by the amount of such overstatement (to the extent such overstatement is still applicable at the Termination Date), provided that the amount of the Force Majeure Termination Sum will never be less than the Revised Senior Debt Termination Amount.

38.6 **Payment**

The Force Majeure Termination Sum payable pursuant to this clause 38 (Compensation on Termination for Force Majeure) shall be determined and paid in accordance with clauses 41 (Miscellaneous Compensation Provisions) and 42 (Method of Payment).

39. **ASSETS**

If termination of this Agreement occurs for whatever reason then the Authority shall have the option to require the Contractor to transfer its rights, title and interest in and to the Assets to the Authority at no cost to the Authority.

40. **CONTRACTOR'S ACCOUNTS AND FINANCING AGREEMENTS**

40.1 **Accounts**

The accounts of the Contractor shall be maintained as foreseen in the Base Case.

40.2 **Changes to the Financial Agreements**

For the purposes of calculating the compensation payable under clauses 38 (Compensation on Termination for Force Majeure), 35 (Compensation on Termination for Authority Default) and 36 (Compensation on Termination for Corrupt Gifts, Fraud and Refinancing Breaches), no amendment, waiver or exercise of a right under any Financing Agreement or Ancillary Documents shall have the effect of increasing the Authority's liabilities on early termination of this Agreement unless:-

40.2.1 the Contractor has obtained the prior written consent of the Authority to such increased liability for the purposes of this clause 40.2; or

40.2.2 it is an Additional Permitted Borrowing.

41. **MISCELLANEOUS COMPENSATION PROVISIONS**

41.1 **Gross Up of termination Payments**

If any amount of compensation payable by the Authority under clauses 38 (Compensation on Termination for Force Majeure), 36 (Compensation on Termination for Corrupt Gifts, Fraud and Refinancing Breaches) and clause 35 (Compensation for Termination on Authority Default) is subject to tax payable to the Contractor such additional amount as will put the Contractor in the same after tax position as it would have been in had the payment not been subject to tax taking account of any relief, allowances Deduction, setting off or credit in respect of tax (whether available by choice or not) which may be available to the Contractor to reduce the tax to which the payment is subject.

41.2 **Set off on Termination**

Except where expressly stated otherwise, the Authority is not entitled to set off any amount against any payment of termination compensation under clauses 38 (Compensation on Termination for Force Majeure), 36 (Compensation on Termination for Corrupt Gifts and Fraud) and 35 (Compensation on Termination for Authority Default/Voluntary Termination), save to the extent that after such an amount has been set off, the termination payment made would be an amount greater than or equal to the

Base Senior Debt Termination Amount or the Revised Senior Debt Termination Amount, as the case may be at that time.

41.3 **Exclusivity of Remedy**

Any payment of compensation shall be in full satisfaction of any claim which can be made against the Authority by the Contractor in relation to termination of this Agreement or any Project Document. The compensation payable under clauses 38 (Compensation on Termination for Force Majeure), 37 (Compensation on Termination for Contractor Default), 35 (Compensation on Termination for Authority Default) and 36 (Compensation on Corrupt Gifts, Fraud and Refinancing Breaches) shall be the sole remedy of the Contractor against the Authority on termination of this Agreement.

42. **METHOD OF PAYMENT**

42.1 **Termination Sum**

The Authority shall pay to the Contractor the Termination Sum together with any interest on any Base Senior Debt Termination Amount or Revised Senior Debt termination Amount element of the Termination Sum at the Senior Debt Rate on or before the date falling forty (40) Working Days after the Notice Date provided that it may elect to pay the Adjusted Estimated Fair Value of the Contract or the Base Senior Debt Termination Amount or the Revised Senior Debt Termination Amount (as relevant) element of the Termination Sum in accordance with clause 42.2 (Instalments) below. Where this Agreement terminates pursuant to clause 29.2 (Termination on Authority Default) the Authority shall pay to the Contractor the Authority Default Termination Sum on the Termination Date. Where this Agreement terminates the circumstances set out in clause 76 (Local Government (Contracts) Act 1997) the Authority shall pay the Contractor the Authority Default Termination Sum in accordance with clause 42.2 (Instalments).

42.2 **Instalments**

The Authority may, other than on an Authority Default, elect to pay the Adjusted Estimated Fair Value of this Agreement or the Base Senior Debt Termination Amount element of the Termination Sum:-

42.2.1 in instalments as follows:-

- (a) in respect of that element of the Base Senior Debt Termination Amount or the Revised Senior Debt Termination Amount or the Adjusted Estimated Fair Value (as relevant) representing the Outstanding Principal (where the Base Senior Debt Termination Amount or the Revised Senior Debt Termination Amount or the Adjusted Estimated Fair Value (as relevant) is greater than or equal to the Outstanding Principal) on the dates (the "Instalment Dates") and in the amounts that the Contractor would have been required to pay principal to the Senior Lenders under the terms of the Senior Financing Agreement had the Termination Date not occurred; and the sum (if any) remaining after deducting the Outstanding Principal from the Base Senior Debt Termination Amount or the Revised Senior Debt Termination Amount or the Adjusted Estimated Fair Value of the Contract (as relevant) shall be paid in equal instalments on the Instalment Dates;
- (b) where the Base Senior Debt Termination Amount or the Revised Senior Debt Termination Amount or the Adjusted Estimated Fair Value of the

Contract (as relevant) is less than the Outstanding Principal, on the Instalment Dates pro rata to the amounts that the Contractor would have been required to pay as principal to the Senior Lender on each Instalment Date under the terms of the Senior Financing Agreement has the Termination Date not occurred; or

42.2.2 as the Parties may otherwise agree.

42.3 **Interest**

Where the Authority elects to pay the Adjusted Estimated Fair Value of this Contract the Base Senior Debt Termination Amount or the Revised Senior Debt Termination Amount (as relevant) element of the Termination Sum in instalments pursuant to clause 42.2 above, from the Notice Date until the date of payment, interest shall accrue on any unpaid element of the Termination Sum at the Senior Debt Rate and be payable on the next occurring Instalment Date.

42.4 **Payment of Outstanding Element**

If the Authority has elected to pay in accordance with clause 42.2 (Instalments) it may (on twenty (20) Working Days' prior to written notice to the Contractor) elect to pay any outstanding element of the Adjusted Estimated Fair Value of the Contract Base or the Senior Debt Termination Amount or the Revised Senior Debt Termination Amount (as relevant) in full on any Instalment Date.

42.5 **Authority Default in Payment**

If the Authority:-

42.5.1 fails to make a payment to the Contractor in accordance with clauses 42.1 (Termination Sum) and/or 42.2 (Instalments) and/or 42.3 (Interest); or

42.5.2 breaches clause 57.1 (Restriction on the Authority),

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

PART 8 - GENERAL

43. LIAISON PROCEDURE

The Parties shall give effect to the procedure set out in Schedule 9 (Liaison Procedure).

44. RELIEF EVENTS

44.1 Occurrence

If and to the extent that a Relief Event:-

44.1.1 is the direct cause of a failure by the Contractor

(a) to commence the Works (or an element thereof) on or before the relevant Start on Site Date; and/or

(b) to meet the Service Availability Requirements on or before a relevant Target Service Availability Date or is the direct cause of a delay in the achievement of the Services Availability Requirements; and/or

44.1.2 adversely affects the ability of the Contractor to perform any of its obligations under this Agreement

then the Contractor shall be entitled to apply for relief from any rights of the Authority arising under clause 29.3 (Termination on Contractor Default).

44.2 Relief

To obtain relief, the Contractor must:-

44.2.1 as soon as practicable, and in any event within twenty (20) Working Days after it becomes aware that the Relief Event has caused or is likely to cause delay and/or adversely affect the ability of the Contractor to perform its other obligations give to the Authority a notice of its claim for relief from its obligations under this Agreement, including full details (as far as it is reasonably able and to the extent then known) of the nature of the Relief Event, the date of occurrence and its likely duration;

44.2.2 within five (5) Working Days of receipt by the Authority of the notice referred to in clause 44.2.1, give full details of the relief claimed; and

44.2.3 demonstrate to the reasonable satisfaction of the Authority that:-

(a) the Contractor and its Sub-Contractors could not have avoided such occurrence or consequences by steps which they might reasonably be expected to have taken, without incurring material expenditure;

(b) the Relief Event was the direct cause of the delay to the relevant Start on Site Date, Target Service Availability Date or following the Target Service Availability Date, delay in achieving Service Availability by the Longstop Date and/or the adverse affect on the ability of the Contractor to perform any of its obligations under this Agreement;

- (c) the time lost and/or relief from the obligations under this Agreement claimed could not reasonably be expected to be mitigated or recovered by the Contractor acting in accordance with Good Industry Practice, without incurring material expenditure; and
- (d) the Contractor is using reasonable endeavours to perform its obligations under this Agreement.

44.3 **Consequences**

In the event that the Contractor has complied with its obligations under clause 44.2, then:-

- 44.3.1 the Start on Site Date, Target Service Availability Date, or following the relevant Target Service Availability Date, the relevant Longstop Date shall be postponed by such time as shall be reasonable for such a Relief Event, taking into account the likely effect of delay; and/or
- 44.3.2 the Authority shall not be entitled to exercise its rights of termination under clause 29.3 (Termination on Contractor Default).

44.4 **Deductions**

Nothing in clause 44.3 (Consequences) shall affect any entitlement to make Deductions during the period in which the Relief Event is subsisting provided that any such Deductions shall be disregarded for the purposes of the Authority's right to terminate this Agreement for Contractor Default.

44.5 **Information**

In the event that information required by clause 44.2.3 is provided after the dates referred to in that clause, then the Contractor shall not be entitled to any relief during the period for which the information is delayed.

44.6 **Notify**

The Contractor shall notify the Authority as soon as reasonably practicable 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.

44.7 **Disputes**

If the Parties cannot agree the extent of the relief required, or the Authority disagrees that a Relief Event has occurred or that the Contractor is entitled to any extension of the Target Practical Completion Date, Target Service Availability Date and/or the Longstop Date and/or any relief under this clause the matter shall be resolved in accordance with the Dispute Resolution Procedure.

45. **CHANGE IN LAW**

45.1 **Qualifying Change in Law**

45.1.1 If a Qualifying Change in Law occurs or is shortly to occur, then either Party may write to the other to express an opinion on its likely effects, giving details of its opinion of:-

- (a) any necessary change in the Services and / or Works;
- (b) whether any changes are required to the terms of this Agreement to deal with the Qualifying Change in Law;
- (c) whether relief from compliance with obligations is required, including the obligation of the Contractor to achieve any Target Service Availability Date and/or meet the Output Specification during the implementation of any relevant Qualifying Change in Law;
- (d) any loss of revenue that will result from the relevant Qualifying Change in Law;
- (e) any Estimated Change in Project Costs that directly result from the Qualifying Change in Law; and
- (f) any Capital Expenditure that is required or no longer required as a result of a Qualifying Change in Law;

in each case giving in full detail of the procedure for implementing the change in the Works or the Services. Responsibility for the costs of implementation (and any resulting variation to the Annual Unitary Charge) shall be dealt with in accordance with clauses 45.2 to 45.7, unless the Authority shall (within twenty (20) Working Days after receipt of any notice under this clause 45.1) serve written notice on the Contractor to the effect that it wishes to be responsible for the costs of implementation itself.

45.2 **Discussion**

As soon as is practicable after receipt of any notice from either Party under clause 45.1, the Parties shall discuss and agree the issues referred to in clause 45.1, and any ways in which the Contractor can mitigate the effect of the Qualifying Change in Law, including:-

- 45.2.1 providing evidence that the Contractor has used reasonable endeavours (including, (where practicable) the use of competitive quotes) to oblige its sub-contractors to minimise any increase in costs and maximise any reduction in costs;
- 45.2.2 demonstrating how any Capital Expenditure to be incurred or avoided is being measured in a cost effective manner, including showing that when such expenditure is incurred or would have been incurred, foreseeable Changes in Law at that time have been taken into account by the Contractor;
- 45.2.3 giving evidence as to how the Qualifying Change in Law has affected prices charged by any similar businesses to the Project, including similar businesses in which the shareholders of the Contractor or their Affiliates carry on business; and

45.2.4 demonstrating that any expenditure that has been avoided, which was anticipated to be incurred to replace or maintain assets that have been affected by the Qualifying Change in Law concerned, has been taken into account in the amount which in its opinion has resulted or is required under clause 45.1.1(e) and/or clause 45.1.1(f) above.

45.3 **Capital Expenditure**

45.3.1 If the Parties agree or it is determined under the Dispute Resolution Procedure that the Contractor is required to incur additional Capital Expenditure due to a Qualifying Change in Law (excluding any amount payable by the Contractor under clause 45.4 below) then the Contractor shall use its reasonable endeavours to obtain funding for such Capital Expenditure on terms reasonably satisfactory to it.

45.3.2 If the Contractor is able to obtain funding as mention in clause 45.3.1 the Annual Unitary Charge shall be increased in accordance with clause 27.2 so as to leave the Contractor in no better and no worse position and the Authority shall have no further liability to bear the cost of the relevant Capital Expenditure.

45.3.3 If the Contractor has used reasonable endeavours to obtain funding for Capital Expenditure referred to in clause 45.3.1, but has been unable to do so within forty (40) Working Days of the date that the agreement or determination in clause 45.3.1 occurred, then the Authority shall pay to the Contractor an amount equal to that Capital Expenditure. The Authority shall make such payment or payments within twenty (20) Working Days after the Contractor produces satisfactory evidence that such Capital Expenditure has been incurred.

45.4 **Contractor's Share**

The Contractor's Share of any Cumulative Capital Expenditure agreed or determined to be required as a result of a General Change in Law shall be solely for the account of the Contractor.

45.5 **Project Costs**

Where a Qualifying Change in Law has occurred and the Parties agree or it is determined under the Dispute Resolution Procedure that the Qualifying Change in Law has directly resulted or will result in a change in costs being incurred by the Contractor the Estimated Change in Project Costs proposed by the Contractor (as subsequently agreed by the Parties or determined pursuant to the Dispute Resolution Procedure) (but only to the extent that it is demonstrated as actually having been incurred by the Contractor shall (to the extent not comprising Capital Expenditure and therefore dealt with in clause 45.3) be paid at the Authority's option either:-

45.5.1 as an adjustment to the Annual Unitary Charge in accordance with clause 27; or

45.5.2 by way of a lump sum.

45.6 **General Change in Law**

Any increases in revenue costs to the Contractor arising from a General Change In Law, whether resulting following a Change or otherwise shall be solely for the account of the Contractor.

45.7 **Payable of Irrecoverable VAT**

The Authority shall pay to the Contractor from time to time as the same is incurred by the Contractor sums equal to any irrecoverable VAT but only to the extent that it arises as a result of a Change in Law. Any such payment shall be made within twenty eight (28) Working Days of the delivery by the Contractor to the Authority of written details of the amount involved accompanied by details as to the grounds for and computation of the amount claimed. For the purposes of this clause 45.7, "irrecoverable VAT" means input VAT incurred by the Contractor on any supply which is made to it which is used or to be used exclusively in performing the Works or the Services or any of the obligations or provisions under the Agreement (together with input VAT incurred as part of its overhead in relation to such activities) to the extent that the Contractor is not entitled to repayment or credit from HM Customs & Excise in respect of such input VAT.

46. **CHANGE PROTOCOL**

The provisions of Schedule 27 (Change Protocol) shall have effect in respect of Changes, except as otherwise expressly provided in this Agreement.

47. **AUTHORITY STEP-IN**

47.1 **Reason for Step-In**

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

47.1.1 because a serious risk exists to the health or safety of persons or property or to the Environment; and/or

47.1.2 then the Authority shall be entitled to take action in accordance with clauses 47.2 (Notify Contractor) and 47.5 (Contractor in Breach) to discharge a statutory duty.

47.2 **Notify Contractor**

If either of the conditions in clause 47.1 applies and the Authority wishes to take action, the Authority shall notify the Contractor in writing ("the Step-In Notice") of the following:-

47.2.1 the action it wishes to take;

47.2.2 the reason for such action;

47.2.3 the date it wishes to commence such action;

47.2.4 the time period which it believes will be necessary for such action; and

47.2.5 to the extent practicable, the effect on the Contractor and its obligation to provide the Services during the period such action is being taken.

