



DATED

27 OCTOBER 2000

DEPARTMENT OF INFRASTRUCTURE (1)

(following a transfer of functions from the DEPARTMENT OF LOCAL GOVERNMENT AND THE  
ENVIRONMENT ~~(1)~~)

- and -

SUEZ RECYCLING AND RECOVERY ISLE OF MAN LTD (2)

(ORIGINALLY, UNITED WASTE (ISLE OF MAN) LIMITED ~~(2)~~ and formerly SITA WASTE  
(ISLE OF MAN) LIMITED)

CONFORMED COPY SHOWING DOCUMENT STATUS AS AT JULY 2016

PROJECT AGREEMENT

INTEGRATED INCINERATOR (ENERGY FROM WASTE)  
FACILITY

~~BEVAN~~  
~~ASHFORD~~  
~~SOLICITORS~~

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## **INTRODUCTORY NOTE TO THE 2016 CONFORMED COPY**

The original Project Agreement (the "PA") was signed on 27 October, 2000. Since then:

- the functions of the Department of Local Government and the Environment have transferred to the Department of Infrastructure (the Department)
- ProjectCo changed its name from United Waste (Isle of Man) Limited to SITA Waste (Isle of Man) Limited on 5 February 2002 and then changed its name to SUEZ RECYCLING AND RECOVERY ISLE OF MAN LTD on 2 April 2016
- there have been several changes to the text of the PA as a result of variations and service changes.

This conformed copy shows the Variations and Services Changes which are current at 1 July 2016. These Variations have been embodied in the variation orders ("VO") of two Deeds of Variation, namely Deed of Variation 1 ("DofV1"), dated 1 February 2003 and Deed of Variation 2 ("DofV2"), dated 1 October 2014.

The effective dates for the changes to the PA which were recorded in DofV2 are given in DofV 2 clause 8 and the Appendices to DofV 2. Where a change has been made, a footnote to the principal definition and/or to the text affected shows which variation order and/or appendix number of DofV1 or DofV2 gave rise to the change.

While care has been taken in producing this document to capture all available information relating to changes to the original Project Agreement, the accuracy of this conformed copy is not warranted.

This document has been compiled for reference and administration purposes only and is not a substitute for the original documentation which records the agreement between the counterparties.

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THIS AGREEMENT is made on the 27<sup>th</sup> day of October 2000

BETWEEN:

- (1) DEPARTMENT OF ~~LOCAL GOVERNMENT AND THE ENVIRONMENT~~ INFRASTRUCTURE, a department of the Isle of Man Government of ~~Murray House Mount Havelock~~ Sea Terminal, Douglas, Isle of Man IM1 2SF ~~RE~~ ("the Department") and
- (2) ~~UNITED WASTE (ISLE OF MAN) LIMITED~~ SUEZ Recycling and Recovery Isle of Man Limited, formally known as SITA (Isle of Man) Limited, formerly United Waste (Isle of Man) Limited, being a company incorporated under the Companies Acts of the Isle of Man and having its registered office ~~situate at 15-19 Athol Street~~ situated Energy from Waste Facility, Richmond Hill, Douglas, Isle of Man, IM1 2LB ~~4~~ IJH (~~"ProjectCo"~~)

WHEREAS

- (A) In December 1990 Tynwald approved the adoption of a Waste Management Strategy including the provision of an integrated incinerator (energy from waste) facility. This was subsequently amended in February 1994 and has been debated and endorsed on a number of occasions since.
- (B) On 16 September 1999, the Department invited ProjectCo, with others, to tender for the design, construction, operation, maintenance and handback of the Facility.
- (C) ProjectCo has been selected by the Department and agrees to carry out the Works and perform the Services.

THE PARTIES RECORD THEIR AGREEMENT TO THE FOLLOWING:

## 1 DEFINITIONS

- |                                 |  |
|---------------------------------|--|
| <b>"Abatement Cap"</b>          | means the amount described at Clause 2.4.3 in Part 2 of Schedule 1 to this Agreement.  |
| <b>"Abatements"<sup>1</sup></b> | means reductions made to the Gate Fees pursuant to Part 2.4 of Schedule 1 to this Agreement.   |
| <b>"Action Notice"</b>          | means a notice served on ProjectCo by the Department authorising and requiring ProjectCo to implement a Services Change in accordance with a Services Change Notice previously issued by the Department. |

<sup>1</sup> DofV 1 changed some of the Abatements. In DofV2, the Parties recorded that Appendix 16 (of DofV2) sets out the amounts of the Abatements in respect of the operating years 2004/5 to 2011/12. Appendix 16 of DofV2 is replicated in this PA at Appendix 7. It takes effect from 0001hrs on 17 August 2009.

<b><u>"Additional Landscaping"</u></b>	<u>means the works and services described or referred to in paragraph 1.9 of Schedule 1 to this Agreement.<sup>2</sup></u>
<b>"Adjudication Rules"</b>	means the rules applicable to an adjudication pursuant to Clause 19 of this Agreement set out in Schedule 13.
<b>"Agreement Period"</b>	means the period from the Effective Date to the Expiry Date.
<b>"Annual Maintenance Plan"<sup>3</sup></b>	means the ongoing detailed plan updated monthly covering a consecutive period of at least one year describing all planned maintenance and repair of the Facility.
<b>"Annual Thermal Load"</b>	means the aggregate Thermal Load in any Operating Year.
<b>"Applicable Laws"</b>	means any law, regulation, statute, rule, order, standards or delegated legislation of the Isle of Man (whether primary or subordinate legislation and specifically including regulations made thereunder) or applied to the Isle of Man by order in council or specifically by Act of the Imperial Parliament, European Community Directives directly applicable to the Isle of Man and/or any other such laws, regulations, statutes, rules, orders, standards, delegated legislation or European Community Directives not applicable to the Isle of Man but specified in the Project Agreement or the Department's Requirements as applicable to this Project.
<b>"Approvals"</b>	means all licences, consents, permits, authorisations, validations and approvals or any similar permissions required to be granted to ProjectCo of or from Tynwald the Governor in Council any Government Department Statutory Board, Local Authority or Regulatory Authority for the performance of any of the obligations of ProjectCo under this Agreement.
<b>"Approved Service Provider"</b>	means the Consortium Member or third party previously approved in writing by the Department and appointed by ProjectCo to provide the Services.
<b>"As Built Documentation"</b>	means all Construction Documents required in complete and finalised form prior to Take Over in accordance with Clause 4.12 of Schedule 2 provided that the O&M Manuals, Operational Plan, and Annual Maintenance Plan shall be

<sup>2</sup> The Department and ProjectCo agreed to the additional landscaping described in VO 3 and DoFV 2, Appendix 2.

<sup>3</sup> This definition should be read in light of DoFV 2, clause 5.4. See paragraph 2.6.4 of Schedule 3 of this Agreement.

incomplete but in draft form only at Take Over and finalised prior to Final Take Over.

**“Availability Fee<sup>4</sup>”**

means that part of the Variable Element of the Gate Fees representing ProjectCo’s fixed costs in operating and maintaining the Facility as identified in ProjectCo’s Proposal as varied pursuant to the terms of this Agreement.

**“Available”**

means able to accept Conforming Waste for storage and disposal in accordance with the terms of this Agreement. The Facility shall be deemed to be Available during a period of Planned Outage or during an Unplanned Outage if the Facility continues to receive Conforming Waste and no more Conforming Waste is stored at the Facility than is permitted by the Approvals in force at the relevant time.

**“Base Date”**

means 25 December 1999.

**“Bottom Ash”**

means the following fractions:

- (i) The solid remains of the Primary and Secondary Waste as extracted at bottom outlet of the incinerators
- (ii) Boiler ashes, i.e. any ash collected from cleaning the boiler systems.

**“Bottom Ash Disposal Contract”**

means an agreement in the form set out in Schedule 18.

**“Business Day”**

means any day within Monday to Friday inclusive but excluding statutory or bank holidays.

**“Capacity Diagram”**

means the diagram annexed to the Department’s Requirements illustrating thermal input against tonnage input of waste, the Nominal Load Point and the intervals of thermal input, tonnage of waste and calorific value which the Facility shall be able to operate within.

**“Capital Impact”**

means in connection with the performance of any of the O & M Obligations that in order to comply with a Legislative Change, it is necessary for ProjectCo to incur expenditure of a capital nature.

**“Claims”**

means without limitation any and all fees, costs, claims, expenses (including legal costs of any solicitor or advocate on an attorney and client costs full indemnity basis), actions, proceedings, damages (including Liquidated Damages and

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<sup>4</sup> [Changes made to the Availability Fee are tabulated in Appendix 2 to this Conformed Copy](#)

Abatements), demands, charges, losses, fines, liabilities under or in connection with this Agreement to or of or brought against the Department or ProjectCo as the context allows and "Claim" shall be construed accordingly.

**"CMS System"**

means a computerised data collection, processing and reporting system meeting the requirements set out in the Department's Requirements and utilising the hardware and the software to be supplied and operated by ProjectCo in connection with the performance of the Services.

**"CPO"**

means a compulsory purchase order relating to the acquisition of part of the Site and re-routing of a right of way over the Site pursuant to a Notice to Treat dated 26 August 1999.

**"Compensatory Adjustment"**

means (in relation to Directly Procured Items) the amount calculated by applying the relevant rate (or rates) of Value Added Tax to the relevant amount. The relevant rate (or rates) of Value Added Tax shall be the rate applicable in the Isle of Man to the supply of such items and related installation, storage, transportation, insurance, clearance, delivery, testing and commissioning costs in force on the date specified in Clause 6.7.8 when the Department becomes entitled to make the Compensatory Adjustment. The relevant amount shall be the amount by which the actual cost of all Directly Procured Items properly invoiced as such by ProjectCo to the Department is less than the total cost of Directly Procured Items shown in ProjectCo's Proposal.

**"Conditions Cut-Off Date"<sup>5</sup>**

means ~~the date which is four months after the Execution Date~~<sup>30<sup>th</sup> April 2001</sup> (other than the conditions to obtain Reserved Matters Approval, the CPO and completion of the Remediation Works, for which the date shall be 15 months after ~~the Execution Date~~<sup>30 April 2001</sup> or such other date as may be agreed in writing by the parties.)

**"Conditions Precedent"**

means those conditions contained in Part 1 of Schedule 16.

**"Conforming Waste"**

means waste so defined and having the characteristics described in Schedule 7 to this Agreement.

**"Consignment Note System"**

means a process broadly equivalent to that set out in the Special Waste Regulations 1996 (SI 1996/972) applicable in England and Wales relating to the pre-notification provision and

<sup>5</sup> [The Department and ProjectCo agreed to base the Conditions Cut-Off Date on 30th April 2001 in VO 5 \(Appendix 4 of DoV2\). This Variation has effect on and from 27th April, 2001.](#)

retention of information relating to special waste (as defined therein).

**“Construction Documents”**

means (in such state of completion and/or finality as the context requires and such of the following as the Department or the Department’s Representative may specify by reasonable prior written notice to ProjectCo as are required in any of the circumstances identified in this Agreement but so that if no such notice is given all such documents shall be required) all drawings which shall include without limitation architectural, civil, mechanical and electrical layout drawings also showing in detail the required need for walking areas, emergency exits, safety and fire fighting facilities, ventilation facilities, working and repair areas, workshops, consumables and stock facilities, staff facilities, control room, administrative facilities, waste streams and residue storage and treatment facilities, with construction drawings showing all necessary details to enable maintenance, repair, extension or replacement of parts or the whole of the Facility, all calculations to enable maintenance and repair, extension or replacement of parts or the whole of the Facility including a detailed description of the standards used, computer software programs, samples, patterns, models and records of the Quality Assurance System and Health and Safety Obligations, the O & M Manuals, the Operational Plan and other manuals and information of a similar nature, to be submitted from time to time by ProjectCo in accordance with this Agreement.

**“Construction Period”**

means the period from the Effective Date to the Test Start Date.

**“Cost”**

means the additional expenditure reasonably and properly incurred (or to be incurred where the context allows) in the performance of the Works by ProjectCo, whether on or off the Site, including overhead and similar charges, but does not include profit.

**“Council of Ministers”**

means those Ministers appointed by the Governor in Council in accordance with the Council of Ministers Act 1990.

**“D & B Contract”**

means any contract for the Works or part thereof between ProjectCo and any D & B Contractor.

**“D & B Contractor”**

means Kvaerner Engineering & Construction UK Limited and any additional or replacement contractor contracting directly with ProjectCo carrying out any part of the Works identified in

Annex 1 of Schedule 2.