47.3 **Action by Authority**

47.3.1 Following service of such notice, the Authority shall take such action as notified under clause 47.2 and any consequential additional action as it reasonably believes is necessary to overcome the circumstances giving rise to the Step-In Notice (together, "the Required Action") and the Contractor shall give all

reasonable assistance to the Authority while it is taking the Required Action. The Authority shall provide the Contractor with notice of completion of the Required Action and shall use reasonable endeavours to provide such advance notice as is reasonably practicable in its anticipated completion. For the avoidance of doubt, the Authority may not take Required Action in relation to any facility which is not a Waste Management Facility other than to prohibit its use.

47.3.2 Where the Required Action has been taken otherwise than as a result of a breach by the Contractor, the Authority shall undertake the Required Action in accordance with Good Industry Practice and shall indemnify the Contractor against all Direct Losses where it fails to do so.

47.4 Contractor Not in Breach

If and to the extent that any Required Action is taken which does not result from a breach by the Contractor of its obligations under this Agreement, then for so long as and to the extent that the Required Action is taken, and this prevents the Contractor from carrying out the Works and/or providing any part of the Services:-

47.4.1 the Contractor shall be relieved from its obligations to carry out the Works and/or provide the Services; and

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

47.5 Contractor in Breach

If the Required Action is taken as a result of a breach of the obligations of the Contractor under this Agreement, then for so long as and to the extent that the Required Action is taken, and this prevents the Contractor from carrying out any part of the Works and/or providing the Services:-

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

47.5.2 in respect of the period in which the Authority is taking the Required Action, the Monthly Unitary Charge due from the Authority to the Contractor shall equal the amount the Contractor would receive if it were satisfying all its obligations and carrying out the Works and/or providing the Services affected by the Required Action in full over that period less an amount equal to all the Authority's costs of operation in taking the Required Action.

47.6 Duty to Mitigate

The Authority shall mitigate and justify any costs incurred by the Authority in connection with the provision of an affected Service directly itself and/or the provision of an affected Service from a third party.

48. REFINANCING

- 48.1 The Contractor shall obtain the Authority's prior written consent to any Qualifying Refinancing and both the Authority and the Contractor shall at all times act in good faith with respect to:-
- 48.1.1 any Refinancing; or
 - 48.1.2 any potential or proposed Refinancing under clause 48.9.
- 48.2 *REDACTED – 7 lines*
- 48.3 The Authority shall not withhold or delay its consent to a Qualifying Refinancing to obtain a greater share of the Refinancing Gain than that specified in clause **Error! Reference source not found.**
- 48.4 The Contractor shall promptly provide the Authority with full details of any proposed Qualifying Refinancing, including a copy of the proposed financial model relating to it (if any) and the basis for the assumptions used in the proposed financial model. The Authority shall (before, during and at any time after any Refinancing) have unrestricted rights of audit over any financial model and documentation (including any aspect of the calculation of the Refinancing Gain) used in connection with that Refinancing whether that Refinancing is a Qualifying Refinancing or not).
- 48.5 The Authority shall have the right to elect to receive its share of any Refinancing Gain as:-
- 48.5.1 a single payment in an amount less than or equal to any Distribution made on or about the date of the Refinancing;
 - 48.5.2 a reduction in the Annual Unitary Charge over the remaining term of the Contract; or
 - 48.5.3 a combination of any of the above.
- 48.6 The Authority and the Contractor will negotiate in good faith to agree the basis and method of calculation of the Refinancing Gain and payment of the Authority's share of the Refinancing Gain (taking into account how the Authority has elected to receive its share of the Refinancing Gain under clause 48.5 above). If the parties fail to agree the basis and method of calculation of the Refinancing Gain or the payment of the Authority's share, the dispute shall be determined in accordance with clause 54 (Dispute Resolution).
- 48.7 The Refinancing Gain shall be calculated after taking into account the reasonable and proper professional costs that each party directly incurs in relation to the Qualifying Refinancing and on the basis that all reasonable and proper professional costs incurred

by the Authority will be paid to the Authority by the Contractor within twenty eight (28) Working Days of any Qualifying Refinancing.

48.8 Without prejudice to the other provisions of this clause 48.8, the Contractor shall:-

48.8.1 notify the Authority of all Notifiable Financings on becoming aware of the same and again when they are entered into and provide full details of the same; and

48.8.2 include a provision in the Financing Agreements whereby it is entitled to be informed of any proposals which the Senior Lenders may have to refinance the Financing Agreements.

48.9 **Authority right to request refinancing**

48.9.1 If the Authority (acting reasonably) considers the funding terms generally available in the market to be more favourable than those reflected in the Senior Financing Agreements, the Authority may, by notice in writing to the Contractor, require the Contractor to request potential funders to provide terms for a potential Refinancing (a "Refinancing Notice").

48.9.2 The Refinancing Notice shall set out in reasonable detail the grounds upon which the Authority believes such funding terms to be available. The Contractor and Authority shall meet to discuss the Refinancing Notice within twenty eight (28) Working Days. Such a meeting will consider the evidence available to both parties about the availability of funding terms for a potential Refinancing. The Authority shall be entitled to withdraw the Refinancing Notice at or before such a meeting, or within ten (10) Working Days following the meeting.

48.9.3 If the Authority serves a Refinancing Notice which is not withdrawn pursuant to clause 48.9.2, then the Contractor shall:

(a) act promptly, diligently and in good faith with respect to the potential Refinancing;

(b) use all reasonable endeavours to obtain the most favourable available terms from existing and/or new lenders for any potential Refinancing (provided that the Contractor shall not be required to propose refinancing in a manner which a prudent board of directors of a company operating the same business in the United Kingdom to that operated by the Contractor, in similar circumstances, would not approve, for the avoidance of doubt also being terms which are likely to generate a positive Refinancing Gain after the deduction of costs in accordance with the provisions of clause 48.7; and

(c) either:-

(i) as soon as reasonably practicable after receipt of the Refinancing Notice, provide to the Authority:-

(A) full details of the proposed Refinancing, including a financial model and the basis for the assumptions used in the financial model and evidence to the reasonable satisfaction of the Authority that these assumptions represent the most favourable available terms for the potential Refinancing on the basis set out in clause 48.9.3(b) above; and

(B) initial drafts of any changes to this Contract including in relation to potential compensation on termination which might be required to give effect to the proposed Refinancing; or

(ii) if the Contractor (acting reasonably) believes that it is not possible to obtain funding terms which are more favourable than those reflected in the Senior Financing Agreements in accordance with the requirements of clause 48.9.3(b), provide evidence to the reasonable satisfaction of the Authority for such belief and evidence to the reasonable satisfaction of the Authority that the Contractor has complied with its obligations in clauses 48.9.3(a) and 48.9.3(b).

48.9.4 Following receipt of the information referred to in clause 48.9.3(c)(i), the Authority shall (in its absolute discretion) either:-

- (a) instruct the Contractor to implement the proposed Refinancing; or
- (b) instruct the Contractor to discontinue the proposed Refinancing

provided that if the Authority reasonably considers that the requirements of clause 48.9.3(c)(i) have not been satisfied, the Authority may require the Contractor to satisfy its obligations under clause 48.9.3(c)(i) whereupon the provisions of clauses 48.9.3 and 48.9.4 shall apply as if the Authority had served a Refinancing Notice.

48.9.5 If the Authority instructs the Contractor to implement the proposed Refinancing:

- (a) the Contractor shall, as soon as reasonably practicable, use all reasonable endeavours to procure that such proposed Refinancing is implemented;
- (b) such proposed Refinancing shall be deemed to be a Qualifying Refinancing; and
- (c) the provisions of clauses 48.1 to 48.8 shall apply.

48.9.6 If:-

- (a) the Authority instructs the Contractor to discontinue the potential Refinancing pursuant to clause 48.9.4(b); or
- (b) the requirements of clause 48.9.3(c)(ii) are satisfied

then, the Authority shall reimburse the Contractor for the reasonable and proper professional costs incurred by the Contractor in relation to the potential Refinancing, such costs to be paid to the Contractor by the Authority within twenty eight (28) days after receipt of a valid invoice in respect of such amount. Such costs shall not include any internal management costs incurred by the Contractor except insofar as:-

- (i) it can be demonstrated to the reasonable satisfaction of the Authority that such costs have been incurred in place of professional costs which would in the normal course of such business have been paid to third parties; and

- (ii) the Authority has, by prior written agreement, approved the use of such internal management resource.

48.9.7 The Authority shall be entitled to issue a Refinancing Notice under clause 48.9.1 at any time but not more than once in any two (2) year period. For the avoidance of doubt, a Refinancing Notice that has been withdrawn under clause 48.9.2 has been issued for the purpose of this clause 48.9.7.

49. **FREEDOM OF INFORMATION AND CONFIDENTIALITY**

49.1 **Duty of Confidentiality**

49.1.1 The Parties agree that the terms of this Agreement and each Project Document shall, subject to clause 49.1.2 below, not be treated as Confidential Information and may be disclosed without restriction.

49.1.2 Clause 49.1.1 above shall not apply to terms of this Agreement or a Project Document designated as Commercially Sensitive Information and listed in Part 1 of Schedule 14 (Commercially Sensitive Information) to this Agreement which shall, subject to clause 49.2 below, be kept confidential for the relevant periods specified in that Part.

49.1.3 The Parties shall keep confidential all Confidential Information received by one Party from the other Party relating to this Agreement and the Project Documents or the Project and shall use all reasonable endeavours to prevent their employees and agents from making any disclosure to any person of any Confidential Information.

49.2 **Permitted Disclosure**

Clauses 49.1.2 and 49.1.3 (Duty of Confidentiality) shall not apply to:-

49.2.1 any disclosure of information that is reasonably required by any person engaged in the performance of their obligations under this Agreement for the performance of those obligations;

49.2.2 any matter which a Party can demonstrate is already or becomes generally available and in the public domain otherwise than as a result of a breach of this clause 48 (Freedom of Information and Confidentiality);

49.2.3 any disclosure to enable a determination to be made under the Dispute Resolution Procedure or in connection with a dispute between the Contractor and any of its subcontractors;

49.2.4 any disclosure which is required pursuant to any statutory, legal (including any order of a court of competent jurisdiction) or Parliamentary obligation placed upon the Party making the disclosure or the rules of any stock exchange or governmental or regulatory authority having the force of law or if not having the force of law, compliance with which is in accordance with the general practice of persons subject to the stock exchange or governmental or regulatory authority concerned;

49.2.5 any disclosure of information which is already lawfully in the possession of the receiving party, prior to its disclosure by the disclosing party;

- 49.2.6 any provision of information to the Parties' own professional advisers or insurance advisers or to the Senior Lenders or the Senior Lenders' professional advisers or insurance advisers or, where it is proposed that a person should or may provide funds (whether directly or indirectly and whether by loan, equity participation or otherwise) to the Contractor and/or HoldCo to enable it to carry out its obligations under this Agreement, or may wish to acquire shares in the Contractor and/or HoldCo in accordance with the provisions of this Agreement to that person or their respective professional advisers but only to the extent reasonably necessary to enable a decision to be taken on the proposal;
- 49.2.7 any disclosure by the Authority of information relating to the design, construction, operation and maintenance of the Project and such other information as may be reasonably required for the purpose of conducting a due diligence exercise, to any proposed New Contractor, its advisers and lenders should the Authority decide to re-tender this Agreement;
- 49.2.8 any application for registration or recording of the Necessary Consents and property registration required; and
- 49.2.9 any disclosure for the purpose of:-
- (a) the examination and certification of the Authority's or the Contractor's accounts; or
 - (b) any examination pursuant to the 1999 Act of the economy, efficiency and effectiveness with which the Authority has used its resources; or
 - (c) complying with a proper request from either Party's insurance advisers, or insurers on placing or renewing any insurance policies; or
 - (d) (without prejudice to the generality of clause 49.2.4 above) compliance with the FoIA and/or the Environmental Information Regulations;

provided that, for the avoidance of doubt, neither clauses (c) or 49.2.4 above shall permit disclosure of Confidential Information otherwise prohibited by clause 49.1.3 above where that information is exempt from disclosure under section 41 of the FoIA.

49.3 **Obligations Preserved**

Where disclosure is permitted under clause 49.2 (other than clauses 49.2.2, 49.2.4, 49.2.5, 49.2.8 and 49.2.9) the Party providing the information shall procure that the recipient of the information shall be subject to the same obligation of confidentiality as that contained in this Agreement.

49.4 **Audit**

For the purposes of:-

- 49.4.1 any the examination and certification of the Authority's accounts;
- 49.4.2 the Local Government Finance Act 1982 (and any other Legislation relating to the inspection, examination and auditing of the Authority's accounts); and

49.4.3 an examination pursuant to the 1999 Act of the economy, efficiency and effectiveness of which the Authority has performed its functions,

the District Auditor and the Audit Commission may examine such documents as he or it may reasonably require which are owned, held or otherwise within the control of the Contractor and any Sub-Contractor and may require the Contractor and any Sub-Contractor to produce such oral or written explanations as he or it considers necessary.

49.5 Exploitation of Information

The Contractor shall not make use of this Agreement or any information issued or provided by or on behalf of the Authority in connection with this Agreement otherwise than for the purposes of this Agreement, except with the written consent of the Authority.

49.6 Disclosure by Audit Commission

The Parties acknowledge that the Audit Commission has the right to publish details of this Agreement (including Commercially Sensitive Information) in its relevant reports to Parliament.

49.7 The provisions of this clause 48 are without prejudice to the application of the Official Secrets Acts 1911 to 1989.

49.8 Freedom of Information

49.8.1 The Contractor acknowledges that the Authority is subject to the requirements of the FoIA and the Environmental Information Regulations and shall facilitate the Authority's compliance with its Information disclosure requirements pursuant to the same in the manner provided for in clauses 49.8.1 to 49.8.4 (inclusive) below.

49.8.2 Where the Authority receives a Request for Information in relation to Information that the Contractor is holding on its behalf the Authority shall transfer to the Contractor such Request for Information that it receives as soon as practicable and in any event within five (5) Working Days of receiving a Request for Information and the Contractor shall:-

- (a) provide the Authority with a copy of all such Information in the form that the Authority requires as soon as practicable and in any event within ten (10) Working Days (or such other period as the Authority acting reasonably may specify) of the Authority's request; and
- (b) provide all necessary assistance as reasonably requested by the Authority in connection with any such Information, to enable the Authority to respond to a Request for Information within the time for compliance set out in section 10 of the FoIA or Regulation 5 of the Environmental Regulations.

49.8.3 Following notification under clause 49.8.1 and up until such time as the Contractor has provided the Authority with all the Information specified in clause 49.8.2(a), the Contractor may make representations to the Authority as to whether or not or on what basis Information requested should be disclosed, and whether further information should reasonably be provided in order to identify and locate the information requested, provided always that the Authority shall be responsible for determining at its absolute discretion:-

- (a) whether the Information is exempt from disclosure under the FoIA and the Environmental Information Regulations;
- (b) whether the Information is to be disclosed in response to a Request for Information, and

in no event shall the Contractor respond directly or allow its sub-contractors to respond directly to a Request for Information unless expressly authorised to do so by the Authority.

- 49.8.4 The Contractor shall ensure that all Information held on behalf of the Authority is retained for disclosure for at least six (6) years from the date it is acquired and shall permit the Authority to inspect such Information as requested from time to time.
- 49.8.5 The Contractor shall transfer to the Authority any Request for Information received by the Contractor as soon as practicable and in any event within two (2) Working Days of receiving it.
- 49.8.6 The Contractor acknowledges that any lists provided by him listing or outlining Confidential Information, are of indicative value only and that the Authority may nevertheless be obliged to disclose Confidential Information in accordance with clause 49.8.4.
- 49.8.7 In the event of a request from the Authority pursuant to clause 49.8.1 above, the Contractor shall as soon as practicable, and in any event within five (5) Working Days of receipt of such request, inform the Authority of the Contractor's estimated costs of complying with the request to the extent these would be recoverable if incurred by the Authority under section 12(1) of the FoIA and the Fees Regulations. Where such costs (either on their own or in conjunction with the Authority's own such costs in respect of such Request for Information) will exceed the appropriate limit referred to in section 12(1) of the FoIA and as set out in the Fees Regulations the Authority shall inform the Contractor in writing whether or not it still requires the Contractor to comply with the request and where it does require the Contractor to comply with the request the ten (10) Working Days period for compliance shall be extended by such number of additional days for compliance as the Authority is entitled to under section 10 of the FoIA. In such case, the Authority shall notify the Contractor of such additional days as soon as practicable after becoming aware of them and shall reimburse the Contractor for such costs as the Contractor incurs in complying with the request to the extent the Authority is itself entitled to reimbursement of such costs in accordance with its own FoIA policy from time to time.
- 49.8.8 The Contractor acknowledges that (notwithstanding the provisions of clause 48) the Authority may, acting in accordance with the Department of Constitutional Affairs' Code of Practice on the Discharge of Functions of Public Authorities under Part I of the Freedom of Information Act 2000 (the "Code"), be obliged under the FoIA, or the Environmental Information Regulations to disclose Information concerning the Contractor or the Project:-
 - (a) In certain circumstances without consulting with the Contractor, or
 - (b) following consultation with the Contractor and having taken their views into account.

Provided always that where clause 49.8.8(a) applies, the Authority shall, in accordance with the recommendations of the Code, draw this to the attention of the Contractor prior to any disclosure.

50. **INDEMNITIES AND RESPONSIBILITY**

50.1 **Contractor's Indemnity**

50.1.1 The Contractor shall, subject to clause 50.3 (Contractor not Responsible), be responsible for, and shall release and indemnify the Authority or any Authority Related Party, on demand from and against all liability for Direct Losses arising from:-

- (a) death or personal injury;
- (b) loss of or damage to property (including property belonging to the Authority or for which it is responsible ("Authority Property")) but excluding the land, buildings, plant, equipment and other assets which are the responsibility of the Contractor to provide under this Agreement and which form part of the Waste Management Facilities; and
- (c) third party actions, claims, and/or demands brought against the Authority or any Authority Related Party (other than any which are the subject of the indemnity in clause 50.1.2), including costs, charges and expenses (including legal expenses on an indemnity basis relating to 50.1.1(a) and 50.1.1(b) above) arising as a result thereof;

which may arise out of or in consequence of, the design, construction, operation or maintenance of the Waste Management Facilities or the performance or non-performance by the Contractor of its obligations under this Agreement or the presence on the Authority's property of the Contractor, a Sub-Contractor, their employees or agents provided that the Contractor shall not be liable under clause 50.1.1(c) to the extent that the relevant third party action, claim and/or demand arises:-

- (i) subject to clause 50.1.3 in respect of contracts entered into by the Authority, its employees, agents and contractors; and
- (ii) without prejudice to clause 50.1.2 in respect of breach of statutory duty.

50.1.2 The Contractor shall, subject to clause 50.1.3 and 50.3, be responsible for and release and indemnify the Authority on demand from and against all liability for Direct Losses and Indirect Losses arising from all third party claims (as described in clause 50.1.1(c)) brought against the Authority or any Authority Related Party for breach of statutory duty (to the extent that the relevant statutory duty existed at the Commencement Date) which may arise out of or in consequence of a breach by the Contractor of its obligations under this Agreement to the extent that there are no other remedies available to the Authority under this Agreement.

50.1.3 Where a third party brings a claim against the Authority for breach of contract but such claim could have been made in tort or for breach of statutory duty, the Contractor shall be liable notwithstanding clause 50.1.1(c)(i) or 50.1.1(c)(ii)

above (as the case may be) to the extent that the Contractor would have been liable thereunder had the claim been brought and succeeded in tort or for breach of statutory duty.

50.2 **Contractor's Environmental Liability**

The Contractor shall, subject to clauses 8.5 (Provisional Sum), 8.6 (Utilities Works Provisional Sum), 50.3 (Contractor not Responsible) and 50.13 (Conduct of Claims), be responsible for and shall release and indemnify any Authority Related Party on demand from and against all Direct Losses to the extent that such liability arises from and relates to:-

- 50.2.1 Environmental Damage caused or knowingly permitted and/or Hazardous Materials brought onto any Waste Management Facilities by the Contractor or any Contractor Related Party; and/or
- 50.2.2 Environmental Damage and/or the presence of Hazardous Materials which exists in, on or under the Southern Resource Park.

provided that:-

- (a) any costs of remediation arising from any Environmental Damage and/or Hazardous Materials referred to in clauses 50.2.1 or 50.2.2 shall be determined by reference to the standard of remediation required in relation to any Waste Management Facilities by a Relevant Authority or, where such remediation is not being carried out pursuant to the direction of a Relevant Authority, so as to enable the relevant Waste Management Facilities to be used for the delivery of the Services at such Waste Management Facilities pursuant to this Contract and to put the Waste Management Facilities into such a condition that they do not give rise to any Losses; and
- (b) for the avoidance of doubt, any of the matters referred to in clause 50.1 (Contractor's Indemnity) which arises from any Environmental Damage and/or Hazardous Materials referred to in this clause 50.2 caused by a Contractor Related Party or for which the Contractor is otherwise responsible under this Contract shall be within the scope of the indemnity in this clause 50.2.

50.3 **Contractor Not Responsible**

The Contractor shall not be responsible or be obliged to indemnify the Authority for:-

- 50.3.1 any of the events within clauses 50.1 (Contractor's Indemnity) or 50.2 (Contractor's Environmental Liability) which arise as a direct result of the Contractor acting on the instruction of the Authority (and for the purposes of this clause 50.3.1, clause 50.8 shall not apply); or
- 50.3.2 any injury, liability, loss, damage, action, claim, demand, charge, costs or expense, to the extent that the said liability, injury, loss, damage, action, claim, demand, charge, costs or expense is caused or contributed to by the negligence or wilful misconduct or default of the Authority or any Authority Related Party or by the breach by the Authority or any Authority Related Party of the Authority's obligations under this Agreement; or

50.3.3 REDACTED – 6 lines

50.3.4 REDACTED – 4 lines

50.4 **Distinct Indemnities**

An indemnity by either Party under any provision of this Agreement shall be without limitation to any indemnity by that Party under any other provision of this Agreement.

50.5 **Authority's Indemnity**

The Authority shall, subject to clause 50.7 (Authority Not Responsible), be responsible for and shall release and indemnify the Contractor and any Contractor Related Party, on demand from and against all liability for Direct Losses arising from:-

50.5.1 death and personal injury;

50.5.2 loss of or damage to property (including property belonging to the Contractor or for which it is responsible);

50.5.3 third party actions, claims, demands, costs, charges and expenses (including legal expenses on an indemnity basis relating to 50.5.1 and 50.5.2 above)

which arise out of or in consequence of a breach by the Authority of its obligations under this Agreement or as a result of the act and/or omission of any Authority Related Party at or about the Waste Management Facilities.

50.6 **Authority's Environmental Liability**

The Authority shall, subject to clause 50.7 (Authority Not Responsible) and subject to clause 50.13 (Conduct of Claims), be responsible for and shall release and indemnify the Contractor and any Contractor Related Party on demand from and against all Direct Losses to the extent that such Direct Losses arise from or relate to:-

50.6.1 the presence of any Hazardous Materials in, on or under the Existing Facilities and the Northern Resource Park prior to the Commencement Date;

50.6.2 Environmental Damage which occurred at the Existing Facilities or at the Northern Resource Park prior to the Commencement Date, or which migrates, releases or escapes to the Existing Facilities or the Northern Resource Park from land owned and/or controlled by the Authority or an Authority Related Party; and/or

50.6.3 Environmental Damage caused or knowingly permitted by, and/or Hazardous Materials brought onto any Waste Management Facility by the Authority or any Authority Related Party after the Commencement Date;

provided that:-

- (a) any costs of remediation arising from any Environmental Damage and/or Hazardous Materials, referred to under clauses 50.6.1, 50.6.2 or 50.6.3 for which the Authority is responsible under the terms of this Contract shall be determined by reference to the standard or remediation required, in relation to any Waste Management Facility, so as to enable the relevant Waste Management Facility to be used for the delivery of the Services at such Waste Management Facility pursuant to this Agreement and to put the Waste Management Facility into such a condition that it does not give rise to any Losses; and/or
- (b) for the avoidance of doubt any of the matters in clause 50.5 which arise from any Environmental Damage and/or Hazardous Materials referred to in clause 50.6 (Authority's Environmental Liability) caused by the Authority or an Authority Related Party or for which the Authority is otherwise responsible under the Agreement shall be within the scope of the indemnity in this clause 50.6.

50.7 **Authority Not Responsible**

The Authority shall not be responsible or be obliged to indemnify the Contractor under clauses 50.5 (Authority's Indemnity) or 50.6 (Authority's Environmental Indemnity) for:-

- 50.7.1 any of the events within clauses 50.5 (Authority's Indemnity) or 50.6 (Authority's Environmental Liability) which arise as a direct result of the Authority acting on the instructions of the Contractor and for the purposes of this clause 50.7.1, clause 50.8 shall not apply;
- 50.7.2 any injury, liability, loss, damage, action, claim, demand, charge, costs or expense, to the extent that the said liability, injury, loss, damage, action, claim, demand, charge, costs or expense is caused or contributed to by the negligence or wilful misconduct or default of the Contractor or any Sub-Contractor or by the breach by the Contractor or any Sub-Contractor of the Contractor's obligations under this Agreement; or
- 50.7.3 Direct Losses which the Contractor recovers under the Required Insurances.

50.8 **Responsibility for Related Parties**

The Contractor shall be responsible as against the Authority for the acts or omissions of the Sub-Contractors as if they were the acts or omissions of the Contractor, and the Authority shall be responsible as against the Contractor for the acts and omissions of the Authority Related Parties as if they were the acts or omissions of the Authority.

50.9 **Death and Personal Injury**

Nothing in clause 50 (Indemnities and Responsibility) shall exclude or limit either Party's liability to the other Party in respect of its own fundamental acts or omissions nor shall any limitation in clause 50 operate to exclude either Party's liability to any person in

respect of death or personal injury caused by its negligence to the person suffering death or personal injury.

50.10 **Notification of Claim**

Where either Party (“the Indemnified Party”) wishes to make a claim under this clause against the other (“the Indemnifying Party”), the Indemnified Party shall give notice of the relevant claim as soon as reasonably practicable setting out full particulars of the claim.

50.11 **Conduct of Claims**

Subject to clause 50.12 (Costs of Claims) the Indemnifying Party may at its own expense and with the assistance and co-operation of the Indemnified Party have the conduct of the claim including its settlement and the Indemnified Party shall not, unless the Indemnifying Party has failed to resolve or otherwise deal with the claim within a reasonable period, admit fault or liability, or take any action to settle or prosecute the claim.

50.12 **Costs of Claims**

The Indemnifying Party shall, if it wishes to have conduct of any claim, give reasonable security to the Indemnified Party for any cost or liability arising out of the conduct of the claim by the Indemnifying Party.

50.13 **General Duty to Mitigate**

Notwithstanding the provisions of this clause 50 (Indemnities and Responsibility) both Parties shall be under a general duty to take all reasonable steps to minimise and mitigate all injury, losses, damage, actions, claims, demands, costs, charges or expenses, which arise out of or in connection with the performance or non-performance of that Party’s obligations under this Agreement in respect of which that Party claims any indemnity under this clause 50.

50.14 **Southern Resource Park**

Prior to the acquisition, lease or occupation of the Southern Resource Park by the Contractor, the Contractor shall carry out at its own expense a baseline environmental survey, which shall be undertaken by Capita Symonds Limited, the scope of which shall be approved in advance in writing by the Authority, and shall procure a collateral warranty from Capita Symonds Limited in respect of such survey in favour of the Authority, and the results of such survey shall be prima facie evidence of the environmental condition of the Southern Resource Park as at the date of such survey.

51. **INSURANCE**

51.1 **Requirement to Maintain**

Subject to clause 53, the Contractor shall:-

51.1.1 during the Works Period take out and maintain or procure the maintenance of the Insurances stipulated in Part 1 and Part 3 of Schedule 12 (Required

Insurances) and any other insurances as may be required by law. These insurances must be effective in each case not later than the date on which the relevant risk commences;

51.1.2 during the Contract Period take out and maintain or procure the maintenances of the insurances stipulated in Part 2 and Part 3 of Schedule 12 (Required Insurances) and any other insurance as may be required by law. These insurances must be effective in each case not later than the date on which the relevant risk commences; and

51.1.3 use its reasonable endeavours to procure that any insurance broker of the Contractor from time to time charged with the responsibility of placing or maintaining the Required Insurances provides a Broker Letter of Undertaking substantially in the form set out in Part 5 of Schedule 12 (Insurance).

51.2 **Obligation on Parties**

No Party to this Agreement shall take any action or fail to take any reasonable action, or (insofar as it is reasonably within its power) permit anything to occur in relation to it, which would entitle any insurer to refuse to pay any claim under any insurance policy in which that Party is an insured, a co-insured or additional insured person.

51.3 **Nature of the Insurances**

With the exception of any insurances required by law the insurances referred to in clause 51.1 above shall:-

51.3.1 subject to clause 51.4 below, name the Contractor as co-insured with any other party maintaining the insurance;

51.3.2 provide for non-vitiation protection in respect of any claim made by the Authority as co-insured in accordance with Endorsement 2 in Part 4 of Schedule 12 (Insurance);

51.3.3 contain a clause waiving the insurers' subrogation rights against the Authority and its employees and agents, in accordance with Endorsement 2 of Part 4 of Schedule 12 (Insurance);

51.3.4 provide for thirty (30) days prior written notice of their cancellation, non-renewal or amendment to be given to the Authority in accordance with Endorsement 1 of Part 4 of Schedule 12 (Insurance);

51.3.5 in respect of the Physical Damage Policies provide for payment of any proceeds received by the Contractor to be applied in accordance with clause 52 (Reinstatement and Change of Requirement after Insured Event);

51.4 Wherever possible and as detailed in Schedule 12 (Insurance), the insurances referred to in clause 51.1 shall name the Authority as a co-insured for its separate interest.

51.5 **Evidence of Policies**

The Contractor shall provide, to the Authority:-

51.5.1 copies on request, of all insurance policies referred to in clause 51.1 together with any other information reasonably requested by the Authority relating to

such insurance policies and the Authority shall be entitled to inspect them during ordinary business hours; and

51.5.2 evidence that the premiums payable under the Required Insurances have been paid and that the insurances are in full force and effect in accordance with the requirements of this clause 51 and Schedule 12 (Insurance).

51.6 Renewal Certificates

Renewal certificates, or such other evidence of renewal as may be acceptable to the Authority in relation to any of the insurances required by clause 51.1 (Requirement to Maintain) shall be obtained as and when necessary and copies (certified in a manner acceptable to the Authority) shall be forwarded to the Authority as soon as possible but in any event on or before the renewal date.

51.7 Breach

If the Contractor is in breach of clause 51.1 (Requirement to Maintain), the Authority may pay any premiums required to keep such insurance in force or itself procure such insurance and may, in either case, recover such amounts from the Contractor on written demand.

51.8 Notification of Claims

The Contractor shall give the Authority notification within thirty (30) days after any claim in excess of fifty thousand pounds (£50,000) (RPIx Indexed) on any of the Required Insurances or which, but for the application of the applicable policy excess, would be made on any of the Required Insurances and (if required by the Authority) give full details of the incident giving rise to the claim.

51.9 Limit of Liability

Neither failure to comply nor full compliance with the insurance provisions of this Agreement shall limit or relieve the Contractor of its other liabilities and obligations under this Agreement.

51.10 Premia

Save where expressly set out in this Agreement, the premia for the insurances referred to in clause 51.1 shall at all times be the responsibility of the Contractor.

51.11 Authority Approval

The Required Insurances shall be effected with insurers approved by the Authority, such approval not to be unreasonably withheld or delayed.