<b>“D &amp; B Contractor’s Warranty”</b>	means a warranty to be given by the D & B Contractor pursuant to Clause 9 in the form set out in Schedule 9 Part 1.
<b>“D &amp; B Contract Price<sup>6</sup>”</b>	means the sum stated in Clause 1.1.1 of Schedule 1 as payable to ProjectCo for the Works as amended in accordance with this Agreement.
<b>“D &amp; B Indices”</b>	means the Manx RPI Index DETR Labour Index and DETR Materials Index applied in the proportions; 15%:25%:60% respectively.
<b>“D &amp; B Obligations”</b>	means the respective rights and obligations of the parties in respect of the Works which are set out in this Agreement.
<b>“D &amp; B Performance Bond”</b>	means a guarantee bond in the form set out in Schedule 11 Part 1 for the period from the Execution Date to Take Over and an on demand bond in the form set out in Schedule 11 Part 2 for the period from Take Over to Final Take Over (as the context requires) to be procured by ProjectCo pursuant to Clause 9.
<b>“D &amp; B Phase”</b>	means the period from the Execution Date to the date two years after Take Over (subject to extension pursuant to Clause 11.4 of Schedule 2).
<b>“D &amp; B Progress Reports”</b>	Means the reports described in Clause 3.25 of Schedule 2 to this Agreement.
<b>“D &amp; B Schedule of Payments<sup>7</sup>”</b>	Means the schedule of payments set out in Schedule 1, Part 1.
<b>“D &amp; B Subcontractor”</b>	Means any person to whom a part of the Works (including without limitation any design services) listed in Annex 1 of Schedule 2 has been subcontracted by the D & B Contractor (or its subcontractors of whatever degree) and any replacement therefor.
<b>“D &amp; B Subcontractor’s Warranty”</b>	means a warranty to be given by a D & B Subcontractor pursuant to Clause 9 in the form set out in Schedule 9 Part 2.

<sup>6</sup> Changes made to the D & B Contract Price are tabulated in Appendix 2 to this Conformed Copy.<sup>1</sup>

<sup>7</sup> The Department and ProjectCo agreed to change the D & B Schedule of Payments in VO 7, DofV 1 and DofV 2, Appendix 6, para 2. The agreed revised Schedule of Payments is incorporated into Schedule 1, Part 1, Para 1.3 (Stage Payments) in this Conformed Copy.

<b>“day”</b>	means a calendar day.
<b>“Delivery Point(s)”</b>	means in the case of Primary Waste the point at which it is deposited into the bunker at the Facility and in the case of each fraction of Secondary Waste the point at which it is deposited in the relevant store for that fraction of Secondary Waste at the Facility.
<b>“Department’s Representative”</b>	means the person or persons appointed by the Department to act as Department’s Representative for the purpose of the O & M Obligations and the D & B Obligations and identified in writing by the Department from time to time.
<b>“Department’s Requirements”</b>	means the Department’s Requirements set out in Schedule 7.
<b>“Design Completion”</b>	means satisfaction of the conditions set out in Clause 4.11.4 of Schedule 7.
<b>“Design Period”</b>	means the period from the Execution Date to the Effective Date.
<b>“DETR Index”</b>	means the Price Adjustment Formulae for Contracts produced by the United Kingdom’s Government Department of Environment Transport and Regions and published by the Stationery Office or any published replacement index therefor.
<b>“DETR Labour Index”</b>	means an index comprising in equal proportions, the following elements only of the DETR Index: (i) the Special Engineering Formula - Mechanical Labour (ii) the Civil Engineering Formula - Labour and supervision in civil engineering (iii) Building Formula, Appendix 1 - Building Labour (skilled)
<b>“DETR Materials Index”</b>	means an index comprising, in the respective proportions 0.165, 0.165 and 0.67, the following elements only of the DETR Index: (i) Building Formula - concrete (ii) Building Formula - steelwork (iii) Building Formula - boilers, pumps and radiators
<b>“Directly Procured Items<sup>8</sup>”</b>	means those items of Plant to be procured from third parties located in member states of the European Union other than the United Kingdom.

<sup>8</sup> [The services required under VO 3 Additional Landscaping were not Directly Procured Items: VO 3 and DofV 2 Appendix 2, para 3.](#)



<b><u>"DofV 1"</u></b>	<u>means the Deed of Variation Number 1 agreed between the parties in January 2003</u>
<b><u>"DofV 2"</u></b>	<u>means the Deed of Variation Number 2 agreed between the parties and executed on 1 October 2014</u>
<b>"DOLGE"</b>	means the Department of Local Government and the Environment acting in its regulatory capacity only.
<b>"DPI Supplier"</b>	means the party supplying Directly Procured Items to the Department pursuant to an agreement negotiated with ProjectCo and approved by the Department.
<b>"Due Date"</b>	means <ul style="list-style-type: none"> <li>(a) in relation to payments made pursuant to the D &amp;B Schedule of Payments, 35 days after the date on which the Department's Representative receives ProjectCo's statement and supporting information in accordance with Clause 12.2 or 12.9 of Schedule 2 for the interim and final payments respectively.</li> <li>(b) in relation to payments of the Variable Element of the Gate Fees, 21 days after the delivery of a Monthly Invoice, or if that day is not a Business Day, the next following Business Day.</li> <li>(c) in relation to payments of the Fixed Element of the Gate Fees, 21 days after the delivery to the Department of a valid VAT invoice addressed to the Department, or if that day is not a Business Day, the next following Business Day.</li> </ul>
<b>"Duty of Care"</b>	means that duty of care as prescribed in the Public Health Act 1990 as amended by legislation bringing into force the Public Health (Amendment) Bill 1999.
<b>"E C Appointment"</b>	means the Deed of Appointment in the form set out in Schedule 20 to this Agreement with such amendments as are reasonably required by the Environmental Consultant and agreed by the Department and ProjectCo (such agreement not to be unreasonably withheld or delayed).
<b>"Electricity Agreement"</b>	means an agreement to be entered into between ProjectCo and the Manx Electricity Authority in the form set out in Schedule 6.

<b>“Effective Date”</b>	means 0001 hours on the next Business Day following the day on which the last of the Conditions Precedent shall have been satisfied.
<b>“EMAS Validation ”</b>	means a confirmation by an accredited environmental verifier that the validated company has had its environmental policy, programme, management system, review or audit procedure and environmental statement or statements examined and that they meet the relevant requirements of the EC Eco-Management and Audit Scheme as established by European Union/Community Regulation 1836/93 (EC).
<b>“Emergency”</b>	means the Facility is not Available.
<b>“Emergency Plan”</b>	means the steps and obligations set out in Schedule 19 to this Agreement.
<b>“Environmental Consultant”</b>	means an environmental consultant with suitable appropriate experience in the surveying and investigation of contamination of the scope and nature that is likely to be found on the Site, the interpretation of the results thereof and the design and supervision of any likely appropriate remediation works such consultant shall be selected from a list first approved in writing by the Department and jointly appointed by the Department and ProjectCo in the form of the EC Appointment in accordance with Clause 4A of this Agreement.
<b>“Environmental Contamination”</b>	means any material contamination or pollution of the air, ground or water above or surrounding the Site including the Facility or any part thereof which is in contravention of any Applicable Laws and/or Approvals.
<b>“EU Standards”</b>	means those EU standards specifically identified in the Department’s Requirements.
<b>“Execution Date”</b>	means the date of this Agreement.
<b>“Expiry Date”</b>	means the earlier of the Termination Date and 2359 hours on the twenty-fifth anniversary of the day preceding Take Over
<b>“Facility”</b>	means the integrated incineration (energy from waste) plant and associated works and services to be designed, constructed, installed, tested, commissioned and completed by ProjectCo more particularly described in the Department’s Requirements and ProjectCo’s Proposal. For the avoidance of

doubt the Facility shall include all Directly Procured Items.

<b>“Final Payment Certificate”</b>	means the payment certificate issued by the Department's Representative under Schedule 2 Clause 12.13.
<b>“Final Statement”</b>	means the final statement defined, submitted and agreed in accordance with Clauses 12.9 - 12.12 of Schedule 2.
<b>“Final Take Over”</b>	means the date of issue of the Final Taking Over Certificate.
<b>“Final Taking Over Certificate”</b>	means the certificate issued by the Department's Representative in accordance with Schedule 2 Clause 11.11.
<b>“Financial Model”</b>	means the Financial Model contained in ProjectCo's Proposal as amended from time to time in accordance with this Agreement.
<b>“Financier”<sup>9</sup></b>	means <del>any party providing finance to the Department connected to this project.</del> <u>Isle of Man Bank Limited (a company incorporated in the Isle of Man with company number 1) whose registered office is at 2 Athol Street, Douglas, Isle of Man IM99 1AN or such replacement person as the Department may notify to ProjectCo in writing from time to time as having an insurance interest in the Facility.</u>
<b>“Fixed Element”</b>	means that part of the Gate Fee payable pursuant to Clause 2.1.1 of Schedule 1 to this Agreement.
<b>“Flue Gas Treatment Residues”<sup>10</sup></b>	means the reaction products as precipitated in the flue gas treatment systems for Primary and Secondary Waste.
<b>“Force Majeure”</b>	(a) Means the occurrence of all or any of the following events:-war, civil war or armed conflict ; or (b) Nuclear, chemical or biological contamination affecting the Facility unless the source or cause of contamination arises from the act omission negligence or wilful default of ProjectCo or its Staff; or (c) Supersonic pressure waves.
<b>“Gate Fees”<sup>11</sup></b>	means the fees payable by the Department to ProjectCo

<sup>9</sup> The words in italic type were added by DofV 2, clause 2.1. Pursuant to DofV2, clause 8.1, this variation is deemed to have taken effect between the Parties with effect from 0001 hrs on August 17<sup>th</sup>, 2009.

<sup>10</sup> The Department and ProjectCo agreed in VO 10 (DofV 2, Appendix 8) to a future retrofit of a flue gas cleaning system "based on the SCR process". None of the D & B Contract Price, Availability Fee or Operating Costs are to be altered as a result.

<sup>11</sup> The Department and ProjectCo agreed to include "Sewage Sludge Screenings" in Primary Waste in VO 11 (Appendix 9 of DofV 2), on terms that the Parties would review the Gate Fee if a decision to burn Sewage Sludge Screenings in the Primary Waste Stream incinerator was taken.<sup>1</sup>

	referred to in Schedule 1 Part 2.1.
<b>“General Legislative Change”</b>	means Legislative Change which is not a Specific Legislative Change.
<b>“Golden Share”</b>	means one fully paid issued ordinary share of £1 in ProjectCo having the rights specified in Schedule 14.
<b>“Government”</b>	means the Isle of Man Government.
<b>“Government Department”</b>	means any department of the Government, whether acting through its Minister or otherwise any sub-division or part thereof and any department, Statutory Board, authority, agency, bureau, or tribunal having or exercising authority or delegated authority over the Department or ProjectCo or their respective functions or operations as the case may be.
<b>“Governor in Council”</b>	means the Governor acting on the advice and with the concurrence of the Council of Ministers.
<b>“Guarantee Period”</b>	means the period from Take Over to Final Take Over.
<b>“Handback Obligations”</b>	means the requirements with regard to the handback of the Facility to the Department on the Expiry Date set out in this Agreement in particular, but without limiting the generality of the foregoing, in Schedules 7 and 17.
<b>“Hazardous Materials”</b>	means any substance whether a solid, liquid, gas or vapour (other than Conforming Waste) which alone or in combination with anything else is capable of causing harm or damage to property or to man or to any other organism supported by the environment including without limitation, hazardous substances, pollutants, contaminants, petroleum, petroleum products and radioactive material and waste.
<b>“Health and Safety Obligations”</b>	means those obligations set out in Schedule 15 to this Agreement.
<b>“Imperial Parliament”</b>	means the Parliament of the United Kingdom.
<b>“Insurance Proceeds Account”</b>	means a designated deposit account held on the terms set out in Clause 17.11 by the solicitors appointed from time to time by the Department.
<b>“Insured Risks”</b>	means the risks to be insured more particularly described in Clause 17 and Schedule 5.

<b>“Intellectual Property Rights”</b>	means all copyright, patents or patent rights, registered and unregistered design rights, trade marks, trade names and all other intellectual or industrial property rights of whatever nature wherever in the world enforceable.
<b>“Interim Payment Certificate”</b>	Means any payment certificate issued by the Department's Representative under Schedule 2 Clause 12, other than the Final Payment Certificate.
<b>“Key Personnel”</b>	means ProjectCo's Representative and, in respect of the D & B Phase, the project director, project manager, site manager, lead designers and the D&B Contractor's project manager and thereafter the persons occupying the positions of general manager, operations manager, maintenance manager, technical services manager, administration manager or such other persons who report directly to the general manager.
<b>“Know-How”</b>	means all identifiable material, experience, data and all other technical or commercial information relating to the Facility whether in human or machine readable form and whether stored electronically or otherwise and which might reasonably be of commercial interest to any party in the operation and maintenance of the Facility.
<b>“Latent Defect”</b>	means any failure of the Works to comply with the Department's Requirements and/or any defect in or arising from the design of the Facility, Plant, Materials or workmanship discovered after the issue of the Final Taking Over Certificate and which (if arising from any act or omission done or omitted prior to the issue of the Final Taking Over Certificate) a reasonable examination by the Department's Representative of the test data produced in compliance with ProjectCo's obligations in respect of the Tests after Take Over or a reasonable physical examination of the Facility immediately prior to the issue of the Final Taking Over Certificate would not have disclosed.
<b>“Lease”</b>	means the lease or sublease to be granted by the Department to ProjectCo in the form of the draft set out in Part 2 of Schedule 4.
<b>“Legislative Change”</b>	means any change in the Applicable Laws having an impact on ProjectCo and the performance of its obligations under this Agreement and which takes effect after the Base Date save as expressly provided otherwise in this Agreement.