51.12 Professional Indemnity Insurance

Except for clause 51.2 (Obligation on Parties), the previous provisions of this clause 51 (Insurance) shall not apply to professional indemnity insurance ("PI Insurance") and in respect of PI Insurance the Contractor shall procure that its Sub-Contractors on the basis set out below undertake to:-

51.12.1

- (a) (in relation to Hanson only) provide evidence satisfactory to the Authority (as and when reasonably required by the Authority) of the PI Insurance being in full force and effect from the date of this Agreement until the date twelve (12) Years from and including the completion of all the Works (such evidence to include confirmation of territorial limits, indemnity limit (which shall be a minimum of ten million pounds (£10,000,000) for any one (1) occurrence or series of occurrences and in the aggregate in any one (1) Year of insurance with a minimum of one (1) automatic reinstatement of the aggregate indemnity limit in any one (1) Year of insurance), levels of excess, insurers and policy number); and
- (b) (in relation to Sistema EcoDeco only) provide evidence of the PI Insurance being in full force and effect from the date of this Agreement until the date ten (10) Years from and including completion of all of the Works with an indemnity limit of five million euros (€5,000,000) for any one claim and for all claims in the aggregate in any one (1) Year of insurance;

Provided that such insurance is generally available in the market to members of the relevant Sub Contractor's profession at commercially reasonable rates and provided further that payment of any increased or additional premiums required by insurers by reason of the relevant Sub Contractor's own claims record or other acts, omissions, matters or things peculiar to the relevant party will be deemed to be within the reasonable rates.

51.12.2 provide the Authority with copies of all notices under the PI Insurance relative to the Project;

51.12.3 provide the Authority with notice of:-

- (a) any cancellation of the PI Insurance not less than twenty (20) Working Days prior to the relevant cancellation date;
- (b) any material changes to or suspension of cover relevant to the Project not less than twenty (20) Working Days prior to the relevant change or suspension;
- (c) any event of which it becomes aware which may vitiate the PI Insurance;
- (d) any act, omission or event which may adversely affect the terms and scope of the PI Insurance relevant to the Project or invalidate or render it unenforceable;

51.12.4 provide such information to the Authority as the Authority may reasonably require in relation to any claim or circumstance notified to it under the PI Insurance in respect of the Project and any potential breach of the aggregate limit of the policy;

51.12.5 disclose to the relevant insurers:-

- (a) any matters which could reasonably be expected to be material in the context of the Project; and

- (b) any of the other insurances required to be maintained under this clause 51 (Insurance);

51.12.6 include the interests (if any) of the Authority in any claim or circumstances notified under the PI Insurance relative to the Project and provide a copy of such notification to the Authority.

51.13 **Insurance Review Procedure**

51.13.1 This procedure shall be used to determine whether the Authority shall bear any increase or benefit from any decrease in Relevant Insurance costs.

51.13.2 The Contractor's insurance broker shall prepare a report on behalf of both the Contractor and the Authority (the "Joint Insurance Cost Report"). The Joint Insurance Cost Report is to be prepared at the Contractor's expense and should, as a minimum, contain the following information for the relevant Insurance Review Period:-

- (a) a full breakdown of the Actual Relevant Insurance Cost;
- (b) a full breakdown of the Base Relevant Insurance Cost;
- (c) a spreadsheet (the Insurance Summary Sheet) detailing separately:-
 - (i) the sum(s) insured/limit of indemnity (ie rateable factor) for each of the Relevant Insurances;
 - (ii) the premium rate for each of the Relevant Insurances;
 - (iii) the net premium paid (or to be paid) for each of the Relevant Insurances (i.e. excluding both insurance premium tax and brokers fees and commissions);
 - (iv) the deductible(s) for each Relevant Insurance;
 - (v) details of any claims (paid or reserved) (including incident date, type and quantum) in excess of fifty thousand pounds (£50,000) RPIx Indexed) being the amount stated in clause 51.8 (Notification of Claims);
- (d) an assessment and quantification of each Project Insurance Change together with reasons therefor;
- (e) full details of any Portfolio Cost Savings;
- (f) any other reasons that the Contractor believes may have caused a change (by way of increase or decrease) in the Actual Relevant Insurance Cost;
- (g) the opinion of the Contractor's insurance broker as to the reasons why the Actual Relevant Insurance Cost has varied from the Base Relevant Insurance Cost, specifying the impact of each of the factors and quantifying the amount attributable to each factor specified above. To the extent such information is available and having used all reasonable endeavours to obtain such information, the insurance broker's assessment should include:-

- (i) an assessment of the magnitude of, and reasons for insurance rate movement generally prevailing in the Power and Engineering Insurance Market, including full details of the information underpinning the assessment. This should include:-
 - (A) feedback received further to discussions with at least three (3) lead underwriters at each insurance renewal or placement during the relevant Insurance Review Period;
 - (B) premium rate change information broadly corresponding to the same period further to a review of insurance cost data for a representative sample of Relevant Assets in various European Member States for which the Relevant Insurance has been renewed by the Contractor's insurance broker during the six (6) months prior to the relevant Insurance Review Date;
 - (C) all additional available evidence of any changes to circumstances generally prevailing in the Power and Engineering Insurance Market that are deemed to have contributed to any Insurance Cost Differential. This should include details of movements in any other index which both parties agree is relevant to the Power and Engineering Insurance Market which is or becomes available;
- (ii) an assessment of the magnitude of, and reasons for insurance rate movements generally prevailing in the PFI Insurance Market, including all available evidence of changes to circumstances generally prevailing in the PFI Insurance Market that are deemed to have contributed to any Insurance Cost Differential. This should include details of movements in the CBS Private Capital non-marine index, and (if available from other sources) details of changes in insurance cost across the PFI market as a whole; and
- (h) the calculation of the Insurance Cost Differential and any Exceptional Cost or Exceptional Saving arising from this calculation.

51.13.3A The Contractor shall, as soon as is reasonably practicable, notify the Authority if the Contractor's insurance broker is unable to obtain any of the information required under clause 51.13.2(g). The Authority shall be entitled to provide the Contractor's insurance broker with any such information for inclusion in the Joint Insurance Cost Report and the Contractor shall reimburse the Authority's costs that have been reasonably and properly incurred in obtaining and providing such information.

51.13.3 The Contractor shall procure that its insurance broker no later than the date which is twenty five (25) Working Days after the Insurance Review Date, delivers to the Authority at the same time as it delivers to the Contractor at least two copies of the Joint Insurance Cost Report. At the same time the Contractor should send a copy of its Insurance Summary Sheet to HM Treasury private finance unit or its nominee. Following receipt of the Joint Insurance Cost Report the Authority shall notify the Contractor in writing within fifteen (15) Working Days whether or not it accepts the Joint Insurance Cost Report including full details of any disagreement. If the Authority does not provide such notification and/or details of any disagreement to the Contractor within fifteen (15) Working

Days, the Authority shall be deemed to have accepted the Joint Insurance Cost Report. If the Authority disagrees with any item in the Joint Insurance Cost Report, the Parties shall use their respective reasonable endeavours acting in good faith to agree the contents of the Joint Insurance Cost Report. If the Parties fail to agree the contents of the Joint Insurance Cost Report within forty five (45) Working Days from the date it was delivered to the Authority, the matter shall be resolved pursuant to clause 54 (Dispute Resolution) provided always that references in clause 54.10 to an expert shall be construed as references to an independent insurance expert agreed by the Parties or, in the absence of agreement, appointed by the President for the time being of the Chartered Institute of Arbitrators.

51.13.4 The Authority may make the Joint Insurance Cost Report available to any of HM Treasury's agents or advisors for insurance cost verification, benchmarking or similar purpose.

51.14 Sharing of Insurance Cost Differentials

51.14.1 If, following the implementation and completion of the Insurance Review Procedure, it is agreed or determined that there is an Exceptional Cost, the Authority shall within thirty (30) days of completion of the Insurance Review Procedure make a one off lump-sum payment to the Contractor equal to eight five per cent (85%) of the Exceptional Cost.

51.14.2 If, following the implementation and completion of the Insurance Review Procedure, it is agreed or determined that there is an Exceptional Saving, the Contractor shall within thirty (30) days of completion of the Insurance Review Procedure make a one-off lump-sum payment to the Authority equal to eight five per cent (85%) of the Exceptional Saving.

51.14.3 Following the completion of the Insurance Review Procedure, if it is agreed or determined that there is neither an Exceptional Cost nor an Exceptional Saving, any Insurance Cost Differential shall be borne by or benefit the Contractor.

51.15 Insurance Cost Index

If at any time an Insurance Cost Index is published and intended for use in PFI contracts of a similar nature to this Agreement, the Parties shall meet with a view to agreeing:-

51.15.1 its application to the Project, taking into account any relevant Guidance issued by HM Treasury;

51.15.2 how it may be account for or is relevant to the Power and Engineering Insurance Market; and

51.15.3 how a Portfolio Cost Saving may be accounted for when the Insurance Cost Index is in use.

52. REINSTATEMENT AND CHANGE OF REQUIREMENT AFTER INSURED EVENT

All insurance proceeds received under any policy referred to in paragraph 1 Part 1 and paragraphs 1 and 2 of Part 2 of Schedule 12 (Insurance) (the "Physical Damage Policies") shall be applied to repair, reinstate, replace each part or parts of the Assets in respect of which such proceeds were received.

52.1 **Joint Account**

The Contractor shall set up and at all times maintain an account in the joint names of the Authority and the Contractor (the "Joint Insurance Account"). All insurance proceeds paid under any Physical Damage Policy in respect of a single event (or a series of related events) in an amount in excess of one hundred and fifty thousand pounds (£150,000) (RPIx Indexed) shall be paid into the Joint Insurance Account.

52.2 **Obligations**

Where a claim is made or proceeds of insurance are received or are receivable under any Physical Damage Policy in respect of a single event (or a series of related events) relating to a Waste Management Facility (the "Relevant Incident") in an amount in excess of one hundred and fifty thousand pounds (£150,000) (RPIx Indexed):-

- 52.2.1 the Contractor shall deliver to the Authority as soon as practicable and in any event within twenty eight (28) Working Days after the making of the claim a plan prepared by the Contractor for the carrying out of the works necessary (the "Reinstatement Works") to repair, reinstate or replace (the "Reinstatement Outline") the assets which is or are the subject of the relevant claim or claims in accordance with clause 52.2 (Obligations). The Reinstatement Outline shall set out:-
- (a) if not the Building Contractor, the identity of the person proposed to effect the Reinstatement Works, which shall be subject to the prior written approval of the Authority; and
 - (b) the proposed terms and timetable upon which the Reinstatement Works are to be effected (including the date that the Project will become fully operational), the final terms of which shall be subject to the prior written approval of the Authority which approval shall not be unreasonably withheld or delayed);
- 52.2.2 the Authority shall within ten (10) Working Days of receipt of the Reinstatement Outline notify the Contractor in writing that:-
- (a) it is satisfied that the Reinstatement Outline will enable the Contractor to comply with its obligations to carry out the Reinstatement Works within a reasonable timetable, and that the identity of any person (set out in the Reinstatement Outline) that may be appointed to effect the Reinstatement Works is approved; or
 - (b) the identity of any person (set out in the Reinstatement Outline) that may be appointed to effect the Reinstatement Works is not approved together with its reasons for such non-approval in sufficient detail so as to enable the Contractor to understand the nature and extent of such non-approval and to assess whether the Authority's approval under clause 52.2.1(a) (Obligations) has been unreasonably withheld; or
 - (c) the Authority does not approve the Reinstatement Outline together with its reasons for such non-approval, in sufficient details so as to enable the Contractor to understand the nature and extent of such non-approval and to assess whether the Authority's approval under clause 52.2.1(b) (Obligations) has been unreasonably withheld; or

- (d) if the Authority does not make one (1) of the said responses within the period specified in clause 52.2.2 (Obligations) it shall be deemed to have approved the Reinstatement Outline, save where the Authority has reasonably requested any further information from the Contractor, in which case the time limit outlined in clause 52.2.2 (Obligations) will be deemed to commence upon receipt of such information by the Authority.
- 52.2.3 If the Authority gives notice of non-approval in accordance with clauses 52.2.2(b) or 52.2.2(c) the Contractor may amend and re-submit the Reinstatement Outline (the "Amended Reinstatement Outline") to the Authority for its reconsideration and the Authority shall give its approval or non approval within five (5) Working Days of the submission of the Amended Reinstatement Outline to the Authority. If the Authority does not approve the Amended Reinstatement Outline, it shall provide reasons for such non-approval in sufficient detail so as to enable the Contractor to understand the nature and extent of such non-approval and to assess whether the Authority's approval has been unreasonably withheld.
- 52.2.4 In the event that the Amended Reinstatement Outline or a person proposed to carry out the Reinstatement Works is not approved by the Authority in accordance with clause 52.2.3 the Contractor may submit the Amended Reinstatement Outline to the Dispute Resolution Procedure in order for it to be determined whether the Authority's approval under clause 52.2.3 (Obligations) was unreasonably withheld.
- 52.2.5 The Reinstatement Outline or the Amended Reinstatement Outline (as the case may be) as approved by the Authority pursuant to this clause 52 (Reinstatement and Change of Requirement after Insured Event) or as determined pursuant to the Dispute Resolution Procedure shall become the reinstatement plan (the "Reinstatement Plan").
- 52.2.6 The Contractor shall effect the Reinstatement Works in accordance with the Reinstatement Plan, and:-
- (a) shall enter into contractual arrangements to effect the Reinstatement Works with the person(s) identified in the Reinstatement Plan;
 - (b) prior to the earlier to occur of the Termination Date or the Expiry Date, any amounts standing to the credit of the Joint Insurance Account (the "Relevant Proceeds") (together with any interest accrued) may be withdrawn by the Contractor from the Joint Insurance Account as required to enable it to make payments in accordance with the terms of the contractual arrangements entered into to effect the Reinstatement Works and to meet any other reasonable costs and expenses of the Contractor for the sole purposes of funding the Reinstatement Works and the Parties shall operate the signatory requirements of the Joint Insurance Account in order to give effect to such payments. Following the earlier to occur of the Termination Date and the Expiry Date, the Authority may withdraw amounts standing to the credit of the Joint Insurance Account for the purposes of funding any Reinstatement Works;
 - (c) the Authority agrees and undertakes that, subject to compliance by the Contractor with its obligations under this clause 52 (Reinstatement and Change of Requirement after Insured Event), and provided that the

Contractor procures that the Reinstatement Works are carried out and completed in accordance with this clause 52.2 (Obligations) it shall not exercise any right which it might otherwise have to terminate this Agreement by virtue of the event which gave rise to the claim for the Relevant Proceeds;

- (d) the Authority undertakes to use reasonable endeavours to assist the Contractor in the carrying out of the Reinstatement Plan;
- (e) after the Reinstatement Plan has been implemented to the reasonable satisfaction of the Authority and in accordance with clause 52.2 (Obligations) the Authority shall permit withdrawal by the Contractor of any Relevant Proceeds then held in the Joint Insurance Account that have not been paid under this clause 52.2 in respect of the Relevant Incident, together with any interest accrued;
- (f) subject to clause 50 (Indemnities and Responsibility), the Contractor shall be solely responsible for the payment of any deficiency.

52.3 Works Carried Out

Where insurance proceeds are to be used in accordance with this Agreement to repair, reinstate or replace any part of any Waste Management Facility, the Contractor shall carry out the work in accordance with the Output Specification and the Service Delivery Plan so that on completion of the work the provisions of this Agreement are complied with.

53. RISKS THAT BECOME UNINSURABLE

53.1 Uninsurable Risks

Nothing in clause 51 or this clause 53 shall oblige the Contractor to take out insurance in respect of a risk which is Uninsurable save where the predominant cause of the risk being Uninsurable is any act(s) or omission(s) of the Contractor or a Contractor Related Party (other than members of the public who are otherwise in this Agreement categorised as Contractor Related Parties).

53.2 Risks Become Uninsurable

If a risk usually covered by construction all risks insurance, property damage insurance, machinery breakdown insurance, third party liability insurance, or environmental impairment liability insurance, delay in start up insurance (but excluding loss of profits), business interruption insurance (but excluding loss of profits) or machinery breakdown business interruption insurance (but excluding loss of profits) or statutory insurances, in each case required under this Agreement, becomes Uninsurable then:-

53.2.1 the Contractor shall notify the Authority within five (5) Working Days of becoming aware of the same and in any event at least five (5) Working Days before expiry or cancellation of any existing insurance in respect of that risk; and

53.2.2 if both Parties agree, or it is determined in accordance with the Dispute Resolution Procedure, that the risk is Uninsurable and that:-

- (a) the risk being Uninsurable is not caused by the actions, breaches, omissions or defaults of the Contractor or a sub-contractor; and
- (b) in respect of the risks specified in clause 53.2 above, the Contractor has demonstrated to the Authority that the Contractor and a prudent board of directors of a company operating the same or substantially similar PFI businesses in the United Kingdom to that operated by the Contractor would in similar circumstances (in the absence of the type of relief envisaged by this clause) be acting reasonably and in the best interests of the company if they resolved to cease to operate such businesses as a result of that risk becoming Uninsurable, taking into account inter alia (and without limitation) the likelihood of the uninsurable risk occurring (if it has not already occurred), the financial consequences for such company if such uninsurable risk did occur (or has occurred) and other mitigants against such consequences which may be available to such company,

then the Parties shall meet to discuss the means by which the risk should be managed or shared (including considering the issue of self-insurance by either Party).

53.3 Consequences

53.3.1 If the requirements of clause 53.2 (Risks Become Uninsurable) are satisfied, but the Parties cannot agree as to how to manage or share the risk, then:-

- (a) in respect of such third party liability or environmental impairment liability (as defined in paragraph 3 of Part 1, paragraph 4 of Part 2 and Part 3 of Schedule 12 (Insurance) respectively) insurance only, the Authority shall (at the Authority's option) either pay to the Contractor an amount equal to the amount set out in clause 47 (Compensation on Termination for Force Majeure) and this Agreement will terminate or elect to allow this Agreement to continue and clause 53.3.1(b) below shall thereafter apply in respect of such risk; and
- (b) in respect of such Contractor's all risks, property damage, machinery breakdown, delay in start up (but excluding loss of profits), business interruption (but excluding loss of profits), machinery breakdown, business interruption (but excluding loss of profits) (as defined in paragraphs 1 and 2 of Part 1 and paragraphs 1, 2 and 3 of Part 2 of Schedule 12 (Insurance) respectively) or statutory insurances this Agreement shall continue and on the occurrence of the risk (but only for as long as such risk remains Uninsurable) the Authority shall (at the Authority's option) either pay to the Contractor an amount equal to insurance proceeds that would have been payable had the Relevant Insurance continued to be available and this Agreement will continue, or an amount equal to the amount set out in clause 38.1 (Compensation on Termination for Force Majeure) plus (in relation to third party liability insurance only) the amount of insurance proceeds that would have been payable to the Contractor whereupon this Agreement will terminate;
- (c) where pursuant to clause 53.3.1(a) and/or 53.3.1(b) this Agreement continues then the Annual Unitary Charge shall be reduced in each Contract Year for which the Relevant Insurance is not maintained by an amount equal to the premium paid (or which would have been paid) by the

Contractor in respect of the relevant risk in the Contract Year prior to it becoming Uninsurable (RPIx Indexed). Where the risk is Uninsurable for part of a Contract Year only the reduction in the Annual Unitary Charge shall be pro rated to the number of Months for which the risk was Uninsurable;

- (d) where pursuant to clauses 53.3.1(a) and/or 53.3.1(b) this Agreement continues, the Contractor shall approach the insurance market at least every four (4) Months to establish whether the risk remains Uninsurable. As soon as the Contractor is aware that the risk is no longer Uninsurable, the Contractor shall take out and maintain or procure the taking out and maintenance of insurance (to be incepted as soon as is reasonably practicable) for such risk in accordance with this Agreement;
- (e) in respect of any period between the Authority receiving notification in accordance with clause 53.2.1 that a risk which is required to be insured under third party liability insurance or environmental impairment liability insurance has become Uninsurable (Uninsurable Liability Risk) and the Authority's notification to the Contractor in accordance with clause 53.3.1(b) in respect of such risk then, provided it is ultimately agreed or determined that the requirements of clause 53.2.2(b) are satisfied in respect of the Uninsurable Liability Risk and subject to clause 53.3.1(f) below, clause 53.3.1(b) shall apply in respect of the occurrences of Uninsurable Liability Risk during such period unless the Parties otherwise agree how to manage this risk during this period;
- (f) clause 53.3.1(e) shall only apply provided the Contractor does not unreasonably materially delay:-
 - (i) agreement and/or determination in accordance with the Dispute Resolution Procedure as to whether the requirements of clause 53.2 are satisfied in respect of the Uninsurable Liability Risk; and/or
 - (ii) meeting with the Authority to discuss the means by which the risk should be managed.

53.3.2 If pursuant to clause 53.3.1(b) (Consequences), the Authority elects to make payment to Contractor (such that the Agreement will terminate) ("the Relevant Payment") the Contractor shall have the option (exercisable within twenty (20) Working Days of the date of such election by the Authority) (the "Option Period") to pay to the Authority on or before the end of the Option Period an amount equal to the insurance proceeds that would have been payable had the risk not become Uninsurable in which case this Agreement will continue (and the Relevant Payment will not be made by the Authority) and the Contractor's payment shall be applied for the same purpose and in the same manner as insurance proceeds would have been applied had the relevant risk not become Uninsurable.

53.4 **Increase in Insured Amount**

The limit of indemnity and the maximum deductibles for each of the Required Insurances shall be RPIx Indexed, provided such limits of indemnity and maximum deductibles shall only be increased on each renewal date such that the limit that is RPIx Indexed becomes

equal to or exceeds the next whole insurable amount or deductible (as the case may be) available in the insurance market.

53.5 Unavailability of Terms or Conditions

- 53.5.1 If, upon the renewal of any insurance which the Contractor is required to maintain or to procure the maintenance of pursuant to this Agreement:-
- (a) any Insurance Term is not available to the Contractor in the worldwide insurance market with reputable insurers of good standing; and/or
 - (b) the insurance premium payable for insurance incorporating such Insurance Term is such that the Insurance Term is not generally being incorporated in insurance procured in the worldwide insurance market with reputable insurers of good standing by contractors in the United Kingdom,
- (other than, in each case, by reason of one or more actions or omissions of the Contractor and/or any sub-contractors) then clause 53.5.2 shall apply.
- 53.5.2 If it is agreed or determined that clause 53.5.1 applies then the Authority shall waive the Contractor's obligations in clause 51 (Insurances) and/or Schedule 12 (Insurance) in respect of that particular Insurance Term and the Contractor shall not be considered in breach of its obligations regarding the maintenance of insurance pursuant to this Agreement as a result of the failure to maintain insurance incorporating such Insurance Term for so long as the relevant circumstances described in clause 53.5.1 continue to apply to such Insurance Term.
- 53.5.3 To the extent that the Parties agree (acting reasonably), or it is determined pursuant to the Dispute Resolution Procedure, that an alternative or replacement term and/or condition of insurance is available to the Contractor in the worldwide insurance market with reputable insurers of good standing which if included in the Relevant Insurance policy would fully or partially address the Contractor's inability to maintain or procure the maintenance of insurance with the relevant Insurance Term, at a cost which contractors in the UK are (at such time) generally prepared to pay, the Contractor shall maintain or procure the maintenance of insurance including such alternative or replacement term and/or condition. Notwithstanding any other provision of this Agreement whatsoever, the costs of such insurance shall be subject to the premium costs sharing mechanism set out at clause 51.13.
- 53.5.4 The Contractor shall notify the Authority as soon as reasonably practicable and in any event within five days of becoming aware that clauses 53.5.1(a) and/or 53.5.1(b) are likely to apply (on expiry of the Relevant Insurance then in place) do apply in respect of an Insurance Term (irrespective of the reason for the same). The Contractor shall provide the Authority with such information as the Authority reasonably requests regarding the unavailability of the Insurance Term and the Parties shall meet to discuss the means by which such unavailability should be managed as soon as is reasonably practicable.
- 53.5.5 In the event that clauses 53.5.1(a) and/or 53.5.1(b) apply in respect of an Insurance Term (irrespective of the reasons for the same) the Contractor shall approach the insurance market at least every four (4) Months to establish whether clause 53.5.1(a) and/or 53.5.1(b) remain applicable to the Insurance

Term. As soon as the Contractor is aware that clause 53.5.1(a) and/or 53.5.1(b) has ceased to apply to the Insurance Term, the Contractor shall take out and maintain or procure the taking out and maintenance of the insurance (to be incepted as soon as is reasonably practicable) incorporating such Insurance Term in accordance with this Agreement.

54. **DISPUTE RESOLUTION**

54.1 **Disputes**

Any dispute arising in relation to any aspect of this Agreement shall be resolved in accordance with this clause save for a dispute relating to the Code which shall be resolved in accordance with Schedule 25 (Code Dispute Resolution Procedure).

54.2 **Consultation**

If a dispute arises in relation to any aspect of this Agreement, the Contractor and the Authority shall consult in good faith in an attempt to come to an agreement in relation to the disputed matter.

54.3 **Adjudication**

Without prejudice to clause 54.2, either Party may give the other notice of its intention to refer the dispute to adjudication (the "Notice of Adjudication"). The Notice of Adjudication shall include a brief statement of the issue to be referred and the redress sought. The Party giving the Notice of Adjudication (the "Referring Party") shall on the same day and by the same means of communication send a copy of the Notice of Adjudication to an adjudicator selected in accordance with clause 54.4 (Identity of Adjudicator) ("Adjudicator").

54.4 **Identity of Adjudicator**

The Adjudicator nominated to consider a dispute referred to him shall be selected on a strictly rotational basis from the relevant panel of experts selected in accordance with the following:

54.4.1 there shall be three (3) panels of experts, one (1) in respect of construction matters ("Construction Panel"), one (1) in respect of operational and maintenance matters ("Operational Panel"), and one (1) in respect of other matters dealt with under this Agreement ("Commercial Panel"). All the experts on each panel shall be wholly independent of the Contractor, the Authority, the relevant Sub-Contractor and any of the major competitors of the Contractor or relevant Sub-Contractor;

54.4.2 the Construction Panel shall comprise three (3) experts who shall be selected jointly by the Contractor and the Authority. Such selection shall take place within twenty (20) Working Days of the Commencement Date;

54.4.3 the Operational Panel shall comprise three (3) experts who shall be selected jointly by the Contractor and the Authority. Such selection shall take place within twenty (20) Working Days of the Commencement Date;

5.4.3A the Commercial Panel shall comprise three (3) experts who shall be selected jointly by the Contractor and the Authority. Such selection shall take place within twenty (20) Working Days of the Commencement Date;

- 54.4.4 if any member of a panel resigns during the Contract Period, a replacement expert shall be selected by the Contractor and the Authority as soon as practicable;
- 54.4.5 in the event that the nominated Adjudicator is unable or unwilling to confirm acceptance of his appointment as Adjudicator within two (2) Working Days of receipt of the Notice of Adjudication, then the Referring Party shall invite the person next in line to act as the Adjudicator. In the event that the second panel member is unwilling or unable to confirm acceptance of his appointment as Adjudicator within two (2) Working Days or if the Parties disagree as to the relevant panel of experts to be used then the Referring Party may apply to the President for the time being of the Chartered Institute of Arbitrators who shall within three (3) Working Days of any such application nominate an Adjudicator to determine the issue set out in the Notice of Adjudication; and
- 54.4.6 if the Authority and the Contractor are unable to agree on the identity of the experts to be selected for the panels, the President for the time being of the Chartered Institute of Arbitrators shall appoint such expert(s) within thirty (30) days of any application for such appointment by either Party.

54.5 **Referral of the Dispute**

Within seven (7) days of the service of the Notice of Adjudication, or as soon thereafter as the Adjudicator is appointed, the Referring Party shall serve its statement of case (the "Referral Notice") on the Adjudicator and the other Party (the "Responding Party"). The Referral Notice shall include a copy of this Agreement, details of the circumstances giving rise to the dispute as set out in the Notice of Adjudication, the reasons why the Referring Party is entitled to the redress sought, and the evidence upon which it relies.

54.6 **Response to the Referral**

The Responding Party shall serve its statement of case (the "Response") on the Adjudicator and the Referring Party within a period of time to be directed by the Adjudicator. The Response shall include any arguments in response to the Referral Notice of the dispute set out in the Notice of Adjudication and any additional evidence on which the Responding Party relies.

54.7 **Procedure**

Subject to clause 54.11, the Adjudicator shall have absolute discretion as to how to conduct the adjudication, including whether a meeting is necessary. He shall establish the procedure and timetable subject to any limitation within this Agreement. The Parties shall comply with any request or direction of the Adjudicator in relation to the adjudication.

54.8 **Adjudicator's Decision**

In any event, the Adjudicator shall provide to both Parties his written decision on the dispute, within twenty eight (28) days after the date of receipt of the Referral Notice (or such other period as the Parties may agree after the reference). The Adjudicator shall be entitled to extend the said period of twenty eight (28) days by up to fourteen (14) days with the consent of the Referring Party. The Adjudicator shall state any reasons for his decision. Unless and until revised, cancelled or varied by the English courts, the

Adjudicator's decision shall be binding on both Parties who shall forthwith give effect to the decision.

54.9 **Adjudicator's Costs**

The Adjudicator's costs of any referral shall be borne as the Adjudicator shall specify or, in default, equally by the Parties. Each party shall bear its own costs arising out of the referral, including legal costs and the costs and expenses of any witnesses.

54.10 **Adjudicator as Expert**

The Adjudicator shall be deemed not to be an arbitrator but shall render his decision as an expert, and the provisions of the Arbitration Act 1996 and the law relating to arbitration shall not apply to the Adjudicator or his determination or the procedure by which he reached his determination.

54.11 **Adjudicator's Powers**

The Adjudicator shall act fairly and impartially and may take the initiative in ascertaining the facts and the law. The Adjudicator shall have the power to open up, review and revise any opinion, certificate, instruction, determination or decision of whatever nature given or made under this Agreement.

54.12 **Confidentiality**

All information, data or documentation disclosed or delivered by a Party to the Adjudicator in consequence of or in connection with his appointment as Adjudicator shall be treated as confidential. The Adjudicator shall not, save as permitted by clause 48 (Freedom of Information and Confidentiality), disclose to any person or company any such information, data or documentation and all such information, data or documentation shall remain the property of the Party disclosing or delivering the same and all copies shall be returned to such Party on completion of the Adjudicator's work.

54.13 **Liability of Adjudicator**

The Adjudicator is not liable for anything done or omitted in the discharge or purported discharge of his functions as Adjudicator unless the act or omission is in bad faith. Any employee or agent of the Adjudicator is similarly protected from liability.

54.14 **Fast Track Dispute Resolution Procedure**

Where the parties agree in writing that a dispute should be referred to the Fast Track Dispute Resolution Procedure, the dispute shall be referred to an Adjudicator in accordance with this clause 54, and the dispute shall be dealt with pursuant to clauses 54.3 to 54.13 save that the Referring Party shall have two (2) Working Days to put its case under clause 54.5 and the time for the Adjudicator's decision set out in clause 54.8 shall be five (5) Working Days in the case of all disputes which are subject to this Fast Track Dispute Resolution Procedure.

54.15 **Reference to the Courts**

Either Party may (within ninety (90) days of receipt of the Adjudicator's decision or where the Adjudicator fails to give a decision pursuant to clause 54.8) give notice to the other Party of its intention to refer the dispute to the courts of England and Wales for final determination.

54.16 **Parties' Obligations**

The Parties shall continue to comply with, observe and perform all their obligations hereunder regardless of the nature of the dispute and notwithstanding the referral of the dispute for resolution under this clause and shall give effect forthwith to every decision of the Adjudicator and the courts delivered under this clause.

54.17 **Similar Disputes**

If any dispute arising under this Agreement raises issues which relate to:

54.17.1 any dispute between the Contractor and the Building Contractor arising under the Building Contract or otherwise affects the relationship or rights of the Contractor and/or the Building Contractor under the Building Contract ("Building Contract Dispute"); or

54.17.2 any dispute between the Contractor and the Sub-Contractor arising under the relevant sub-contract or otherwise affects the relationship or rights of the Contractor and/or the Sub-Contractor under the relevant Sub-Contract ("Operating Contract Dispute"); or

then the Contractor may include as part of its submissions made to the Adjudicator or to the courts submissions made by the Building Contractor or by the Sub-Contractor as appropriate.