<b>“Liquidated Damages”</b>	means the amounts payable by ProjectCo to the Department pursuant to Clause 7.11 of Schedule 2 and set out in Clause 1.5 of Part 1 of Schedule 1.
<b>“Local Authority”</b>	<p>means</p> <p>(a) Within the borough of Douglas, the municipal corporation of such borough;</p> <p>(b) Elsewhere within the Isle of Man, the commissioners of any local government district;</p> <p>where the context so admits any joint board constituted by representatives of any one of more constituent authorities established or deemed to be established by order under section 7 of Local Government Act 1985 or any other enactment or any joint committee appointed by one or more local authorities under section 17 of the Local Government Act 1985 or any other enactment.</p>
<b>“Local Currency”</b>	means pounds sterling (or the Euro, in the event that the Euro becomes the currency of the Isle of Man in which case any sums payable under this Agreement shall be calculated at the rate applicable when the Euro first replaced pounds sterling as the currency of the Isle of Man).
<b>“Long Stop Date”</b>	means twelve months after the Time for Completion.
<b>“Manx RPI Index”</b>	means the Isle of Man Index of Retail Prices published monthly by the Economic Affairs Division of the Treasury of the Isle of Man Government or any other published index which replaces it.
<b>“Materials”</b>	means things of all kinds (other than Plant) to be provided and incorporated in the Works by ProjectCo, including the supply-only items (if any) and Directly Procured Items which are to be supplied by ProjectCo as specified in this Agreement.
<b>“MEA”</b>	means the Manx Electricity Authority and any successor to its statutory functions.
<b>“month”</b>	means a calendar month.
<b>“Monthly Invoice”</b>	means an invoice in respect of the Variable Element of the Gate Fee produced and agreed in accordance with Schedule 1 Part 2.2.

<b>“Net Calorific Value”</b>	means the energy released by combustion in air at standard pressure presuming that all waste leaves the combustion process in its evaporated state.
<b>“Nominal Load Point”</b>	means the hourly throughput in metric tonnes and the corresponding Net Calorific Value.
<b>“Nominated Currency”</b>	means the currency identified in ProjectCo’s Proposal as the currency in which part of the D & B Contract Price shall be paid. The currency is the Euro.
<b>“O &amp; M Default Notice”</b>	means a notice served by the Department (acting reasonably) on ProjectCo requiring ProjectCo to remedy any failure, breach or non performance of the O & M Obligations or any of them in such manner and within such period as the Department may direct.
<b>“O &amp; M Direct Agreement”</b>	means an agreement in the form set out Schedule 12.
<b>“O &amp; M Manuals”</b>	means the documents and drawings required for the operation, maintenance, renewal and decommissioning of the Facility or any part thereof to be prepared by ProjectCo pursuant to the Department’s Requirements.
<b>“O &amp; M Obligations”</b>	means the respective rights and obligations of the parties in respect of the Services which are set out in this Agreement.
<b>“Operation and Maintenance System”</b>	means the operation, maintenance, reporting and documentation procedures and systems used for daily operation, maintenance and reporting, and based on the CMS System.
<b>“Operating Fee<sup>12</sup>”</b>	means that part of the Variable Element of the Gate Fees equal to the amount in tonnes of Conforming Waste received at the Facility each month multiplied by the amount per tonne identified in ProjectCo’s Proposal or such other figure agreed by the parties pursuant to the terms of this Agreement
<b>“Operating Period”</b>	means the period from Take Over to the Expiry Date.
<b>“Operating Year”</b>	means each period of twelve consecutive months between 1 April and 31 March in the Agreement Period provided that the

<sup>12</sup> [Changes made to the Operating Fee are tabulated in Appendix 2 to this Conformed Copy. In accordance with Clause 9.4 of DofV2, the Parties record their agreement to the Availability and Operating Fee amounts set out in Appendix 8 to this PA \(Appendix 17 of DofV2\) which are payable with effect from 0001hrs on August 1<sup>st</sup>, 2010.](#)<sup>1</sup>

first Operating Year shall start on Take Over and last until and including the following 31 March and the last Operating Year shall start on 1 April and end on the Expiry Date notwithstanding the duration of the period.

<b>“Operational Plan”</b>	means ProjectCo’s detailed plan and description of all procedures for operation of the Facility, including, without limitation, energy recovery, management of staff, repair, reception and storage facilities, stocks of consumables and Strategic Spare Parts and Wear Parts, acceptance and disposal of Waste Streams, Residues and environmental monitoring.
<b>“Parent Company Guarantee”</b>	means a guarantee in the form set out in Schedule 10 Part 1 to be provided by Groupe Fabricom S.A. and a guarantee in the form set out in Schedule 10 Part 2 to be provided by Kvaerner E & C Plc.
<b>“Payment Notice”</b>	means a notice issued by the Department’s Representative pursuant to Schedule 1 Part 2.2.
<b>“Plan<sup>13</sup>”</b>	means the plan set out in Schedule 4 Part 1 to this Agreement reference NE70257/028/C, <a href="#"><u>read in conjunction with Kvaerner drawing C48567-00-C100-XD042 insofar as the latter determines the western perimeter boundary.</u></a>
<b>“Planned Outage”</b>	means a situation where one or both of the incinerators are out of operation as anticipated in the Annual Maintenance Plan.
<b>“Planning Acts”</b>	means the Town and Country Planning Acts 1934 - 1999 and any amendments or additions thereto.
<b>“Planning Scheme Order”</b>	means the Braddan (Middle Farm) Planning Scheme Order 1998 and any amendments or variations thereto materially in the form contemplated by the Braddan (Middle Farm) Planning Scheme (Amendment) Order 2000.
<b>“Plant”</b>	means machinery and apparatus intended to form or forming part of the Facility, including the supply-only items (if any) which are to be supplied by ProjectCo pursuant to this Agreement or as specified in this Agreement (including for the avoidance of doubt Directly Procured Items).

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<sup>13</sup> [The Department and ProjectCo agreed to include the words in italics in VO 15 and DoFV 2, Appendix 12, paragraph 1. A copy of the relevant plan is in Appendix 3 to this Conformed Copy. This variation takes effect from and including 11 August 2004.](#)



<b>“Prescribed Rate”</b>	means the rate of 2% above the three month London Inter Bank Offer Rate (L.I.B.O.R.) for sterling from time to time accruing on a daily basis.
<b>“Price Review Date”</b>	means the date of Take Over and the date of each Quinquennial Review thereafter.
<b>“Primary Waste”<sup>14</sup></b>	means waste so defined and having the characteristics described in Schedule 7 to this Agreement.
<b>“Principal Construction Documents”</b>	means those principal construction documents defined in the Department’s Requirements which shall be submitted to the Department’s Representative for review in accordance with Clause 4.4 of Schedule 2.
<b>“Profit”</b>	means before the expiry of the first three Operating Years (including the D&B Phase) a gross profit margin of 7.3% (for the avoidance of doubt this gross profit margin shall apply to the Variable Element of the Gate Fee as forecast in the Financial Model in the case of termination payments during the first three Operating Years) and thereafter the average gross profit margin of the last three completed financial years (ending on 31 March) as evidenced and supported by the audited financial statements produced by ProjectCo at the conclusion of each financial year as submitted to the Assessor of Income Tax.

The gross profit margin shall be calculated as follows:

Gross income receipts from Gate Fees collected from the Department plus income from the MEA or other sources approved in accordance with Clause 14 of this Agreement

Less

All costs and overheads arising from the operation of the Facility (including rent payable under the Lease and stock adjustments (whether positive or negative) properly due and allocated to the primary accounts of ProjectCo.

By way of example:

Tender Model:-

£

<sup>14</sup> [The Department and ProjectCo agreed to include "Sewage Sludge Screenings" in Primary Waste in VO 11 \(Appendix 9 of DoFV 2\), on terms that ProjectCo would ensure that \(1\) the IPPC application and subsequently-granted permits would cover Sewage Sludge Screenings as a Primary Waste; \(2\) the D & B Contract Price and the Programme would not be affected by the variation; \(3\) the Parties would review the Gate Fee if the decision to burn Sewage Sludge Screenings in the Primary Waste Stream incinerator was taken; \(4\) no changes were made to the design of the Plant; and \(5\) this variation would take effect from and including 2 December 2002.](#)

Inc	Gross Gate Fees	X	
	Other Income (Electric)	X	
	Other Approved Activities on Site	<u>X</u>	XX(A)
Exp	Lease Rentals	X	
	Operating Costs/Overheads etc	X	
	Stock Adjustments (+ - )	<u>X</u>	XX(B)
Gross Profit C = A-B			
Gross Profit % $\frac{C}{A} \times 100$			

<b>“Programme<sup>15</sup>”</b>	means the programme described in Clauses 3.22 - 3.24 of Schedule 2 to this Agreement.
<b>“Project Agreement”</b>	means this agreement and references to “this Agreement” shall mean this Project Agreement.
<b>“ProjectCo’s Equipment”</b>	means all machinery, apparatus and other things (other than Temporary Works) required for the execution and completion of the Works and the remedying of any defects, but does not include Plant, Materials or other things intended to form or forming part of the Works.
<b>“ProjectCo’s Parent”</b>	means United Waste Limited (a company incorporated in England and Wales under registration number 1866716) or any future member of ProjectCo which holds a majority of the voting rights in ProjectCo (either alone or pursuant to an agreement with other members) or has the right to appoint or remove a majority of the board of directors, or has the right to exercise a dominant influence over ProjectCo by virtue of ProjectCo’s memorandum or articles of association or by virtue of a control contract.
<b>“ProjectCo’s Proposal”</b>	means ProjectCo’s proposal for the design, completion, commissioning, operation and maintenance of the Facility set out in Schedule 8.

<sup>15</sup> The Department and ProjectCo agreed in VO 10 and DoFV 2, Appendix 8 to a future retrofit of a flue gas cleaning system “based on the SCR process”. None of the D & B Contract Price, Availability Fee or Operating Costs were to be altered as a result.<sup>1</sup>  
VO 10, which deals with preparations for SCR confirmed that the Programme would not be affected by that Variation.<sup>1</sup>  
VO 15, which deals with the determination of the Site Boundary, confirmed it had no effect on the Programme.<sup>1</sup>  
VO 16, which deals with the use of waste oil as an additional support fuel for the Secondary Waste incinerator, confirmed it would not affect the Programme.

**“ProjectCo’s Representative”**

means Jean-Claude Sartenaer and thereafter the person appointed by ProjectCo to act as ProjectCo’s Representative for the purposes of the O & M and D & B Obligations identified in writing by ProjectCo from time to time.

**“ProjectCo’s Warranty”**

means a warranty to be given by ProjectCo pursuant to Clause 9 in the form set out in Schedule 9 Part 3.

**“Provisional Sum”<sup>16</sup>**

means the sum (if any) specified in this Agreement and designated as such, for the execution of any part of the Works.

**“Prudent Engineering and Operating Practices”**

means the practices, methods and acts engaged in or approved of by prudent operators of similar facilities, from time to time, in the exercise of reasonable judgement in light of the facts known or that reasonably should be known at the time a decision is made, would be expected to accomplish the desired result in a manner consistent with Applicable Laws, regulation, reliability, safety, environmental protection, economy and expedition. With respect to the Facility, Prudent Engineering and Operating Practices shall include, but shall not be limited to, taking reasonable steps to ensure that:-

- (a) adequate materials, resources and supplies, are available to meet the Facility’s needs under normal conditions and reasonably anticipated abnormal conditions;
- (b) sufficient operating personnel are available and are adequately experienced and trained to operate the Facility properly, efficiently and within the manufacturers’ guidelines and specifications and are capable of responding to emergency conditions;
- (c) preventive routine and non-routine maintenance and repairs are performed to the Facility on a basis that ensures reliable and safe operation, and are performed by knowledgeable, trained and experienced personnel utilising proper equipment, tools and procedures;
- (d) appropriate monitoring and testing is done to ensure the equipment is functioning as designed and to provide assurance that equipment will function properly under normal conditions.