54.18 **Jurisdiction over Sub-Contractors**

The Adjudicator shall not have jurisdiction to determine the Building Contract Dispute or the Operating Contract Dispute but the decision of the Adjudicator and/or the courts shall, subject to clause 54.15 (Reference to the Courts), be binding on the Contractor and the Building Contractor insofar as it determines the issues relating to the Building Contract Dispute and on the Contractor and the Sub-Contractor insofar as it determines the issues relating to the Operating Contract Dispute.

54.19 **Sub-Contractors' Submissions**

Any submissions made by the Building Contractor or the Sub-Contractor shall:

54.19.1 be made within the time limits applicable to the delivery of submissions by the Contractor; and

54.19.2 concern only those matters which relate to the dispute between the Authority and the Contractor under this Agreement.

54.20 **Costs**

Where the Building Contractor or the Sub-Contractor makes submissions in any reference before:

54.20.1 the Adjudicator, the Adjudicator's costs of such reference shall be borne as the Adjudicator shall specify, or in default, one-third by the Authority and two-thirds (2/3) by the Contractor; and

54.20.2 the courts, the costs of the litigation shall be in the discretion of the court.

54.21 **Authority's Liability**

The Authority shall have no liability to the Building Contractor or the Sub-Contractor arising out of or in connection with any decision of the Adjudicator or courts or in respect of the costs of the Building Contractor or the Sub-Contractor in participating in the resolution of any dispute under this Agreement.

54.22 **Access to Documents**

The Contractor shall not allow the Building Contractor or the Sub-Contractor access to any document relevant to issues in dispute between the Authority and the Contractor save where:

54.22.1 the document is relevant also to the issues relating to the Building Contract Dispute or the Operating Contract Dispute as the case may be; and

54.22.2 the Contractor has first delivered to the Authority a written undertaking from the Building Contractor and/or the Sub-Contractor (as appropriate) addressed to the Authority that they shall not use any such document otherwise than for the purpose of the dispute resolution proceedings under this Agreement and that they shall not disclose such documents or any information contained therein to any third party other than the Adjudicator or the courts or any professional adviser engaged by the Building Contractor or the Sub-Contractor (as appropriate) to advise in connection with the dispute.

55. **ENVIRONMENT, HEALTH AND SAFETY**

55.1 The Contractor shall take all such steps as are reasonably necessary to ensure that the impact of any operation of the Contractor in pursuance of its obligations under this Agreement upon the Environment is adequately and sufficiently considered, supervised, controlled monitored mitigated and remediated as required by the appropriate Relevant Authorities and that all Legislation and Good Industry Practice relating to the Environment is complied with;

55.2 Without prejudice to its obligations to comply with all applicable Legislation, the Contractor shall at all times comply with its duty of care under section 34 of the Environmental Protection Act 1990 and shall not contravene section 33(1) of the Environmental Protection Act 1990 or any condition of a Waste Management Licence or EPs;

55.3 The Contractor shall promptly notify the Authority of all circumstances which shall or might reasonably be regarded as a breach of this clause 55.1.

55.4 The Contractor shall use its reasonable endeavours to deliver the Works and Services in such a way as to minimise any actual or potential damage to the Environment.

55.5 The Contractor shall be responsible for the observance by itself, its staff and Sub-Contractors of all Legislation relating to health and safety for all aspects of the Project, and shall take on all precautions necessary for the protection of itself, its staff, Sub-Contractors, the Authority and its staff and any other persons invited onto or visiting the Waste Management Facilities.

- 55.6 The Contractor shall immediately report to the Authority any accidents to the Contractor's or a Sub-Contractors' employees or agents which ordinarily require reporting in accordance with the Health and Safety at Work etc Act 1974.
- 55.7 The Contractor shall carry out environmental monitoring of all Waste Management Facilities and Services in accordance with the requirements of the Output Specification on the basis proposed in the Service Delivery Plan and the results of such monitoring shall be included in the Monthly Monitoring Report and Environmental Report to be produced by the Contractor pursuant to this Agreement.
- 55.8 The published accounts of the Contractor shall in relation to environmental performance be produced to a standard that is not less than that employed in the production of the published accounts of the Contractor.
- 55.9 The Contractor shall produce and deliver the Environmental Report to the Authority each Year as part of the Annual Services Report.
- 55.10 The Contractor shall ensure that the minimum possible use is made of Hazardous Materials in the delivery of the Services. The Contractor shall ensure that all such products are used at no greater concentration than is required to perform its obligations under the Agreement and that used Containers are disposed of so as not to cause any danger or damage to the Environment, in accordance with Legislation and the Authority's Policies relating to the Environment introduced from time to time pursuant to an Authority Change.
- 55.11 The Contractor shall take all reasonable measures to prevent any Hazardous Materials from being discharged from the Waste Management Facilities into any rivers or any ditches or Conduits on the Waste Management Facilities or any Adjoining Property and shall take all reasonable measures to prevent the blockage of any of such rivers, ditches or Conduits by reason of anything done or omitted to be done on the Waste Management Facilities or any land affected by the Works.

56. **INTELLECTUAL PROPERTY**

- 56A.1 The provisions of this clause 56 shall not apply to the intellectual property rights in relation to the EcoDeco Plant which are the subject of the EcoDeco Licence, which shall (either on expiry or early termination of this Agreement) be novated to the Authority subject to the terms of such EcoDeco Licence.
- 56.1 The Contractor shall make available to the Authority free of charge (and hereby irrevocably licences the Authority to use) all Project Data that might reasonably be required by the Authority and the Contractor shall ensure that the Contractor obtains all necessary licenses, permissions and Consents to ensure that the Contractor can make the Project Data available to the Authority on these terms, for the purposes of:-
- 56.1.1 the Authority utilising the Waste Management Facilities for waste disposal, its duties under this Agreement and/or any statutory duties which the Authority may have; and
- 56.1.2 following termination of this Agreement, the design or construction of the Waste Management Facilities, the operation, maintenance or improvement of the Waste Management Facilities and/or the provision of services the same as, or similar to, the Services,

(together, “the Approved Purposes”), and in this clause “use” shall include the acts of copying, modifying, adapting and translating the material in question and/or incorporating them with other materials and the term “the right to use” shall be construed accordingly.

56.2 The Contractor:-

56.2.1 hereby agrees to notify the Authority (as soon as reasonably practicable) of any New Trade Marks created or developed under the Branding Strategy;

56.2.2 hereby assigns upon creation (or shall procure the assignment) of all New Trade Marks (and any copyright and related rights in them) to the Authority;

56.2.3 hereby grants to the Authority, free of charge, an irrevocable, non-exclusive and transferable (but only to any assignee or transferee of any rights or benefits under this Agreement or upon or at any time following termination of this Agreement) licence (carrying the right to grant sub-licences) to use all the Intellectual Property Rights (excluding New Trade Marks which shall be dealt with by clause 56.2.2) which are or become vested in the Contractor; and

56.2.4 shall, where any Intellectual Property Rights are or become vested in a third party, use its reasonable endeavours to procure the grant of a like licence to that referred to in clause 56.2.1 above to the Authority,

in both cases, solely for the Approved Purposes.

56.3 The Contractor hereby agrees to enter into a non-exclusive licence to use the Trade Marks and the New Trade Marks in the performance of the Services. The licence in respect of the Trade Marks shall come into force upon the Contractor registering with the Waste & Resources Action Programme (WRAP) (via <http://www.recyclenowpartners.org.uk/>) as a service delivery partner of the Authority and the Contractor agrees to complete the necessary registration within thirty (30) Working Days of the Commencement Date. The said licence will be on terms and conditions specified by WRAP and the Contractor will ensure that such terms and conditions are complied with at all times during its use of the Trade Marks. In the event that the Authority become the legal and beneficial owner of the Trade Marks and any New Trade Marks, the Authority will grant to the Contractor a non-exclusive licence to use the Trade Marks and the New Trade Marks in the performance of the Services. In such circumstances the Contractor acknowledges that the Authority will be the legal and beneficial owner of the Trade Marks and the New Trade Marks and the Contractor shall not dispute or challenge the rights of the Authority to the Trade Marks and the New Trade Marks. Any goodwill derived from the use by the Contractor of the Trade Marks and the New Trade Marks shall accrue to the Authority.

56.4 The Contractor shall use all reasonable endeavours to ensure that any Intellectual Property Rights created, brought into existence or acquired during the term of this Agreement vest, and remain vested throughout the term of this Agreement, in the Contractor and the Contractor shall enter into appropriate agreements with any relevant Contractor Related Party (or other third parties) that may create or bring into existence, or from which it may acquire, any Intellectual Property Rights.

56.5 To the extent that any of the data, materials and documents referred to in this clause are generated by or maintained on a computer or similar system, the Contractor shall:-

- 56.5.1 use all reasonable endeavours to procure for the benefit of the Authority, at no charge or at the lowest reasonable fee, the grant of a licence or sub-licence for any relevant software to enable the Authority or its nominee to access and otherwise use (subject to the payment by the Authority of the relevant fee, if any) such data for the Approved Purposes. As an alternative, the Contractor may provide such data, materials or documents in a format which may be read by software generally available in the market at the relevant time or in hard copy format; and
- 56.5.2 enter into the National Computing Centre's then current multi-licence escrow deposit agreement or standard single licence escrow deposit agreement as appropriate in each case.
- 56.6 The Contractor shall ensure the back-up and storage in safe custody of the data, materials and documents referred to in clause 56.5 in accordance with Good Industry Practice. Without prejudice to this obligation, the Contractor shall submit to the Authority's Representative for approval its proposals for the back-up and storage in safe custody of the data, materials and documents and the Authority shall be entitled to object if the same is not in accordance with Good Industry Practice. The Contractor shall comply, and shall cause all Contractor Related Parties to comply, with all procedures to which the Authority's Representative has given its approval. The Contractor may vary its procedures for such back-up and storage subject to submitting its proposals for change to the Authority's Representative, who shall be entitled to object on the basis set out above.
- 56.7 Where a claim or proceeding is made or brought against the Authority which arises out of the infringement of any rights in or to any Intellectual Property Rights (other than any Disclosed Data) or because the use of any materials, plant, machinery or equipment in connection with the Works or the Project infringes any rights in or to any Intellectual Property Rights or a third party then, unless such infringement has arisen out of the use of any Intellectual Property Rights by or on behalf of the Authority otherwise than in accordance with the terms of this Agreement, the Contractor shall indemnify the Authority at all times from and against all such claims and proceedings and the provisions of clause 50 shall apply.

57. ASSIGNMENT AND SUB-CONTRACTING

57.1 Restriction on the Authority

The rights and obligations of the Authority under this Agreement shall not be assigned, novated or otherwise transferred (whether by virtue of any Legislation or any scheme pursuant to any Legislation or otherwise) (other than in respect of the whole of the Agreement) to any person other than any public body (being a single entity) having the legal capacity, power and authority to become a party to and to perform the obligations of the Authority under this Agreement being:-

- 57.1.1 a Minister of the Crown pursuant to an Order under the Ministers of the Crown Act 1975;
- 57.1.2 any local authority which has sufficient financial standing or financial resources to perform the obligations of the Authority under this Agreement; or
- 57.1.3 any other public body whose obligations under this Agreement and/or the Direct Agreement are unconditionally and irrevocably guaranteed (in a form

reasonably acceptable to the Contractor) by the Authority or a Minister of the Crown having the legal capacity, power and authority to perform the obligations under the guarantee and the obligations of the Authority under this Agreement.

57.2 Restriction on the Contractor

Subject to clause 57.3 and subject always to the provisions of the Direct Agreement the Contractor shall not assign, under let, charge, sell, bargain or otherwise deal in any way with the benefit of this Agreement in whole or in part except with the prior written consent of the Authority (which the Authority may in its absolute discretion refuse).

57.3 Exception

57.3.1 The provisions of clause 57.2 do not apply to the grant of any security for any loan made to the Contractor under the Financing Agreements.

57.3.2 Nothing in this Agreement shall prohibit the Contractor from providing or procuring the provision of the Works or the Services from a Sub-Contractor of sound financial standing and good repute and whose identity has been notified to the Authority by the Contractor and approved by the Authority prior to the appointment of such Sub-Contractor, provided that the Sub-Contractor shall remain primarily and directly liable for the Contractor's obligations under this Agreement.

57.4 Contractor's Obligations

The Contractor shall perform its obligations under and observe all the terms of any sub-contract with a Sub-Contractor.

57.5 Sub-Contractors

Nothing in this Agreement shall prohibit or prevent any Sub-Contractor employed by the Contractor from being employed by the Authority at any establishments of the Authority.

57.6 Replacement of Sub-Contractors

The rights set out in clause 57.6.1 may be exercised on no more than two (2) occasions during the Contract Period in relation to the accrual of Additional Mileage Deductions, Performance Points, Performance Deductions any warning notice or Final Warning Notice in respect of clause 29.5. The rights may be exercised on one (1) further occasion if, in the first five (5) Contract Years, at least one (1) of the substitutions or replacement of a defaulting sub-contractor to the Operating Contractor is due to a termination for Persistent Breach or equivalent provision in the relevant sub-contract.

57.6.1 On the substitution or replacement of the defaulting Operating Contractor or a defaulting sub-contractor to the Operating Contractor (in both cases provided that the Contractor is acting in compliance with clause 71.3 (Ancillary Documents)), the Contractor may elect that, for the purposes of clause 29.3 (Termination on Contractor Default) only:-

(a) any accrued Additional Mileage Deductions; and/or

(b) any accrued Performance Points or Performance Deductions; and/or

- (c) any warning notices or Final Warning Notices in respect of clause 29.5 (Termination for Persistent Breach),

in each case relating to the relevant Services in respect of which the Operating Contractor or any sub-contractor to the Operating Contractor is being replaced, shall be cancelled. The Contractor shall notify the Authority on or before the appointment of any such substitute or replacement Operating Contractor or sub-contractor whether it elects for this clause 57.6 to apply on that occasion.

57.6.2 Where an election is made pursuant to clause 57.6.1 on the substitution or replacement of the defaulting Operating Contractor or a defaulting sub-contractor to the Operating Contractor then, for the purposes of clause 29.3 (Termination on Contractor Default) only:-

- (a) no Additional Mileage Deductions shall accrue for the purposes of limb (l) of the definition of Contractor Default;
- (b) no Performance Points or Performance Deductions shall accrue for the purposes of limb (k) of the definition of Contractor Default; and
- (c) no warning notices or Final Warning Notices in respect of clause 29.5 (Termination for Persistent Breach by the Contractor) shall accrue for the purposes of limb (b) of the definition of Contractor Default,

in respect of a Service during a period of two (2) months from the date on which that Service is first provided by the replacement or substitute Operating Contractor or sub-contractor as appropriate.

58. **AUDIT ACCESS**

58.1 The Contractor shall co-operate fully and in a timely manner with any request made from time to time by any auditor (whether internal or external) of the Authority (including any Official of the Best Value Inspectorate, or other Statutory Inspectorate) to provide documents, or to procure the provision of documents relating to the Project, and to provide, or to procure the provision of, any oral or written information or explanation relating to the same where such a request of the Contractor is a lawful request with which the Contractor is obliged to comply.

58.2 Any auditor of the Authority, whether internal or external, shall be permitted access to any and all documentation, whether manually or electronically held, to which he is legally entitled relating to the provision of the Services in the possession, custody or control of the Contractor (who shall procure that any person acting on its behalf who has such documents and/or other information shall also provide such access).

58.3 For the avoidance of doubt this right will include the power, at all reasonable times, to interview staff, have access to and take copies of any and all documentation and have access to and take copies of any computer data held for the purposes of the Project and compliance with all provisions of this clause will be at the Contractor's expense.

59. **CORPORATE STRUCTURES**

59.1 **Obligation to Inform**

The Contractor shall inform the Authority as soon as reasonably practicable and, in any event, within thirty (30) Working Days of any Change in Ownership of the Contractor.

59.2 **Contractor Warranty**

The Contractor warrants and represents to the Authority that the legal and beneficial ownership of the Contractor at the date of this Agreement is as set out in Schedule 21 (Warranted Data).

59.3 **Change of Ownership**

59.3.1 Subject to clause 59.3.2 and 59.3.3, prior to the expiry of a period of twenty four (24) Months from the Commencement Date, no Change in Ownership in any or all of the shares in the Contractor or HoldCo shall be permitted without the prior written approval of the Authority.

59.3.2 Subject to clause 59.3.3 and 59.3.4 the conditions and restrictions in clause 59.3.1 shall not apply to:-

- (a) any Change in Ownership of any shares which arises as a consequence of the grant or enforcement of security in favour of the Senior Lenders over or in relation to any of the shares of the Contractor or HoldCo, provided that any document conferring security over any of such shares has been approved by the Authority (such approval not to be unreasonably withheld or delayed); or
- (b) any Change in Ownership of any shares held by a person to its Affiliate; or
- (c) any Change in Ownership of any shares held by any Third Party Shareholder; or
- (d) any Change in Ownership if any shares that are listed on a recognised investment exchange (as defined in Section 285 of the Financial Services and Markets Act 2000);

59.3.3 No Change in Ownership (at any time) in any or all of the shares in the Contractor shall be permitted without the prior written approval of the Authority where such Change in Ownership is to an Unsuitable Third Party.

59.3.4 Where Clause 59.3.2(b) applies and subsequent to any such transfer ("the Original Transfer") the transferee ceases to be an Affiliate of the original transferor, it shall be a breach of this clause 59 if the shares or interests which were the subject of this Original Transfer are not within twenty (20) days of the transferee ceasing to be an Affiliate of the original transferor transferred to that original transferor or any Affiliate of such transferor.

60. **NO AGENCY**

60.1 Nothing in this Agreement shall be construed as creating a partnership or as a contract of employment between the Authority and the Contractor.

60.2 Save as expressly provided otherwise in this Agreement, the Contractor shall not be, or be deemed to be, an agent of the Authority and the Contractor shall not hold itself out as having authority or power to bind the Authority in any way.

60.3 Without limitation to its actual knowledge, the Contractor shall for all purposes of this Agreement, be deemed to have such knowledge in respect of the Project as is held (or ought reasonably to be held) by any Contractor Related Party (other than any person on

or at any of the Waste Management Facilities at the express or implied invitation of the Authority).

61. **ENTIRE AGREEMENT**

61.1 Except where expressly provided in this Agreement, this Agreement constitutes the entire agreement between the Parties in connection with its subject matter and supersedes all prior representations, communications, negotiations and understandings concerning the subject matter of this Agreement.

61.2 Each of the Parties acknowledge that:-

61.2.1 it does not enter into this Agreement on the basis of and does not rely, and has not relied upon any statement or representation (whether negligent or innocent) or warranty or other provision (in any case whether oral, written, express or implied) made or agreed to by any person (whether a Party to this Agreement or not) except those expressly repeated or referred to in this Agreement and the only remedy or remedies available in respect of any misrepresentation or untrue statement made to it shall be any remedy available under this Agreement; and

61.2.2 this sub-clause shall not apply to any statement, representation or warranty made fraudulently, or to any provisions of this Agreement which was induced by fraud, for which the remedies available shall be all those available under the law governing this Agreement.

62. **NOTICES**

62.1 **Form and Service of Notice**

All notices under this Agreement shall be in writing and all certificates, notices or written instructions to be given under the terms of this Agreement shall be served by sending the same by first class post, facsimile, email or by hand, leaving the same at:-

62.1.1 If to the Authority

Address:- The Courts, Carlisle, Cumbria, CA3 8NA

Fax No:- 01228 607 648

62.1.2 If to the Contractor

Address:- 4 Dunedin House, Auckland Park, Mount Farm, Bletchley, Milton Keynes Buckinghamshire, MK1 1BU

Fax No:- 01908 650 654

62.2 **Provision of Information to Representatives**

Where any information or documentation is to be provided or submitted to the Authority's Representative or the Contractor's Representative it shall be provided or submitted by sending the same by first class post, facsimile, email or by hand, leaving the same at:-

If to the Authority's Representative

For the attention of:- NAME REDACTED

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Fax No:- 01228 607 648

If to the Contractor's Representative

For the attention of:- NAME REDACTED

Fax No:- 01908 650 654

(copied in each case to the Contractor and the Authority respectively).

62.3 **Change of Details**

Either Party to this Agreement (and either the Authority Representative or the Contractor Representative) may change its nominated address, facsimile number or email address by prior notice to the other Party.

62.4 **Notices by Post**

Notices given by post shall be effective upon the earlier of (i) actual receipt, and (ii) five (5) Working Days after mailing. Notices delivered by hand shall be effective upon delivery. Any notice given by way of email shall be deemed served when sent between 9am and 4pm on a Working Day or the next following Working Day if sent after 4pm on a Working Day but before 9am on the next following Working Day, provided the party sending the email has not received a notice that the email is undeliverable. Notices given by facsimile shall be deemed to have been received where there is confirmation of uninterrupted transmission by a transmission report and where there has been no telephonic communication by the recipient to the senders (to be confirmed in writing) that the facsimile has not been received in legible form:-

62.4.1 within two (2) hours after sending, if sent on a Working Day between the hours of 9am and 4pm; or

62.4.2 by 11am on the next following Working Day, if sent after 4pm, on a Working Day but before 9am on that next following Working Day.

63. **SEVERABILITY**

If any term, condition or provision of this Agreement shall be held to be invalid, unlawful or unenforceable to any extent, such term, condition or provision shall not affect the validity, legality and enforceability of the other provisions of or any other documents referred to in this Agreement.

64. **WAIVER**

64.1 No term or provision of this Agreement shall be considered as waived by any Party to this Agreement unless a waiver is given in writing by that Party.

64.2 No waiver under clause 64.1 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 Agreement unless (and then only to the extent) expressly stated in that waiver.

65. **PUBLIC RELATIONS AND PUBLICITY**

65.1 **Restriction**

The Contractor shall not by itself, its employees or agents and procure that its sub-contractors shall not communicate with representatives of the press, television, radio or other communications media on any matter concerning this Agreement or the Project without the prior written approval of the Authority (such approval not to be unreasonably withheld or delayed).

65.2 **Photographs**

No facilities to photograph or film in or upon any Waste Management Facilities used in relation to the Project shall be given or permitted by the Contractor unless the Authority has given its prior written approval such approval not to have been unreasonably withheld or delayed.

66. **ADVERTISEMENTS**

The Contractor shall not exhibit or attach to any part of the Waste Management Facilities any notice or advertisement without the prior written permission of the Authority's Representative, save where otherwise required to comply with Legislation.

67. **CONTRACTOR'S RECORDS**

67.1 **Records of Costs**

The Contractor shall at all times:-

- 67.1.1 maintain a full record of particulars of the costs of performing the Services, including those relating to the design, construction, maintenance, operation and financing of the Project;
- 67.1.2 upon request by the Authority, provide a written summary of any of the costs referred to in clause 67.1, including details of any funds held by the Contractor specifically to cover such costs, in such form and detail as the Authority may reasonably require to enable the Authority to monitor the performance by the Contractor of its obligations under this Agreement;
- 67.1.3 provide such facilities as the Authority may reasonably require for its representatives to visit any place where the records are held and examine the records maintained under this clause; and
- 67.1.4 upon request by the Authority, provide to the Authority any information provided on a regular basis by it to the Senior Lenders during the Contract Period.

67.2 **Books of Account**

Compliance with clause 67 shall require the Contractor to keep (and where appropriate to procure that its Sub-Contractors shall keep) books of account in accordance with best accountancy practice with respect to this Agreement showing in detail:-

- 67.2.1 administrative overheads;
- 67.2.2 payments made to Sub-Contractors;

67.2.3 capital and revenue expenditure;

67.2.4 such other items as the Authority may reasonably require from time to time to conduct cost audits for verification of cost expenditure or estimated expenditure, for the purpose of this Agreement;

and the Contractor shall have (and procure that its Sub-Contractors shall have) the books of account evidencing the items listed in clauses 67.2.1 to 67.2.4 above inclusive available for inspection by the Authority (and any expert) upon reasonable notice, and shall promptly present a written report of these to the Authority as and when requested from time to time.

67.3 Retention

The records referred to in this clause 67 shall be retained for a period of at least 5 Years after the Contractor's obligations under the Agreement have come to an end.

67.4 Termination or Expiry

Upon termination or expiry of this Agreement, and in the event that the Authority wishes to enter into another contract for the operation and management of a project the same as or similar to the Project the Contractor shall (and shall ensure that its Sub-Contractors will) comply with all reasonable requests of the Authority to provide information relating to the Contractor's costs of operating and maintaining the Project.

67.5 Confidentiality

All information referred to in this clause 67 is subject to the obligations set out in clause 49.

68. DATA PROTECTION

68.1 General

68.1.1 In relation to all Personal Data, the Contractor shall at all times comply with the DPA as a data controller if necessary, including maintaining a valid and up to date registration or notification under the DPA covering the data processing to be performed in connection with the Service.

68.1.2 The Contractor and any Sub-Contractor shall only undertake processing of Personal Data reasonably required in connection with the Service and shall not transfer any Personal Data to any country or territory outside the European Economic Area.

68.2 Non Disclosure

68.2.1 The Contractor shall not disclose Personal Data to any third parties other than:-

- (a) to employees and Sub-Contractors to whom such disclosure is reasonably necessary in order for the Contractor to carry out the Service; or
- (b) to the extent required under any legal obligation; or
- (c) to the extent otherwise permitted by the DPA

provided that disclosure under clause 68.2.1 is made subject to written terms substantially the same as, and no less stringent than, the terms contained in this clause 68.2.1 and that the Contractor shall give notice in writing to the Authority of any disclosure of Personal Data it or a sub-contractor is required to make under clause 68.2.1 immediately it is aware of such a requirement.

68.2.2 The Contractor shall bring into effect and maintain all technical and organisational measures to prevent unauthorised or unlawful processing of Personal Data and accidental loss or destruction of, or damage to, Personal Data including but not limited to taking reasonable steps to ensure the reliability of staff having access to the Personal Data.

68.2.3 The Authority may, at reasonable intervals, request a written description of the technical and organisational methods employed by the Contractor or the sub-contractors referred to in clause 68.2.2. Within thirty (30) Working Days of such a request, the Contractor shall supply written particulars of all such measures detailed to a reasonable level such that the Authority can determine whether or not, in connection with the Personal Data, it is compliant with the DPA.

68.3 **Indemnity**

The Contractor shall indemnify and keep indemnified the Authority against all Direct Losses, incurred by it in respect of any breach of this clause 68 by the Contractor and/or any act or omission of any Sub-Contractor which causes the Sub-Contractor to be in breach of this clause 68.

69. **CORRUPT GIFTS AND PAYMENTS OF COMMISSION**

69.1 **Corrupts Gifts and Fraud**

The Contractor warrants that in entering into this Agreement it has not committed any Prohibited Act.

69.2 **Termination for Corrupt Gifts and Fraud**

69.2.1 If the 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 Authority shall be entitled to act in accordance with clause 69.2.2 to 69.2.7 below.

69.2.2 If a Prohibited Act is committed by the Contractor or by an employee not acting independently of the Contractor but acting under the authority of or with the knowledge of a director of the Contractor, then the Authority may terminate this Agreement by giving notice to the Contractor.

69.2.3 If the Prohibited Act is committed by an employee of the Contractor acting independently of the Contractor, then the Authority may give notice to the Contractor of termination and this Agreement will terminate, unless within twenty (20) Working Days of receipt of such notice the Contractor terminates the employee's employment and (if necessary) procures the performance of such part of the Services by another person.

69.2.4 If the Prohibited Act is committed by a Sub-Contractor of the Contractor or by an employee of that Sub-Contractor not acting independently of that Sub-

Contractor then the Authority may give notice to the Contractor of termination and this Agreement will terminate, unless within twenty (20) Working Days of receipt of such notice the Contractor terminates the relevant Sub-Contractor and procures the performance of such part of the Services by another person.

69.2.5 If the Prohibited Act is committed by an employee of a Sub-Contractor of the Contractor acting independently of that Sub-Contractor then the Authority may give notice to the Contractor of termination and this Agreement will terminate, unless within twenty (20) Working 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 Services by another person.

69.2.6 If the Prohibited Act is committed by any other persons not specified in clauses 69.2.2 to 69.2.5 above, then the Authority may give notice to the Contractor of termination and this Agreement will terminate unless within thirty (30) Working Days of receipt of such notice, the Contractor procures the termination of such person's employment and of the appointment of their employer (where not employed by the Contractor or the Sub-Contractors) and (if necessary) procures the performance of such part of the Services by another person.

69.2.7 Any notice of termination under this clause 69.2 shall specify:-

- (a) the nature of the Prohibited Act;
- (b) the identity of the party whom the Authority believes has committed the Prohibited Act;
- (c) the date on which this Agreement will terminate, in accordance with the applicable provision of this clause; and
- (d) the Authority's chosen option in respect of method of payment of the Revised Senior Debt Termination Amount under clause 42.

69.3 **Compensation on Termination for Corrupt Gifts and Fraud**

On termination of this Agreement in accordance with clause 69.2 the Authority shall pay the Contractor compensation in accordance with the provisions of clause 36.

70. **INTEREST ON LATE PAYMENT**

Save where otherwise specifically provided where any payment or sum of money due from the Contractor to the Authority or from the Authority to the Contractor under any provision of this Agreement is not paid on the due date for payment hereunder it shall bear interest thereon at the Prescribed Rate from the due date (whether before or after any judgement) until actual payment and it is agreed between the Parties that the Prescribed Rate and the provisions of this Agreement relating to the payment of compensation on termination of this Agreement following the occurrence of an Authority Default provide the Contractor with a substantial remedy pursuant to sections 8 and 9 of the Late Payment of Commercial Debts (Interest) Act 1998.

71. **CO-OPERATION**

71.1 Without failure to comply with this clause 71.1 amounting to a breach of contract both Parties will act in good faith towards each other in relation to all matters arising under

this Agreement and both Parties will do all things reasonably within their power which are necessary or desirable to give effect to the Agreement. In particular:-

- 71.1.1 the Contractor will inform the Authority fully and as soon as possible of any circumstances which might prejudice the Contractor's ability to provide the Services whether temporarily or permanently;
 - 71.1.2 each Party shall inform the other fully and as soon as possible of any circumstance which might reasonably lead to any substantial change in the nature, composition or amount of Contract Waste or any other circumstance which might alter the burden of the obligations of each Party;
 - 71.1.3 the Authority's Representative shall be given all information and other access and assistance he may require to ensure that the Contractor is fulfilling its obligations under this Agreement;
 - 71.1.4 the representatives of the Parties appointed under clause 10 (Representatives) shall hold regular meetings at no less frequent intervals than those specified in clause 10 and Schedule 9 (Liaison Procedure) in order to review the working of this Agreement to identify any way in which either Party might be, or become, in breach of its obligations, and any necessary remedial action, and to resolve informally any problem arising as perceived by either Party or its representative appointed in accordance with clause 10 (Representatives).
- 71.2 Each Party agrees to co-operate, at its own expense, with the other Party in the fulfilment of the purposes and intent of the following provisions of this clause 71 and the Authority undertakes to the Contractor that it shall not wilfully impede the Contractor in the performance of its obligations under the Agreement (having regard always to the interactive nature of the activities of the Authority and of the Contractor and to the Authority's statutory duties from time to time in its capacity as a WDA and any other operations or activities carried out by the Authority contemplated by this Agreement).

71.3 **Ancillary Documents**

(Save in relation to any SRF Offtake Contract (to which the provisions of clause 71.4 to 71.5 shall apply)), the Contractor shall perform its obligations under, and observe all of the provisions of, the Ancillary Documents and shall not:-

- 71.3.1 terminate or agree to the termination of all or part of any Ancillary Document;
- 71.3.2 make or agree to any material variation of any Ancillary Document;
- 71.3.3 in any material respect depart from its obligations (or waive or allow to lapse any rights it may have in a material respect), or procure that others in any material respect depart from their obligations (or waive or allow to lapse any rights they may have in a material respect), under any Ancillary Document; or
- 71.3.4 enter into (or permit the entry into by any other person of) any agreement replacing all or part of (or otherwise materially and adversely affecting the interpretation of) any Ancillary Document,

unless the proposed course of action (and any relevant documentation) has been submitted to the Authority's Representative for review under the Review Procedure and there has been no objection in accordance with paragraph 3 of the Review Procedure

within twenty (20) Working Days of receipt by the Authority's Representative of the submission of the proposed course of action (and any relevant documentation), or such shorter period as may be agreed by the Parties, and, in the circumstances specified in clause 71.3.1 (Ancillary Documents), the Contractor has complied with clauses 57 (Assignment and Sub-Contracting) and 59.3 (Change in Ownership).