<sup>16</sup> [Changes made to the Provisional Sum are tabulated in Appendix 2 to this Conformed Copy.](#)

- (e) appropriate planning procedures are carried out to ensure disposal of Waste Streams, Residues and effluents under normal conditions and reasonably anticipated abnormal conditions;
- (f) appropriate planning procedures and the Quality Assurance System are used and integrated in all aspects of construction, operation, maintenance and repair works;
- (g) the EU Standards are complied with.

<b>“PSO Application”</b>	means the submission of particulars of the Reserved Matters and of the restoration works referred to in paragraph 8(1) of Schedule 2 to the Planning Scheme Order.
<b>“Qualifying Staff”</b>	means those full-time employees of the Department engaged in waste disposal activities at Take Over.
<b>“Quality Assurance System”</b>	means an independently accredited quality assurance system in accordance with or equivalent to IS EN ISO9000.
<b>“Quinquennial Review”<sup>17</sup></b>	means the review carried out every five years by the Department and ProjectCo in accordance with Clause 2.19 of Schedule 3.
<b>“Regulator’s Licence”</b>	means any licence issued or to be issued by DOLGE pursuant to Part IV of the Public Health Act 1990 as amended by legislation bringing into force the Public Health (Amendment) Bill 1999.
<b>“Relevant Break Costs”</b>	means the reasonable costs properly incurred by ProjectCo arising as a direct consequence of the voluntary termination of this Agreement by the Department or the termination of this Agreement pursuant to Clause 22.18 including break costs incurred by ProjectCo as a result of termination of agreements with contractors and sub-contractors (ProjectCo having used all reasonable endeavours to mitigate such costs and having demonstrated the nature and extent of such costs to the reasonable satisfaction of the Department).
<b>“Relevant Indices”</b>	means the Manx RPI Index DETR Labour Index and the DETR Materials Index applied in the proportions 30%, 30% and 40% respectively.

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<sup>17</sup> [Note that the results of the first Quinquennial Review were recorded in DofV 2.](#)

**“Relief Events”**

means the occurrence of all or any of the following events:-

- a) fire, explosion, lightning, storm, tempest, flood bursting or overflowing of water tanks apparatus or pipes, earthquakes, riot and civil commotion;
- b) failure by a statutory undertaker or utility company or local department or other like body to carry out works or provide services including, without limitation, delay which is consistent with the conditions described in Clause 7.8 of Schedule 2;
- c) any accidental loss or damage to the Works or the Facility or any roads servicing it;
- d) any failure or shortage of power fuel or transport;
- e) any blockade or embargo not being Force Majeure;
- f) General Legislative Change;
- g) damage to the Site or Facility as a result of an Insured Risk;
- h) industrial or protestor action;
- i) terrorist attack;
- j) any negligence or breach on the part of the Department or its employees, agents and contractors (other than any Local Authority and its employees agents and contractors) which affects ProjectCo's ability to perform its obligations under this Agreement
- k) the discovery of antiquities or fossils not reasonably foreseeable by an experienced contractor at the Execution Date

to the extent that in every case such event:-

- 1. is outside the control of ProjectCo and its Staff; and
- 2. does not arise from the act omission negligence or wilful default of ProjectCo or its Staff

and any reference to Relief Event shall be construed accordingly.

**“Remediation Works”**

means any remediation works which are in the opinion of the Environmental Consultant reasonably necessary in order to:

- a) prevent the Facility being adversely affected by Hazardous Materials or waste present at, in, on or under the Site or land adjoining the Site at the Execution Date; and/or
- b) prevent Hazardous Materials or waste present at, in, on or under the Site at the Execution Date adversely affecting any adjoining land or any waters; and/or

- c) enable the safe and cost effective completion of the Facility and its operation in accordance with the terms of the Project Agreement; and/or
- d) prevent any liability on the Department or ProjectCo arising in respect of Hazardous Materials or waste present at, in, on or under the Site or land adjoining the Site at the Execution Date.

[Revised estimated costs of Remediation Works are set out in Appendix 4<sup>18</sup>.](#)

<b>“Requisite Consents”</b>	means all planning, building, environmental and other permissions, consents, approvals and requirements whether statutory or otherwise necessary for the construction of the Facility (or the reinstatement of the Facility following damage by an Insured Risk) including: <ul style="list-style-type: none"><li>(a) all permissions, consents, approvals and requirements required by all Applicable Laws; and</li><li>(b) the consent of any party having an interest or right in or over the Site who by the lawful exercise of their powers in the absence of such consent could prevent or impede the reinstatement of the Facility or the use and enjoyment of the Site thereafter.</li></ul>
<b>“Reserved Matters”</b>	means the matters set out in paragraph 3(1) of schedule 2 to the Planning Scheme Order.
<b>“Reserved Matters Approval”</b>	means approval by the Governor in Council of the PSO Application.
<b>“Residues”</b>	means those fractions so defined and having the characteristics described in Schedule 7 to this Agreement.
<b>“Review Period”</b>	means the period required by the Department's Representative, which shall not exceed 10 Business Days, calculated from the date on which the Department's Representative receives a Principal Construction Document and ProjectCo's notice that it is considered ready, both for a pre-construction review in accordance with Clause 4.4 of

<sup>18</sup> [The Department and ProjectCo agreed to increased costs for the Remediation Works. See paragraph 1.8 of Schedule 1. In DoV 1, the Department and ProjectCo agreed to complete an audit of the Remediation Works within 60 days of the execution of DoV 1 and effect any adjustment necessary to any payments due, or made pursuant to clause 4A of the Project Agreement as soon as reasonably practicable thereafter.](#)

Schedule 2, and for use.

<b>“Revised Design Proposal”</b>	means a revised design proposal (if any) submitted to the Department in accordance with the provisions of Clause 4 of Schedule 3.
<b>“Savage and Chadwick”</b>	means Savage and Chadwick, chartered architects of Merchant’s House, 24 North Quay, Douglas, Isle of Man.
<b>“Schedule”</b>	means a schedule to this Agreement together with all Annexes to it and all documents of any kind expressly incorporated by the parties by reference herein.
<b>“Scrap Metal”</b>	means metal which can be separated by an overhead magnetic separator.
<b>“Secondary Waste”</b>	means waste so defined and having the characteristics described in Schedule 7 to this Agreement.
<b>“Section”</b>	means a part of the Works.
<b>“Services”</b>	means the operation, maintenance and handback of the Facility and all associated goods and services provided to the Department to comply with the Department’s Requirements and on the terms and subject to the conditions of this Agreement and any Services Changes.
<b>“Services Change”<sup>19</sup></b>	means any change to the Services resulting from Legislative Change or otherwise made under the procedure set out in Clause 4 of Schedule 3.
<b>“Services Change Capital Cost”</b>	means the capital costs to ProjectCo of the implementation of a Services Change calculated in accordance with Clause 4 of Schedule 3.
<b>“Services Change Notice”</b>	means a notice served on ProjectCo by the Department requesting a Services Change or Changes to be evaluated setting out the Department’s requirements for a Services Change together with details of any alternative financial arrangements (such as Treasury finance or other private finance) which the Department wishes to evaluate together with details of any reasonable timescales in which ProjectCo is to respond.
<b>“Site”</b>	means until Take Over the Site shown for the purpose of

<sup>19</sup> [Variations and Services Changes made up to 1 October 2014 and recorded in the 17 Variation Orders provided and 2 Deeds of Variations are reflected in this Conformed Copy.](#)

identification only edged red and cross hatched blue in part, cross hatched green in part and hatched red in part on the Plan less the land required by the Department of Transport in relation to the proposed road works in the vicinity of the Site which shall not exceed the area shown cross hatched green on the Plan and from Take Over shall mean the same site less the land hatched red and such land shall not form part of the premises demised by the Lease.

**“Specific Legislative Change”**

means any Legislative Change which is a change affecting the design, construction, commissioning, operation or maintenance of the Facility or incinerators generally or the disposal of Residues.

**“Staff”**

means all personnel employed or engaged or to be employed or engaged by or through ProjectCo in the provision of the Works or Services and/or in connection with Schedules 2 and 3, whether such personnel are partners, directors, subcontractors or in any manner employed or engaged by ProjectCo or by subcontractors to ProjectCo or are employed by ProjectCo as independent contractors.

**“Statutory Board”**

means a body specified in Schedule 1 of the Statutory Boards Act 1987 as amended from time to time.

**“Strategic Spare Parts”**

means components or parts of components of the Facility whose operational life is not readily predictable but the failure of which would make the Facility inoperable.

**“Successor Operator”**

means the person or persons nominated by the Department to operate and/or maintain the Facility with effect from the Expiry Date.

**“SWS Oil”**

as defined in Schedule 1, paragraph 2.1.4.

**“Take Over”<sup>20</sup>**

means the date identified as the date when the relevant Section of the Facility was completed in the Taking Over Certificate. except that it shall be deemed to mean, for the purposes of the Quinquennial Review and the Expiry Date, the 17 August 2004.

**“Taking Over Certificate”**

means a certificate issued or deemed to have been issued in accordance with Clause 9.2.1 of Schedule 2.

**“Temporary Works”**

means all temporary works of every kind (other than

<sup>20</sup> This definition was amended by Clause 2.1.1 of the DoFV 2.



	ProjectCo's Equipment) required for the execution and completion of the Works and the remedying of any defects.
<b>"Termination Date"</b>	means the time and date (if any) on which this Agreement shall terminate pursuant to Clause 22.1.1, 22.18 or 22.19 or pursuant to Clause 17.14.1, 17.17.1 or 17.18.1.
<b>"Termination Event"</b>	means any of the circumstances described in Clause 22.1.2, 22.1.3, 22.3 and 22.14 as giving rise to a right to terminate this Agreement.
<b>"Testing Period"</b>	means the period commencing six months prior to the anticipated date of Take Over during which cold and hot testing is carried out such period coming to an end on Take Over.
<b>"Tests after Take Over"</b>	means the tests specified in Clause 10 of Schedule 2, Schedule 7 and Schedule 8 and designated as such, which are to be carried out by ProjectCo after the issue of the Taking Over Certificate in respect of the Works or any Section in accordance with Clause 10 of Schedule 2.
<b>"Tests on Take Over "</b>	means the tests specified in Clause 8.2 of Schedule 2, Schedule 7 and Schedule 8 and designated as such, and any other such tests as may be agreed by the Department's Representative and ProjectCo or instructed as a Variation, which are to be carried out by ProjectCo in accordance with Clause 8 of Schedule 2 before the issue of the Taking Over Certificate in respect of the Works or any Section.
<b>"Test Start Date"</b>	means 18 months after the Effective Date, being the date identified in ProjectCo's Proposal as the date on which ProjectCo shall commence testing the Facility.
<b>"Thermal Load"</b>	means, in relation to Primary Waste only, the product of the Net Calorific Value and the tonnage throughput at the Facility.
<b>"Time for Completion"</b>	means twenty-four months after the Effective Date or such later date fixed in accordance with Clause 7 of Schedule 2.
<b>"Trial Period"</b>	means the final three months of the Testing Period during which ProjectCo shall demonstrate to the Department that the Facility can operate throughout that period in accordance with the Project Agreement.
<b>"Unplanned Outages"</b>	means a situation where one or both of the incinerators are out

of operation which is not a Planned Outage.

**“Variable Element”** means that part of the Gate Fees described in Clause 2.1.2 in Part 2.1 of Schedule 1 to this Agreement.

**“Variation”<sup>21</sup>** means any alteration and/or modification to (including for the avoidance of doubt any addition and/or omission to the Works) the Department’s Requirements, which is instructed by the Department’s Representative or approved as a Variation by the Department’s Representative, in accordance with Clause 13 of Schedule 2.

**“Vehicles”** means vehicles used for the delivery of Conforming Waste to the Facility and registered with the Department or vehicles transporting Residues from the Facility as appropriate.

**“Warning Notice”** means the warning notice referred to in Clause 22.

**“Waste Oil”<sup>22</sup>** means the following fractions:

- (i) Mineral oil as collected from, e.g. garages around the Isle of Man.
- (ii) Vegetable oil as collected from, e.g. hotels, fish and chip shops, which will have been filtered before delivery to the Facility.

**“Wear Parts”** means any component at the Facility with an expected life of less than two years.

**“Wheelie Bins”** means wheelie bins as described in the Department’s Requirements with a capacity of 1,100 litres or as otherwise agreed between the Department and ProjectCo in writing and, in the case of Waste Oil only, suitable drums, tankers and containers.

**“Works”** means the design, construction, testing, commissioning and completion of the Facility and remedying of any defects therein (excluding Temporary Works) on the terms and subject to the conditions of this Agreement.