71.4 **Consultation Process for Changes to SRF Offtake Contracts**

71.4.1 The Contractor shall procure that the Operating Contractor performs its obligations under, and observes all of the provisions of, the SRF Offtake Contract and shall procure that the Operating Contractor shall not:-

- (a) terminate or agree to the termination of all or part of any SRF Offtake Contract;
- (b) make or agree to any material variation of any SRF Offtake Contract;
- (c) in any material respect depart from its obligations (or waive or allow to lapse any rights it may have in a material respect), or procure that others in any material respect depart from their obligations (or waive or allow to lapse any rights they may have in a material respect), under any SRF Offtake Contract; or
- (d) enter into (or permit the entry into by any other person of) any agreement replacing all or part of (or otherwise materially and adversely affecting the interpretation of) any SRF Offtake Contract,

unless the proposed course of action (and any relevant documentation) has been submitted to the Authority's Representative for review under the Review Procedure and there has been no objection in accordance with paragraph 3 of the Review Procedure within twenty (20) Working Days of receipt by the Authority's Representative of the submission of the proposed course of action (and any relevant documentation, or such shorter period as may be agreed by the Parties).

71.4.2 At least:

- (a) on each SRF Contract Review Date; and
- (b) in relation to new SRF Offtake Contracts to be entered into as a result of a premature termination of a current SRF Offtake Contract, sixty (60) Working Days prior to the intended date for entering into any new SRF Offtake Contract (or such shorter period as may be reasonable in the circumstances given the length of any applicable termination notice period); or
- (c) in relation to variations to SRF Offtake Contracts, sixty (60) Working Days (or such shorter period as may be reasonable in the circumstances given the context within which the proposed variation is contemplated) prior to the intended date for entering into any new SRF Offtake Contract,

the Contractor shall (prior to completion of the process described in clause 71.4.3 below if applicable) deliver to the Authority's Representative copies of any draft contract or heads of terms in respect of such SRF Offtake Contract

together with all associated documentation and information which may be reasonably required and/or requested by the Authority in relation to such draft contract or heads of terms.

- 71.4.3 In relation to new SRF Offtake Contracts to be entered into pursuant to clauses 71.4.2(a) and 71.4.2(b), the details submitted by the Contractor will include:
- (a) the manner it proposes of advertising the tender of Template SRF Offtake Contract required and the means of identifying prospective tenderers;
 - (b) the tender requirements which must include:-
 - (i) a statement of the tender validity period;
 - (ii) the terms and conditions of the Template SRF Offtake Contract (applied mutatis mutandis);
 - (iii) the duration of the tender services which will be 5 years or such other period as may be agreed in advance by the Parties;
 - (iv) details of the service standards and outputs that will form the subject of the tender;
 - (v) the information that tenderers are required to provide;
 - (c) The method by which the tenders will be evaluated and the successful tenderer selected (as set out in clause 71.5 below).
- 71.4.4 In relation to variations pursuant to clause 71.4.2(c), the Parties shall undertake a process of consultation in relation to the intended contractual terms of such arrangements and the Contractor shall upon request by the Authority provide such further information as is reasonable so as to demonstrate to the Authority's satisfaction (acting reasonably) that the price payable to any SRF Offtaker under the terms of such contract(s) has not been increased, diluted or otherwise adjusted by any arrangement with the Contractor or any intermediate third party other than on an arms' length basis relating solely to this Project; provided always that where the Contractor is restricted (for reasons of confidentiality) from disclosing any such information regarding the terms of such off-take arrangements then the Contractor shall, upon the request of the Authority, provide through a properly audited process, confirmation of such information to the Authority's reasonable satisfaction.
- 71.4.5 The Authority shall be entitled to propose variations to the Contractor's proposed arrangements as referred to in clause 71.4.2 above and shall be entitled to put forward alternative options for the Contractor to explore with other potential offtake providers.
- 71.4.6 Once all such documentation and information has been submitted by the Contractor in accordance with the requirements of clause 71.4.2, the Contractor shall in due course be required to carry out the Review Procedure process set out in clause 71.4.1 above. Such process shall amount to the final stage of consultation between the Contractor and the Authority.
- 71.4.7 Provided that the Contractor has carried out the consultation process in accordance with the terms of clause 71.4.2 to 71.4.6 (inclusive), and the

documentation provided to the Authority under clause 71.4.1 reflects the terms of that consultation process, the Authority shall have no right to raise comments or objections in accordance with paragraph 3 of the Review Procedure under either of the grounds set out in paragraph 3.1.3 or 3.1.5 of such Review Procedure. For the avoidance of doubt, neither the Contractor nor the Operating Contractor shall be required to propose or enter into, an SRF Offtake Contract which contains a risk profile which is more onerous to the Contractor or the Operating Contractor than the risk profile contained in the Template SRF Offtake Contract.

71.4.8 The Operating Contractor shall enter into a new SRF Offtake Contract with the successful tenderer once the consultation process set out in clause 71.4 (Consultation Process for Changes to SRF Offtake Contracts) and the tender process set out in clause 71.5 (Tendering Procedure for SRF Offtake Contracts) has been completed.

71.5 Tendering Procedure for SRF Offtake Contracts

71.5.1 At least thirty (30) Working Days prior to the SRF Contract Review Date the Contractor shall, subject to clause 71.5.2, select the most economically advantageous tender received in respect of the provision of the Template SRF Offtake Contract on the following basis:-

- (a) if one or more compliant tenders are received, the Contractor shall pick the most economically advantageous tender from the compliant tenders received;
- (b) if only one compliant tender is received, the Contractor shall pick the compliant tender; and
- (c) if only non-compliant tender(s) are received, the Parties shall consider in good faith the reason for the non-compliance with the tender. If the reason for non-compliance is due to a failure by one or more of the tenderers to adhere to the requirements of the Template SRF Offtake Contract, then the Funder's Technical Adviser (acting on behalf of the Parties and the Senior Lender) shall, for the purposes of that tender, consider whether by alteration to the Template SRF Offtake Contract (and any change to the risk profile in such contract) terms could be agreed which would represent the best commercial agreement which could reasonably be expected to be reached with the non-compliant tenderer(s) and shall, acting reasonably, select the most economically advantageous tender from the non-compliant tenders for approval by the Parties (taking into consideration always clause 71.5.2 below). The Parties shall consider what amendments (if any) to the Agreement may be necessary to accept such non-compliant tender, and the Authority shall then instruct an irrevocable Authority Change to give effect to such amendments. In the event that the Parties cannot agree on the action to be taken in order to accept such non-compliant tender, either Party may refer to the Fast Track Dispute Resolution Procedure).

71.5.2 The Contractor shall upon request by the Authority provide such further information as is reasonable so as to demonstrate to the Authority's satisfaction (acting reasonably) that the price payable by any SRF Offtaker under the terms of such contract(s) has not been reduced, diluted or otherwise adjusted by any arrangement with the Contractor or any intermediate third party; provided

always that where the Contractor is restricted (for reasons of confidentiality) from disclosing any such information regarding the terms of such off-take arrangements then the Contractor shall, upon the request of the Authority, provide through a properly audited process, confirmation of such information to the Authority's reasonable satisfaction.

71.6 Delivery of Initial and Changed Ancillary Documents and Financing Agreements

71.6.1 The Contractor has provided to the Authority copies of the Ancillary Documents (as listed in Part 2 of Schedule 15) and of the Initial Financing Agreements.

71.6.2 Without prejudice to the provisions of clauses 71.6.1 or 40.2 (Changes to the Financing Agreement), or to the definition of Senior Financing Agreements, if at any time an amendment is made to any Ancillary Document or Financing Agreement, or the Contractor enters into a new Ancillary Document or Financing Agreement (or any agreement which affects the interpretation or application of any Ancillary Document or Financing Agreement), the Contractor shall deliver to the Authority a conformed copy of each such amendment or agreement within ten (10) Working Days of the date of its execution or creation (as the case may be), certified as a true copy by an officer of the Contractor.

72. EQUALITIES LEGISLATION

The Contractor shall not, and shall take all reasonable steps to secure that all servants, employees or agents of the Contractor and all Sub-Contractors employed in the execution of this Agreement do not, unlawfully discriminate within the meaning and scope of the provisions of the Sex Discrimination Act 1975, the Race Relations Act 1976, the Disability Discrimination Act 1995, the Employment Equality (Religion or Belief) Regulations 2003, the Employment Equality (Sexual Orientation) Regulations 2003 and the Employment Equality (Age) Regulations 2006 or any statutory modification or re-enactment thereof in relation to discrimination in employment or, any future Legislation which concerns discrimination in employment.

73. SUCCESSORS

This Agreement shall be binding upon and shall endure for the benefit of each Party's permitted successors and assigns.

74. INSPECTIONS AND APPROVALS BY THE AUTHORITY

74.1 Contractor Responsibility

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

74.1.1 inspect any part of the Works or the Waste Management Facilities;

74.1.2 check compliance by the Contractor with its obligations;

74.1.3 confirm or indicate approval of or non-objection to proposals made by the Contractor;

74.1.4 request the Contractor to make a Change; or

74.1.5 otherwise seek to influence the manner in which the Project is conducted by the Contractor

74.2 it will always be fully the responsibility of the Contractor, and not the responsibility of the Authority, to ensure that the Project is conducted in all respects in accordance with the Contractor's obligations under this Agreement. No such action by or on behalf of the Authority will in any way limit or affect such obligations.

74.3 **Legislation**

Without prejudice to the generality of clause 74.1, no such actions by or on behalf of the Authority will in any way lessen the Contractor's responsibility for ensuring that the Project is at all times conducted in a manner which complies with all applicable Legislation.

75. **ORDERING OF GOODS AND SERVICES**

Neither Party shall place or cause to be placed any orders with suppliers or otherwise incur liabilities in the name of the other Party or any representative of the other Party.

76. **LOCAL GOVERNMENT (CONTRACTS) ACT 1997**

76.1 **Certification Requirements**

The Certification Requirements are intended to be satisfied by the Authority with respect to this Agreement and the Direct Agreement before the end of the period relating to each Agreement within which the Certification Requirements must be satisfied for the agreement to be a certified contract for the purposes of the Local Government (Contracts) Act 1997.

76.2 **Contractor's Consent**

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

76.3 **Failure to Issue a Certificate**

If a certificate is not issued by the Authority pursuant to clause 76.2 (Contractor's Consent) within six (6) weeks of the date of this Agreement then the Contractor shall be entitled by giving notice in writing to the Authority within five (5) Business Days of such date to terminate this Agreement, whereupon the Authority shall pay to the Contractor an amount equal to the compensation that would be payable in accordance with clause 35 (Compensation on Termination for Authority Default/Voluntary Termination) on termination for Authority Default pursuant to clause 29.2 (Termination on Authority Default).

76.4 **Relevant Discharge Terms**

The relevant discharge terms within the meaning of section 6 of the Local Government (Contracts) Act 1977 are set out in Schedule 20 (Relevant Discharge Terms).

77. **NOT USED**

78. **GOVERNING LAW AND JURISDICTION**

This Agreement shall be governed by and construed in all respects in the accordance with the laws of England and Wales. Subject to clause 54, the English Courts shall have exclusive jurisdiction to settle any disputes which may arise out of or in connection with this Agreement.

79. **NOT USED**

80. **SOLE REMEDY**

80.1 **Common Law Rights for the Contractor**

Without prejudice to any entitlement of the Contractor:-

80.1.1 to specific performance of any obligation under this Agreement; or

80.1.2 to injunctive relief,

the Contractor's sole remedy in relation to any Compensation Event that affects the Works (as opposed to the Services) at any Site that occurs on or prior to the Longstop Date shall be the operation of clause 15.5 (Delays due to a Compensation Event) or where this Agreement provides an express remedy in respect of such breach.

80.2 **Common Law Rights of the Authority**

Subject to:-

80.2.1 clause 80.3;

80.2.2 any other express right of the Authority pursuant to this Agreement; and

80.2.3 the Authority's right to claim, on or after termination of this Agreement, the amount of its reasonable costs, losses, damages and expenses suffered or incurred by it as a result of rectifying or mitigating the effects of any breach of this Agreement by the Contractor, save to the extent that the same has already been recovered by the Authority pursuant to this Agreement or has been taken into account to calculate any compensation payable by the Authority pursuant to clauses 38 (Compensation on Termination for Force Majeure), 37 (Compensation on Termination for Contractor Default), 35 (Compensation on Termination for Authority Default/Voluntary Termination) or 36 (Compensation on Corrupt Gifts, Fraud and Refinancing Breaches);

the sole remedy of the Authority in respect of a failure on the part of the Contractor to provide the Services in accordance with this Agreement shall be the operation of Schedule 5 (Payment Mechanism).

80.3 **LATS and Landfill Tax**

Notwithstanding any other provision of this Agreement, the sole remedy of the Authority against the Contractor for any costs, losses, damages and expenses suffered or incurred by it in respect of Landfill Tax or the LATS during the term of this Agreement or on or after termination of the Agreement shall be:-

- 80.3.1 under Schedule 5 (Payment Mechanism); and
- 80.3.2 any adjustment to any amounts payable to the Contractor on termination for Contractor Default as a consequence of those adjustments being taken into account by bidders under clause 37.2 (Retendering Procedure) or by an expert under clause 37.3 (No Retendering Procedure).

Save where stated to the contrary, the indemnities under this Agreement shall not apply and (without prejudice to the Authority's rights under the Payment Mechanism) there shall be no right to claim damages for breach of this Agreement, in tort or on any other basis whatsoever, to the extent that any loss claimed by either Party is for Indirect Losses. The Authority agrees that, notwithstanding the foregoing, any Losses of the Contractor arising under the Sub-Contracts as originally executed (or as amended in accordance with the terms of this Agreement) which are not of themselves Indirect Losses, shall not be excluded from such a claim solely by reason of this clause.

81. CONSTRUCTION INDUSTRY SCHEME

- 81.1 This clause 81 relates to the Construction Industry Scheme ("the Scheme") the framework of which is contained in the Finance Act 2004 with the operational details contained in the Income Tax (Construction Industry Scheme) Regulations 2005 SI 2005/2045 ("2005 Regulations") and which commenced on 6 April 2007 as from time to time modified or replaced whether before or after the date of this Agreement.
- 81.2 All payments made under this Agreement will be paid in accordance with this clause.
- 81.3 The Parties believe that all payments made under this Agreement will be exempt from the Scheme under Regulation 23 SI 2005/2045 (Arrangements involving public bodies).
- 81.4 If and to the extent that payments are not exempt from the Scheme by virtue of Regulation 23, the Parties agree to operate the Scheme in accordance with the 2005 Regulations, the Finance Act 2004 or any other statute or subordinate legislation ("the Relevant Legislation") relating to the Scheme as from time to time modified or replaced whether before or after the date of this Agreement and in particular the Authority shall be entitled to make the statutory deduction from any payment due to the Contractor in accordance with the 2005 Regulations and/or the Relevant Legislation.
- 81.5 If compliance with this clause involves the Authority or the Contractor in not complying with any other of the terms of this Agreement (save for the Parties' obligations to comply with all laws), then the provisions of this clause shall prevail.

82. CAPACITY

Without prejudice to the Contractor's remedies under this Agreement, nothing in this Agreement shall fetter or constrain the Authority from exercising its statutory powers or performing its statutory duties.

IN WITNESS whereof the Parties have executed this Agreement as a Deed on the date first before written.

THE COMMON SEAL of CUMBRIA) C22460
COUNTY COUNCIL was hereunto affixed)
in the presence of:-)

Authorised Signatory *Timothy Howes*

EXECUTED AS A DEED by SHANKS)
CUMBRIA LIMITED by a ~~director~~ *attorney*)
in the presence of a witness:-)

Attorney ~~Director~~ Signature

Attorney ~~Director~~ Name *Anthony Peter Sharpe*

Witness Signature *A Doyle*

Witness Name *Anna Doyle*

Witness Address *3 Noble Street, EC2V 7EE*