**“year”** means a calendar year.

<sup>21</sup> Variations and Services Changes made up to the date of this Conformed Copy have been recorded in 17 Variation Orders and 2 Deeds of Variation.

<sup>22</sup> Appendix 13 of DoV2, Variation Order No. 16, states that Waste Oil shall form an additional support fuel for the Secondary Waste Incinerator.

<del>“Works”</del>	<del>means the design, construction, testing, commissioning and completion of the Facility and remedying of any defects therein (excluding Temporary Works) on the terms and subject to the conditions of this Agreement.</del>
<del>“year”</del>	<del>means a calendar year.</del>

## 2 INTERPRETATION

- 2.1** Words importing any gender include any other gender and words in the singular include the plural and vice versa.
- 2.2** References to any statute or statutory provision in this Agreement shall be to Acts of Tynwald and shall be deemed to refer to and include any modification, amendment or re-enactment thereof for the time being in force whether by statute or applied by order in council or regulation.
- 2.3** The headings and index are inserted for convenience only and shall be ignored in interpreting the terms and provisions of this Agreement.
- 2.4** References in this Agreement to any Clause Annex or Schedule without further designation shall be construed as a reference to the Clause Annex or Schedule to this Agreement as so numbered.
- 2.5** Where consent or approval of any party hereto is required for any purpose under or in connection with the terms hereof it shall be given in writing.
- 2.6** In relation to any inconsistency or alleged inconsistency:
- 2.6.1** Except as otherwise expressly provided, in the event of any inconsistency between any of the documents described in Clause 2.6.2 the matter shall be resolved by the Department’s Representative who shall resolve the matter by reference to Clause 2.6.2 and whose decision shall be final and binding on the parties save where manifestly unreasonable. Any such decisions shall not be construed as a Variation or a Services Change.
- 2.6.2** Any inconsistency between the express provisions of any of the following documents shall be resolved on the basis that the provisions of an earlier named document in the following list shall take precedence over a later named document:
- 2.6.2.1** the Project Agreement (without the Schedules);
- 2.6.2.2** Schedule 16 (Conditions Precedent);

- 2.6.2.3** Schedule 1 (Payment);
  - 2.6.2.4** Schedules 2 and 3 (the D & B Obligations up to Take Over and the O & M Obligations after Take Over) and Schedule 20 (EC Appointment);
  - 2.6.2.5** Schedule 7 (Department's Requirements);
  - 2.6.2.6** Schedule 17 (Handback Obligations);
  - 2.6.2.7** Schedule 4 (the Lease);
  - 2.6.2.8** Schedule 5 (Insurances);
  - 2.6.2.9** Schedule 15 (Health and Safety Obligations);
  - 2.6.2.10** Schedule 19 (Emergency Plan);
  - 2.6.2.11** Schedule 14 (Golden Share);
  - 2.6.2.12** Schedule 13 (Adjudication Rules);
  - 2.6.2.13** Schedules 9, 10, 11 and 12 (Warranties, Bonds and Guarantees);
  - 2.6.2.14** Schedule 6 (Electricity Agreement);
  - 2.6.2.15** Schedule 18 (Bottom Ash Disposal Contract);
  - 2.6.2.16** Schedule 8 (ProjectCo's Proposal).
- 2.7** Any reference to indemnity or indemnify or other similar expression shall mean that the relevant Party indemnifies shall indemnify and keep indemnified and hold harmless the other Party.
- 2.8** Any reference to the Department in this Agreement shall, where applicable, include a reference to any successor to its statutory functions or any emanation of the Government or organisation or entity which has taken over all or some of its functions or responsibilities and its permitted assigns. Any reference to ProjectCo in this Agreement shall, where applicable, include a reference to any successor in title and permitted assigns.
- 2.9** References to this Agreement include references to Schedules, and vice versa.
- 2.10** Reference to employees of ProjectCo shall be deemed to include ProjectCo's agents and sub-contractors unless the context otherwise requires.
- 2.11** Reference to time shall be construed, during the period of summer time, to mean British Summer Time and otherwise to mean Greenwich Mean Time.
- 2.12** Any agreement by ProjectCo not to do an act or thing shall be deemed to include an obligation not to permit such an act or thing to be done by parties over whom

the Department could reasonably expect ProjectCo to exercise influence or control.

- 2.13** No deletion, addition to or variation of these terms shall be valid or of any effect unless agreed in writing and executed by the duly authorised representatives of the parties who, in the case of the Department, have been specifically identified to ProjectCo as having authority to execute the change identified in the authority.
- 2.14** Copyright in this Agreement shall remain vested in the Department but ProjectCo may obtain or make at its own expense any further copies required for use by ProjectCo in performance of the Services, but for no other purpose whatsoever without the prior written consent of the Department.
- 2.15** This Agreement is without prejudice to the Department's powers and responsibilities regarding the treatment and disposal of waste or any of its other functions whatsoever.
- 2.16** In construing this Agreement, the rule known as the ejusdem generis rule shall not apply nor shall any similar rule or approach to the construction of this Agreement and accordingly general words introduced or followed by the word "other" or "including" or "in particular" shall not be given a restrictive meaning because they are followed or preceded (as the case may be) by particular examples intended to fall within the meaning of the general words.

[2.17 For the avoidance of doubt, it is hereby agreed that any reference to the provision of copies of documents from ProjectCo to the Department under this Agreement shall be satisfied by the provision of such copies in electronic format, save where otherwise expressly stated or requested by the Department<sup>23</sup>.](#)

### **3 CONDITIONS PRECEDENT AND EFFECTIVE DATE**

- 3.1** Except for those clauses identified in Part 2 of Schedule 16 which shall apply notwithstanding Conditions Precedent remain to be satisfied, the obligations of the parties hereunder shall be conditional upon the satisfaction (or waiver in writing by the Department in the case of conditions in Clause 1 of Part 1 of Schedule 16 (other than 1.1.1) and by ProjectCo in the case of conditions in Clause 2 of Part 1 of Schedule 16 (other than 2.1.1 and 2.1.2) and by both parties in the case of the condition in Clause 3 of Part 1 of Schedule 16) of the Conditions Precedent on or before the applicable Conditions Cut-Off Date.
- 3.2** Immediately following satisfaction (or waiver in writing) of the Conditions Precedent the Department shall issue a certificate of commencement to ProjectCo noting the date upon which the last Condition Precedent was satisfied or otherwise waived in accordance with this Agreement and recording the Effective Date.

<sup>23</sup> [This was agreed between the parties pursuant to Clause 3 of DofV 2.](#)

- 3.3** Each party shall use its reasonable endeavours to procure satisfaction of the Conditions Precedent listed as its obligations in Part 1 of Schedule 16 as soon as reasonably possible following the Execution Date.
- 3.4** Without liability or penalty or the requirement to pay any compensation for either party (save only in respect of any antecedent breach of a provision of this Agreement which, pursuant to Clause 3.1, came into force on the Execution Date and without prejudice to stage payments 1 and 2 referred to in Part 1 of Schedule 1) this Agreement shall terminate automatically and with immediate effect on the Conditions Cut-Off Date if the Effective Date has not occurred by such date.

## **4 APPROVALS<sup>24</sup>**

- 4.1** ProjectCo shall be responsible for giving any notices under, paying all fees for and acquiring and maintaining at its own cost any Approvals and Requisite Consents which are necessary for ProjectCo's performance of the Works and/or the Services in reasonable time taking account of the times for delivery of the Plant and Materials and for completion of the Works provided that ProjectCo is not by the operation of this Clause responsible for obtaining the Planning Scheme Order or the costs connected therewith other than pursuant to Clause 4.2 below (subject to Clause 1.4 of Schedule 1 to this Agreement). The Department shall provide such reasonable assistance (with any third party costs at ProjectCo's expense) as ProjectCo shall reasonably require in obtaining the Approvals and all Requisite Consents.

- 4.2** In relation to the Reserved Matters Approval:

**4.2.1** ProjectCo shall prepare the PSO Application for submission by the Department using the reasonable skill and care to be expected of an expert planning consultant holding the qualification of Associate or Fellow of the Royal Town Planning Institute or an equivalent qualification preparing an application in respect of reserved matters in relation to a scheme of similar size and complexity as the Facility.

**4.2.2** Within three months of the date of this Agreement ProjectCo shall submit to the Department the PSO Application in draft form together with copies of plans, drawings and all other information that the Department may request in connection with the PSO Application.

**4.2.3** If the Department requires any amendments or clarification in relation to the draft PSO Application it shall request the same within 10 Business Days of receipt of the draft PSO Application. Once the Department is satisfied with the PSO Application it shall submit it to the Governor in Council and in any event within four months of the Execution Date.

<sup>24</sup> [The Department and ProjectCo agreed to base the Conditions Cut-off Date on 30th April 2001 in VO 1.](#)

- 4.2.4** ProjectCo shall use its best endeavours to progress the PSO Application in order to obtain a Reserved Matters Approval as soon as practicable and in any event within twelve months of the Execution Date.
- 4.2.5** The Department will provide such reasonable assistance as it considers appropriate to assist and promote the PSO Application.
- 4.2.6** In connection with the PSO Application each party shall:-
- 4.2.6.1** at all times keep the other advised of progress and provided with such information as is available to it regarding the progress of the PSO Application; and
- 4.2.6.2** advise the other of the outcome of the PSO Application as soon as a decision is known and provide the other with a copy of any written decision and any other relevant communication as soon as the same is received.
- 4.2.7** ProjectCo shall not be entitled either itself or through any third party agent to lodge any other application for planning permission relating to the Site without the consent of the Department.
- 4.2.8** No approval of the PSO Application nor any other matter pursuant to the PSO Application by the Department shall exonerate ProjectCo from any liability under this Agreement or constitute a waiver of any right or remedy of the Department hereunder nor shall the Department incur any liability whatsoever in respect of such approval.
- 4.2.9** ProjectCo shall not be entitled to any implied right of indemnity from the Department in relation to the performance of its obligations under this Clause 4.2 as agent of the Department.

**4.3** ProjectCo shall ensure that the IPPC application and subsequently-granted permits shall cover Sewage Screenings as Primary Waste.

#### **4A ENVIRONMENTAL CONSULTANT AND REMEDIATION**

- 4A.1** The Department and ProjectCo shall use all reasonable endeavours to co-operate in the joint appointment of the Environmental Consultant in the form and on the terms of the EC Appointment to carry out the services identified therein as soon as reasonably practicable after the Execution Date. For the avoidance of doubt such services shall include the identification, design and supervision of any Remediation Works.

- 4A.2** The EC Appointment shall, inter alia, require the Environmental Consultant to identify any Remediation Works and in so doing to act in a fair and impartial manner as between the ProjectCo and the Department initially producing its advice and opinions in draft and giving each party a reasonable opportunity to make representations in respect thereof prior to finalising its conclusions.
- 4A.3** ProjectCo shall procure that any Remediation Works required are carried out in accordance with the relevant terms and conditions of this Agreement as if the Remediation Works formed part of the Works subject to this Clause 4A.
- 4A.4** Subject to Clause 4A.5 of this Agreement ProjectCo shall procure the Remediation Works in full consultation with the Department using all reasonable endeavours to ensure that the Remediation Works represent best value for money to the Department in all the circumstances. Without limitation ProjectCo shall:
- 4A.4.1** procure competitive bids for the Remediation Works from not less than 3 suitable contractors experienced in carrying out such works selected from a list previously approved in writing by the Department (such approval not to be unreasonably withheld or delayed). For the avoidance of doubt in fulfilling its obligations under Clause 4A.4 ProjectCo shall not be obliged to select the least expensive bid;
- 4A.4.2** procure that the Remediation Works are tendered on terms previously approved by the Department in writing (which terms shall be reasonable and include for the avoidance of doubt the obligation to provide a D&B Sub-Contractor's Warranty) subject only to such negotiated amendments approved by the Department (in all cases such approval not to be unreasonably withheld or delayed);
- 4A.4.3** procure that the scope of the Remediation Works shall be as advised by the Environmental Consultant in accordance with the EC Appointment unless agreed otherwise by ProjectCo and the Department;
- 4A.4.4** use reasonable endeavours to procure that the Remediation Works are carried out as soon as reasonably practicable so as to seek to ensure completion of the Remediation Works prior to the Conditions Cut-Off Date (or such date as is otherwise agreed with the Department (such agreement not to be unreasonably withheld or delayed));
- 4A.4.5** procure that insurance approved by the Department (such approval not to be unreasonably withheld or delayed) is in place in respect of the Environmental Consultant and the Remediation Works to protect the interests of the Department, ProjectCo and any relevant third parties in relation to the Site;



- 4A.4.6** maintain a full record of the costs of performing the Remediation Works and provide a summary and all supporting details in such form as the Department may reasonably require at the request of the Department's Representative.
- 4A.5** If in the opinion of the Department (acting reasonably) the cost of the Remediation Works and/or the services of the Environmental Consultant adversely affect the financial viability of the construction and/or operation and maintenance of the Facility under the terms of this Agreement it may (at any time prior to the completion of the Remediation Works) terminate this Agreement. Such termination shall be deemed a termination in accordance with Clause 22.1.1 of this Agreement and the rights and obligations of the parties shall be the same as if the Department had lawfully terminated this Agreement in accordance with Clause 22.1.1 of this Agreement.
- 4A.6** ProjectCo shall pay (or procure the payment of) the Environmental Consultant and shall be liable for all payments in respect of the carrying out of the Remediation Works. The Department shall reimburse ProjectCo in respect of the services of the Environmental Consultant and Remediation Works in accordance with Clause 1.7 of Schedule 1 of this Agreement.
- 4A.7** For the avoidance of doubt the opinion of the Environmental Consultant as to the nature and scope of any Remediation Works shall be conclusive as between ProjectCo and the Department for the purposes of this Agreement and such works shall include any amendments to the design of the Facility as a result of the presence of Hazardous Materials not provided for in ProjectCo's Proposal or reasonably foreseeable at the Execution Date by ProjectCo, United Waste Limited and/or Kvaerner Engineering & Construction (UK) Limited.
- 4A.8** The Department grants a licence to ProjectCo and all others duly authorised by ProjectCo (subject to any rights of approval under this Agreement) to enter and remain on the relevant part or parts of the Site for purposes in connection with the Remediation Works or for any other purpose reasonably required in connection with the Works with the prior consent of the Department (such consent not to be unreasonably withheld or delayed provided it shall be reasonable for the Department to withhold consent where ProjectCo cannot show that it has procured appropriate insurance arrangements).

## **5 PROJECTCO'S APPOINTMENT**

- 5.1** The Department grants ProjectCo the exclusive right to undertake the Works and perform the Services during the Agreement Period.

## **6 UNDERTAKINGS OF BOTH PARTIES**

- 6.1** Both parties will act in good faith towards each other in relation to all matters arising under this Agreement and in particular but without prejudice to the specific reporting requirements set out in the Department's Requirements:-

- 6.1.1** ProjectCo shall inform the Department fully and as soon as possible of any Emergency and/or any circumstances which might prejudice ProjectCo's ability to carry out the Works or to provide the Services whether temporarily or permanently.
- 6.1.2** The Department's Representative shall be given all information and other facilities he may require to ensure that ProjectCo is fulfilling its obligations under this Agreement.
- 6.1.3** Both parties will do all things reasonably within their power which are necessary or desirable to give effect to the spirit and intent of this Agreement and its fundamental purpose which is to procure the design construction completion operation and maintenance of an integrated incinerator (energy from waste) facility and associated works and services in accordance with the Department's Requirements for the Agreement Period and for its subsequent handback to the Department or handover to a Successor Operator in accordance with the terms of this Agreement.
- 6.1.4** ProjectCo shall assist the Department if it seeks external funding relating to the Facility during the Agreement Period by providing all rights of access or inspection, data, reports, documentation and information reasonably requested by, or on behalf of, a potential funder.
- 6.2** ProjectCo shall perform (or, subject to such consents and approvals as this Agreement may require, procure the performance) in each case in accordance with the Applicable Laws and with the Approvals in a proper, skilful and proficient manner (to be assessed objectively) and on the other terms and subject to the other conditions of this Agreement:
- 6.2.1** the Works in accordance with the Department's Requirements and the D & B Obligations;
- 6.2.2** the Services in accordance with Prudent Engineering and Operating Practices, the Department's Requirements, the O & M Obligations, the O & M Manuals, the Operational Plan and any manuals, instructions and guidelines supplied by any manufacturers of the Plant and equipment incorporated into the Facility; and
- 6.2.3** the Handback Obligations

and in each case in accordance with ProjectCo's Proposal and particularly, but without limitation, the Quality Assurance System. For the avoidance of doubt the rights, remedies and obligations of the Parties in respect of the Works, Services and Handback Obligations are cumulative and the rights, remedies and obligations in respect of any one of the Works, Services and

Handback Obligations shall not affect the rights, remedies and obligations in respect of any other.

- 6.3** ProjectCo is incorporated in and shall remain registered in the Isle of Man until the Expiry Date and while this Project Agreement subsists shall engage in no business or activities unrelated to or not anticipated by this Agreement.
- 6.4** Subject to the other terms of this Agreement, the Department reserves the right to enter into external arrangements for the prior recycling or recovery of resources from Conforming Waste which otherwise would be subject to delivery and disposal as part of the Services.
- 6.5** ProjectCo shall be responsible for providing at its own expense all necessary materials, labour, plant, equipment, transport, materials handling equipment, tools and appliances to ensure that the Services are carried out in accordance with Clause 6.2.2.
- 6.6** ProjectCo acknowledges that it is not authorised to, and agrees it will not enter into any agreement which purports to bind or create any liability on the Department or settle, waive, release, file or prosecute any right, claim, debt, liability or suit on the Department's behalf save as expressly provided elsewhere in this Agreement that ProjectCo is acting as agent for the Department.
- 6.7** ProjectCo will arrange for the supply of Directly Procured Items to the Department as follows:
- 6.7.1** ProjectCo will negotiate and agree terms and conditions for the manufacture, (where consistent with appropriate industry practice) the installation, the sale and delivery of all Directly Procured Items to the Facility and their insurance in transit on the basis that the purchaser of all Directly Procured Items and the person entitled to the benefit of any insurance for the goods, their carriage, or delay shall be the Department.
- 6.7.2** ProjectCo shall ensure that a valid VAT invoice in respect of the supply, (where consistent with appropriate industry practice) the installation, the transport, forwarding, clearance, delivery and insurance of Directly Procured Items is addressed to the Department as purchaser of the Directly Procured Items.
- 6.7.3** ProjectCo shall provide the Department with all relevant purchase, carriage, insurance and clearance documents for signature on behalf of the Department and a schedule of the payments to be made by the Department, in each case for approval by the Department identifying how much of any payment is to be made in Local or Nominated Currency. ProjectCo shall identify in the schedule which payments to DPI Suppliers are to be made as part of which of the stage payments set out in Part I of Schedule 1 and shall provide that schedule not less than 21 days before the relevant payments

shall become due. ProjectCo will also provide the Department with the account name and number and bank details of the DPI Supplier to whom payment shall be made by the Department.

- 6.7.4** ProjectCo shall procure warranties from DPI Suppliers in relation to Directly Procured Items supplied by them in a form approved by the Department (acting reasonably).
- 6.7.5** ProjectCo shall subject the Directly Procured Items to appropriate acceptance tests within the time limits (if any) set by DPI Suppliers and advise the Department that the Directly Procured Items as delivered comply in all respects with the obligations of the DPI Suppliers. On completion of such acceptance tests ProjectCo shall certify to the Department in writing whether or not the Directly Procured Items have been delivered (and/or installed as the case may be) in complete satisfaction of the relevant DPI Supplier's obligations under the relevant contract and shall advise the Department of the amounts payable to the DPI Supplier which shall not exceed the amounts shown against them in ProjectCo's Proposal.
- 6.7.6** ProjectCo shall perform such services as may be necessary on behalf of the Department (and without additional cost to the Department) to ensure that the terms of supply, carriage and insurance are appropriate to safeguard the interests of the Department and, where not complied with by parties other than the Department, are enforced. The Department shall provide such reasonable assistance (with any third party costs at ProjectCo's expense) as ProjectCo shall reasonably require in connection with the enforcement of such rights and remedies.
- 6.7.7** ProjectCo shall ensure that the Directly Procured Items are promptly cleared on arrival at the Isle of Man and safely delivered to the Facility without damage or deterioration.
- 6.7.8** If ProjectCo does not make arrangements for the Department to purchase Directly Procured Items having an aggregate value equal to or greater than that specified in ProjectCo's Proposal, the Department shall be entitled to deduct the Compensatory Adjustment from the final stage payment and to recover any balance as a debt due. Where it is clear from Schedule 1 Part 1 or ProjectCo's Proposal that payment for Directly Procured Items which were not in fact supplied was to have been made in Local Currency or Nominated Currency, the Compensatory Adjustment shall be made in that currency. Where it is not, the currency of deduction shall be at the Department's option.
- 6.7.9** ProjectCo affirms that notwithstanding the purchase of the Directly Procured Items by the Department pursuant to this Clause 6.7 it shall not hold the Department responsible for any

defect in the Directly Procured Items and shall take all steps necessary to remedy such defects promptly on becoming aware of the same. ProjectCo acknowledges that any risks associated with Directly Procured Items (including selection, specification, design, manufacture, storage, transportation, insurance, clearance, delivery, damage or delay in transit or otherwise, installation, testing, commissioning and operation) and with the performance and solvency of DPI Suppliers will be the risk of ProjectCo. ProjectCo will not be relieved from any obligation in connection with this Agreement, whose performance is affected by these risks.

**6.7.10** The Department shall execute and give effect to such transfers of its rights against third parties in relation to the supply, insurance, transport, clearance, delivery and/or installation of Directly Procured Items (including any warranties referred to in Clause 6.7.4) as ProjectCo shall reasonably request provided that such transfers do not impose any new or increase any existing liability on or of the Department.

**6.8** The Department or the Department's Representative shall be entitled to call on ProjectCo to take all such steps as shall be required to effect the issue of (and if so required ProjectCo shall within 28 days issue) the Golden Share to the Department in consideration of the payment of £1 by the Department to ProjectCo.

**6.9** Without limiting any other obligations of ProjectCo the Works and the Services shall be performed with due regard to the protection of the health and safety of any persons affected or likely to be affected by the conduct of the Works and the Services, including (without limitation) the Department's employees and contractors and any visitors to or trespassers on the Site and ProjectCo shall accordingly observe and comply with all legal requirements and appropriate standards and all appropriate by-laws as applicable. The cost of compliance with such regulations shall be deemed to be included in the D & B Contract Price and the Gate Fees save in respect of any Specific Legislative Change or as otherwise expressly provided in this Agreement.

**6.10** ProjectCo shall be responsible for the suitability and safety of all equipment used in the performance of its obligations pursuant to this Agreement. No equipment shall be used which is deemed by the Department to be unsuitable, unsafe or liable to cause damage to any person or property.

## **7 PAYMENT**

**7.1** In consideration of the provision of the Works the Department shall pay to ProjectCo (or a DPI Supplier as the case may be) the D&B Contract Price (or an appropriate part thereof) on the basis set out in Part 1 of Schedule 1 and in consideration of the performance of the Services the Department shall pay the Gate Fees described in Part 2.1 of Schedule 1 in each case on the terms and

subject to the conditions of this Agreement. All amounts stated in those Schedules are exclusive of VAT which shall be payable at the rate applicable at the relevant invoice date on production of an appropriate VAT invoice.

- 7.2** The Department will pay the amounts referred to in Clause 7.1 which are due to ProjectCo in the Local or Nominated Currency in respect of the Works and in the Local Currency in respect of the Services on the Due Date in immediately available and freely transferable cleared funds for value. Such payments shall be made to an account or accounts notified to the Department by ProjectCo for the purpose.
- 7.3** Each party shall pay interest at the Prescribed Rate on late payment of all sums due from it pursuant to this Agreement until such sums are paid after as well as before the final determination of any sums due.
- 7.4** The Department reserves the right to set-off and/or withhold and/or abate against its indebtedness to ProjectCo at any time, including any payment of the Fixed or Variable Elements of the Gate Fees, all amounts due in respect of Liquidated Damages, or Abatements, or any other liquidated debt owed to it by ProjectCo.
- 7.5** For the avoidance of doubt, the Department shall pay any such sums to ProjectCo as it is bound to do by this Agreement and shall not unless specifically and expressly required to by this Agreement pay or expend any money or be responsible for any expense of ProjectCo or anyone else or otherwise.
- 7.6** ProjectCo shall pay to the Department and the Department shall pay to ProjectCo VAT (or any equivalent tax which may at any time during the currency of this Agreement be imposed in substitution therefor or in addition thereto) upon any sums payable by ProjectCo or the Department hereunder or upon any other supply of goods or services (within the meaning of Sections 4 and 5 of the Value Added Tax Act 1996 and Schedule 5 thereof) made by the Department to ProjectCo or ProjectCo to the Department, respectively, so far as such tax is from time to time properly chargeable upon the same Provided that at all times ProjectCo shall without prejudice to itself use all reasonable endeavours to minimise the liability of the Department to pay such tax.

## **8 VARIATIONS AND SERVICES CHANGES**

- 8.1** Variations and Services Changes shall be requested, costed, evaluated and implemented or not (as the case may be) according to the terms of Clause 13 of Schedule 2 in the case of Variations and of Clause 4 of Schedule 3 in the case of Services Changes.
- 8.2** The Department recognises that where unforeseeable extreme requirements are imposed on ProjectCo by a Government Department to achieve Approvals, it will give due consideration, acting reasonably, to a request from ProjectCo to treat such requirements as Variations or Service Changes.

## **9 WARRANTIES/BONDS/GUARANTEES**

**9.1** ProjectCo shall procure at its own cost the execution and delivery to the Department of the following deeds, duly executed:-

- 9.1.1** the D & B Contractor's Warranty by the D & B Contractor in favour of the Department on or by the Execution Date and in favour of any lender to the Department, purchaser of the Facility and/or (in the event of the termination for any reason of this Agreement) future operator of the Facility or part thereof within 28 days of a written request from the Department therefor;
- 9.1.2** the D & B Performance Bond executed by a surety (to be first approved by the Department in writing) and delivered to the Department on or by the Execution Date or Take Over as the context requires;
- 9.1.3** a D & B Subcontractor's Warranty by any D & B Subcontractor in favour of the Department and any lender to the Department, purchaser of the Facility and/or (in the event of the termination for any reason of this Agreement) future operator of the Facility or part thereof within 14 days of a written request therefor and in any event such a warranty shall be provided in favour of the Department before such D & B Subcontractor commences any part of the Works PROVIDED THAT ProjectCo shall not be in breach of its obligation to procure a D&B Subcontractor's Warranty where it has used all reasonable endeavours to obtain such a warranty and a D&B Subcontractor has refused to provide the D&B Subcontractor's Warranty. In such circumstances ProjectCo shall procure a warranty from the D&B Subcontractor in a form approved in writing by the Department. Such approval shall not be unreasonably withheld or delayed, but the Department may refuse to approve the warranty where it reasonably believes the D&B Subcontractor is not warranting to maintain adequate professional indemnity insurance;
- 9.1.4** the O & M Direct Agreement by the Approved Service Provider (if any) in favour of the Department prior to it commencing provision of any of the Services;
- 9.1.5** the Parent Company Guarantees executed by Groupe Fabricom S.A. and Kvaerner E&C plc in favour of the Department on or by the Execution Date; and
- 9.1.6** ProjectCo's Warranty executed by ProjectCo in favour of any lender to the Department and/or purchaser of the Facility or part thereof within 14 days of a written request from the Department therefor;

with, in each case, only such amendments as the Department may approve

in writing.

- 9.2** This Clause 9 shall apply mutatis mutandis to any substitute or additional D & B Contractor, D & B Subcontractor, approved surety, Approved Service Provider or party providing a Parent Company Guarantee.
- 9.3** The Department shall give ProjectCo not less than 28 days' notice in writing prior to making a call on the D&B Performance Bond between Take Over and Final Take Over except in the circumstances where ProjectCo is insolvent (as described in Clauses 22.14.1 to 22.14.8 inclusive of this Agreement.).
- 9.4** If the D&B Performance Bond shall expire prior to Take Over ProjectCo shall renew the same at its own expense so that there shall always be a D&B Performance Bond subsisting between the Execution Date and Final Take Over.

## **10 PROPERTY ISSUES**

- 10.1** Subject to Clause 10.3, for the period from the Effective Date to Take Over, the Department grants a licence to ProjectCo and all others duly authorised by ProjectCo (subject to any rights of approval under this Agreement) to enter and remain on the relevant part or parts of the Site for the purposes only of enabling ProjectCo the D&B Contractor and its authorised sub-contractor's agents and employees to carry out the Works and to comply with ProjectCo's obligations under this Agreement. This licence is conditional upon ProjectCo having obtained such of the Requisite Consents as are required in order to enable the Works to be commenced on Site and is subject to the terms of this Agreement.
- 10.2** The Licence contained in Clause 10.1 of this Agreement shall not operate nor be deemed to operate as a demise of the Site or any part thereof nor shall ProjectCo have or be entitled to any estate right title or interest therein and ProjectCo and those authorised by it shall enter the Site (or the relevant part or parts thereof) as licensee of the Department only.
- 10.3** The Department and those duly authorised by the Department shall be entitled to enter and remain on the Site. ProjectCo shall be responsible for the co-ordination of the Works and those exercising rights pursuant to this Clause. The Department, and those duly authorised by the Department to enter onto the Site, shall upon arrival at the Site report their presence to and comply with any reasonable directions and safety rules of which it is informed. The Department and those duly authorised by the Department shall not in any circumstances give instructions to any person or company involved in carrying out the Works other than ProjectCo's Representative and shall not interfere with the carrying out of the Works (other than as may be permitted under Schedule 2 to this Agreement).
- 10.4** The Department HEREBY AGREES to grant to ProjectCo and ProjectCo HEREBY AGREES to take a lease or sub lease of the Site in the form of the Lease.
- 10.5** The term of the Lease shall commence on Take Over and shall be for the period specified therein.



- 10.6** The grant of the Lease shall take place on Take Over.
- 10.7** The Lease shall be granted subject to:-
- 10.7.1** all the matters recorded or registered or minuted on the title to the Site in the Deeds Registry;
  - 10.7.2** all notices served and all orders, resolutions, charges, demands, proposals or requirements made by any local or other public authority, government, department or statutory body;
  - 10.7.3** all actual or proposed charges, notices, orders, restrictions, agreements, conditions or other matters arising under any statutory powers;
  - 10.7.4** all existing wayleaves or rights of way, (subject to Clause 10.8 in relation to the right of way referred to therein, which may require re-routing as part of the CPO) support, drainage, light, air and other easements or quasi-easements or customary rights affecting the Site which have been identified to ProjectCo or are capable of being ascertained by inspection of the Site or by search at the Deeds Registry;
  - 10.7.5** the matters set out in the Lease including but not limited to any headlease or superior interest in the Site created after the date hereof PROVIDED THAT ProjectCo shall have approved the terms, covenants, stipulations, conditions and rent obligations in the same (such approval not to be unreasonably withheld or delayed);
- 10.8** That part of the Site edged red and not cross hatched blue on the Plan is owned in fee simple absolute by the Department subject to a right of way. The benefit of the right of way and that part of the Site which is cross hatched blue on the Plan vest in Carnane Farms Limited but are presently in the process of being compulsorily purchased by the Department following a resolution of Tynwald dated 18 November 1997.
- 10.9** The Lease is to be granted subject to title matters disclosed and ProjectCo shall be deemed to have entered into this Agreement with full knowledge thereof (and of the matters referred to therein) and shall not be entitled to make or raise any objection or requisition thereon.
- 10.10** The Department undertakes to procure a covenant of quiet enjoyment from any party granted a superior title to the Site than the Lease (if and when such an interest in the Site is granted) and to deal with any such superior titles without added expense to ProjectCo.

## **11 EMPLOYMENT RESOURCES AND TRAINING**

- 11.1** If there shall be any Qualifying Staff employed by the Department at Take Over ProjectCo shall or shall procure that the Approved Service Provider shall interview them and consider them for employment in relation to the Services should such Qualifying Staff so wish.
- 11.2** ProjectCo shall at its own expense provide suitably qualified, trained, experienced and competent personnel for the proper performance of the Works and the Services. In particular (and without prejudice to the generality of the above), ProjectCo shall ensure that:
- 11.2.1** all personnel employed for the proper performance of the Works and Services shall be sufficiently proficient in the English Language properly to fulfil their function under this Agreement; and
- 11.2.2** all Key Personnel have suitable or appropriate managerial and communication skills and, in the case of the project director, project manager and D&B Contractor's project manager, are able to demonstrate a high level of competence in international project management all of which must be by reference to past experience.
- 11.3** ProjectCo shall be responsible for the selection, hiring, organisation and supervision of its Staff including the obtaining, maintaining and where necessary, renewing the work permits and any other necessary permissions, registrations, authorisations, licences and permits in relation to such personnel.
- 11.4** ProjectCo shall take account of any representations made to it by the Department regarding the suitability of Key Personnel and may at its discretion remove and replace any such individuals.
- 11.5** ProjectCo shall provide or procure the provision of all training for its personnel necessary to achieve and maintain the standards of performance required to enable ProjectCo efficiently and safely to discharge the O & M Obligations.
- 11.6** During the Agreement Period, ProjectCo shall at its own cost and expense provide sufficient training of the principal operatives of the Department or a Successor Operator (as appropriate) (and shall test personnel to confirm that training is sufficient) prior to the handback or handover of the Facility at the end of the Agreement Period to permit the take-over and operation and maintenance of the Facility.
- 11.7** ProjectCo shall maintain discipline and good order amongst its Staff and subcontractors when such personnel are on Site or performing the Works and/or the Services.
- 11.8** ProjectCo shall be responsible for all acts or omissions of its staff and subcontractors in the performance of the Works and/or the Services.

- 11.9** ProjectCo shall pay rates of wages and observe conditions not less favourable than the general level of wages and conditions in the trade or industry similar to that of ProjectCo.
- 11.10** ProjectCo shall ensure that any staff employed in connection with the Works and Services shall be workers resident in the Isle of Man or, if required, hold valid work permits.
- 11.11** ProjectCo shall keep a record of workers employed at the Site or otherwise directly in relation to the Works and shall submit a monthly return to the Department with details of all work permit holders employed.
- 11.12** ProjectCo shall where possible:
- 11.12.1** comply (or procure that any of its contractors and subcontractors complies) with the Isle of Man Government Scheme for the Certification of Craftsmen; and
  - 11.12.2** give preference to local labour, tradesmen, suppliers and producers in relation to services, goods and materials forming part of the Works and Services provided they comply with the specification required and are readily available at competitive prices.

## **12 RISK AND RESPONSIBILITY**

### **ProjectCo's Risk and Responsibility**

- 12.1** ProjectCo shall take full responsibility for the care of the Works and any outstanding works which are required to be completed up to the expiry of the D & B Phase and thereafter shall take full responsibility for the condition of the Facility and the Site throughout the Agreement Period.
- 12.2** If any loss or damage happens to the Works or the Facility, arising from any cause other than Force Majeure, ProjectCo shall rectify such loss or damage, at its cost, so that the Works or the Facility conform with this Agreement.

### **12.3 ProjectCo's Liability and Indemnity**

- 12.3.1** Save only to the extent that any such Claim arises directly from any act or omission on the part of the Department, its agents, employees or contractors (other than any Local Authority or ProjectCo or their employees agents or contractors), and subject only to Clause 12.12, ProjectCo shall indemnify, defend and hold harmless the Department, its employees and agents from and against any and all third party Claims howsoever arising whether in contract or tort or otherwise out of or in connection with the total or partial performance or non performance of all or any of its obligations under this Agreement and ProjectCo shall be liable to the Department in respect of any and all third party Claims howsoever arising whether in

contract or tort or otherwise arising out of any breach of this Agreement (including without limitation the D & B Obligations or O & M Obligations) or any tortious duty to the Department (or any of its employees or agents) whether caused by ProjectCo or any D & B Contractor or any D & B Subcontractor or any Approved Service Provider or any person engaged or employed in connection with the provision of the Works or Services or any other person for whom ProjectCo is responsible or accountable.

**12.3.2** if the Department receives any notice, demand, letter or other document concerning any claim for which it appears that the Department is, or may become entitled to, indemnification under this Clause 12.3, the Department shall give notice in writing to ProjectCo as soon as reasonably practicable and in any event within twenty (20) Business Days of receipt of the same;

**12.3.3** subject to Clauses 12.3.4 and 12.3.6 below, on the giving of a notice by the Department pursuant to Clause 12.3.2 above, where it appears that the Department is or may be entitled to indemnification from ProjectCo in respect of all (but not part only) of the liability arising out of the claim, ProjectCo shall (subject to providing the Department with a secured indemnity to its reasonable satisfaction against all costs and expenses that it may incur by reason of such action) be entitled to dispute the claim in the name of the Department at ProjectCo's own expense and take conduct of any defence, dispute, compromise, or appeal of the claim and of any incidental negotiations. The Department shall give ProjectCo all reasonable co-operation, access and assistance for the purposes of considering and resisting such claim;

**12.3.4** with respect to any claim conducted by ProjectCo pursuant to Clause 12.3.3 above:

**12.3.4.1** ProjectCo shall keep the Department fully informed and consult with it about material elements of the conduct of the claim;

**12.3.4.2** ProjectCo shall not bring the name of the Department into disrepute; and

**12.3.4.3** ProjectCo shall not pay or settle such claims without the prior consent of the Department, such consent not to be unreasonably withheld or delayed;

**12.3.5** the Department shall be free to pay or settle any claim on such terms as it thinks fit and without prejudice to its rights and remedies under this Agreement if;

**12.3.5.1** ProjectCo is not entitled to take conduct of the claim in accordance with Clause 12.3.3 above; or

**12.3.5.2** ProjectCo fails to notify the Department of its intention to take conduct of the relevant claim within twenty (20) Business Days of the notice from the Department under Clause 12.3.3 above or notifies the Department that it does not intend to take conduct of the claim; or

**12.3.5.3** ProjectCo fails to comply in any material respect with the provisions of Clause 12.3.4 above;

**12.3.6** any person taking any of the steps contemplated by Clauses 12.3.2 to 12.3.5 of this Clause shall comply with the requirements of any insurer who may have an obligation to provide an indemnity in respect of any liability arising under this Agreement.

**12.4** The indemnity and liability under Clause 12.3 shall operate in respect of all Claims whether made before or during the Agreement Period or as a result of the termination of this Agreement or arising within 24 months after such termination.

**12.5** If this Agreement is lawfully terminated by the Department for breach of this Agreement by ProjectCo, ProjectCo shall indemnify the Department and keep the Department indemnified fully and effectively against all reasonable costs and expenses incurred by the Department in the appointment and installation of a Successor Operator in excess of the costs which the Department would have incurred had this Agreement not been so terminated and shall pay all such amounts to the Department on demand supported by an invoice with such other supporting evidence reasonably satisfactory to ProjectCo for any cost and expense to be reimbursed. The Department shall take such steps as are reasonable to mitigate such costs and expenses.

**12.6 Department's Liability**

Subject to Clause 12.7, the Department shall be liable to ProjectCo for any loss or damage to ProjectCo caused by the act or omission of the Department its employees agents or contractors (other than any Local Authority or ProjectCo or their employees agents or contractors).

**12.7 Limit of Department's Liability**

The Department shall in no event be liable to ProjectCo (by way of any indemnity, or by reason of any breach of this Agreement, or for any action in tort (including negligence) or otherwise) for loss of use of the Facility, Works or any section thereof, or for loss of revenue, loss of profit or loss of any contract or for any indirect, special or consequential loss or damage which

may be suffered by ProjectCo in connection with this Agreement for any sum in excess of:

- 12.7.1** one year's loss of Profit in respect of Claims arising prior to Take Over; or
- 12.7.2** one year's loss of Profit in respect of all Claims arising in any one Operating Year; or
- 12.7.3** in the event of termination on any ground or for any reason whatsoever, 5 years' loss of Profit together with Relevant Break Costs provided that this figure shall be reduced by the amount of any payments previously made to ProjectCo by the Department in respect of the matters or circumstances which gave rise to the termination of this Agreement.

Provided that the limits set out in this Clause shall not apply to any liability for death or bodily injury of any person caused by the negligence or malicious act of the Department, its employees, agents or contractors.

## **12.8 Review of Documents**

The giving (or absence) of any approval, consent, examination, acknowledgement, knowledge of the terms of any agreement or document or the review of any document or course of action or proposal by or on behalf of the Department, shall not relieve ProjectCo of or be deemed to have modified any of its duties, obligations or responsibilities under this Agreement (including without limitation the D & B Obligations, the O & M Obligations or ProjectCo's duty to ensure the correctness, accuracy or suitability of the matter or thing which is the subject of the approval, consent, examination, acknowledgement or knowledge). PROVIDED THAT the Department shall be responsible for any breach of contract or delays where the Department or the Department's Representative has required ProjectCo to act in a particular manner where ProjectCo has proposed to act differently and in a way which would not have caused the breach of contract or delay in question.

## **12.9 Inspection**

No inspection, measurement or test nor the provision of any record or other information to the Department shall constitute acceptance of any materials, goods or equipment or acceptance of the services performed or acceptance that the Facility is Available nor a waiver or variation of any obligation on ProjectCo and all other terms and conditions of this Agreement shall remain in full force and effect whether or not such inspection, measurement or test revealed or should have revealed any defect in such materials, goods or equipment. This Clause 12.9 shall not prejudice the right of ProjectCo to receive the relevant stage payment of the D&B Contract Price when the Taking Over Certificate has been issued.

## **12.10 Hazardous Materials**

Without prejudice to the generality of its other obligations in this Clause 12 ProjectCo hereby undertakes to indemnify and hold harmless the Department, its employees, officers, servants, agents and subcontractors and keep it fully and effectively indemnified from and against all and any expenditure (including, without prejudice to the generality of the foregoing, all costs, charges, legal fees and expenses incurred in disputing any action, proceedings, claim, demand, dispute or notice of any nature, damages, payments or other liabilities) incurred or suffered by the Department which arise directly or indirectly from:-

**12.10.1** the disturbance during the performance of the Works or the Services of Hazardous Materials or waste existing on the Site at the Effective Date and from the presence of any new Hazardous Materials arising subsequent to the Effective Date; or

**12.10.2** the leakage, emission, discharge, release, threatened release, seepage or migration at any time of Hazardous Materials or waste from the Site when caused by any negligent or wilful act and/or omission of or breach of contract by ProjectCo and/or any subcontractor of ProjectCo or any of their respective servants, agents or subcontractors.

## **12.11 Data**

The Department accepts no liability (save for the Department's Requirements subject to and in accordance with Clause 3.3 of Schedule 2) (unless expressly warranted in the Project Agreement) for the accuracy and completeness of any information, data, records or reports (or the interpretation thereof) and/or for any design and/or for any workmanship, goods or materials relating to or on the Site whether negligently provided or otherwise. ProjectCo shall be deemed to have satisfied itself as to the accuracy, scope, efficiency and quality (as the case may be) thereof and carried out such further tests, designs, enquiries and investigations as are necessary to so satisfy itself.

## **12.12 Limit of ProjectCo's Liability**

Subject to Clause 12.13 of this Agreement, ProjectCo's liability to the Department by way of any indemnity or by reason of any breach of this Agreement, action in tort (including negligence), or otherwise on any ground or for any reason whatsoever including the loss of use of the Facility, Works or any section thereof, loss of capacity, production, loss of profit, loss of any contract or for any indirect, special or consequential loss or damage which may be suffered by the Department under or in connection with this Agreement shall (except in respect of death or bodily injury of any person caused by the negligence or malicious act of ProjectCo, its employees, agents or contractors) not exceed:

- 12.12.1** 75% of the D & B Contract Price in respect of any Claim arising prior to Take Over;
- 12.12.2** 25% of the D & B Contract Price in respect of any Claim arising in relation to breach of the D & B Obligations between Take Over and Final Take Over;
- 12.12.3** in respect of all Claims arising in an Operating Year (including, without limitation, claims in relation to breach of the O & M Obligations arising prior to Final Take Over), 100% of the Variable Element of the Gate Fees payable in that Operating Year prior to calculation of any deductions or, if higher, the annual amount of the Variable Element of the Gate Fees anticipated by Annex 5 to the Financial Proposal contained within Schedule 8 adjusted by a percentage equivalent to the percentage increase or reduction in the Relevant Indices for the period from 19 July 2000 to the date on which any claim is finally determined;
- 12.12.4** provided that in aggregate ProjectCo's liability under or in connection with this Agreement in relation to breach of the D&B Obligations shall not exceed 75% of the D & B Contract Price;
- 12.12.5** provided that in aggregate ProjectCo's liability under or in connection with this Agreement in relation to breach of the O&M Obligations shall not exceed six million pounds (£6,000,000) adjusted by a percentage equivalent to the percentage increase or reduction in the Relevant Indices for the period from the Execution Date to the date on which any claim is finally determined..

- 12.13** The limits on ProjectCo's liability referred to in Clause 12.12.3 and Clause 12.12.5 shall not restrict or qualify ProjectCo's obligations to procure insurance in accordance with Clause 17 of this Agreement. To the extent that a ProjectCo default results in the Department losing its rights as a co-insured in respect of the



insurances ProjectCo is required to maintain under this Agreement, ProjectCo's liability to the Department arising from or in connection with that default shall not exceed six million pounds (£6,000,000) adjusted by a percentage equivalent to the percentage adjustment shown by the Relevant Indices for the period from the Execution Date to the date on which any claim is finally determined. This liability cap shall be separate and distinct from the caps on liability set out in Clauses 12.12.3 and 12.12.5. The Department shall not seek to recover an amount in excess of the relevant liability cap in respect of the same claim. Any claim by the Department shall only reduce the liability cap in respect of Clause 12.12.3, Clause 12.12.5 or Clause 12.13 as appropriate.

**12.14** ProjectCo shall in no event be liable to the Department (by way of indemnity or by reason of any breach of this Agreement or for any action in tort (including negligence) or otherwise) for loss of use of the Facility, Works or any section thereof or for loss of revenue, loss of profit or loss of any contract or of any indirect, special or consequential loss or damage which may be suffered by the Department in connection with this Agreement for any sum except in relation to the following:

- 12.14.1** the reasonable cost in excess of the amount that would have been due to ProjectCo had the Facility been Available of utilising cost-effective alternative means of disposing of Conforming Waste (including the use of existing landfill on the Isle of Man) for up to 18 months after the Termination Date; and
- 12.14.2** the costs referred to in Clause 12.5; and
- 12.14.3** losses suffered by the Department where the Agreement is terminated for default and no Successor Operator can be appointed by the Department on reasonably acceptable commercial terms (including, for the avoidance of doubt, lost revenue relating to electricity generation) for up to 18 months after the Termination Date; and
- 12.14.4** any losses suffered by the Department arising from a ProjectCo default which adversely affects the Department's status as co-insured in respect of the insurances ProjectCo is required to maintain under this Agreement; and
- 12.14.5** any direct losses suffered by the Department as a consequence of such breaches; and
- 12.14.6** Liquidated Damages, payable to the Department pursuant to Clause 1.5 of Schedule 1 to this Agreement; and
- 12.14.7** Abatements, payable to the Department pursuant to Clause 2.4 of Schedule 1 to this Agreement; and
- 12.14.8** any sums payable by ProjectCo pursuant to Clause 12.3; and

- 12.14.9** a sum equivalent to the VAT payable on rent due under the Lease in the event the Project Agreement is terminated for up to 18 months after the Termination Date; and
- 12.14.10** the costs in connection with breach of the Emergency Plan by ProjectCo.
- 12.15** A party shall not be entitled to recover from the other sums more than once in respect of any loss suffered in connection with this Agreement .
- 12.16** Each party shall take all reasonable steps to mitigate any loss for which it is entitled to bring a claim against the other pursuant to this Agreement and in particular the Department shall use its reasonable endeavours to minimise its losses arising from breaches of this Agreement by ProjectCo.

### 13 PRICE REVIEW<sup>25</sup>

- 13.1** The Variable Element of the Gate Fees payable by the Department and the amount of Abatements payable by ProjectCo shall be reviewed as follows:
- 13.1.1** on 19 February 2003 and shall be increased or reduced by a percentage equivalent to the percentage increase or reduction (if any) shown by the Relevant Indices since 19 July 2000 subject to a maximum increase of 6.59%.
- 13.1.2** on Take Over and shall be increased or reduced by a percentage equivalent to the percentage increase or reduction (if any) shown by the Relevant Indices since 20 February 2003 other than for a period equal to the period of any delay in achieving the Effective Date attributable (in whole or part) to failure by ProjectCo to use best endeavours to obtain a Reserved Matters Approval pursuant to Clause 4.2.4 of this Agreement.
- 13.1.3** on 1 April first following Take Over and at the start of each subsequent Operating Year and shall be increased or reduced by a percentage equivalent to the percentage increase or reduction (if any) shown by the Relevant Indices since the start of the immediately preceding Operating Year and such increase

<sup>25</sup> The results of the first Quinquennial Review ("QR") were recorded in the second Deed of Variation between the parties. DoFV 2 noted, amongst other things, that although the first QR departed in some respects from the requirements of the Project Agreement, future QRs would need to follow those requirements strictly in accordance with their terms. ProjectCo warranted to the Department (DoFV 2, clause 5.1) for itself and as agent for any ProjectCo Group companies in relation to any information provided by or on behalf of any of them to the Department or any of its advisers in connection with the preparation, negotiation, agreement and conclusion of this QR was, when provided, true, complete and accurate in all material respects, and not misleading. DoFV 2, clause 9 recorded that pursuant to this agreement reached between the Parties and recorded in DoFV 2 the Department has paid ProjectCo the sum of £840,623 being £243,561 in respect of ProjectCo's backward looking claim – and £597,062 in respect of ProjectCo's 1 year catch up, together, ("the QR Adjustment"). This payment was made and accepted in full and final settlement and completion satisfaction of all or any claim which either Party may have against the other arising out of or in connection with the first QR. However, without in any way limiting the Department's rights or remedies in respect of any breach of warranty the Department is entitled to reopen agreement reached on all or any matters the subject of the first QR as well as agreement on any associated matters agreed at the same time, if ProjectCo is shown to the Department's reasonable satisfaction, to be in breach of warranty as to the truth, completeness and accuracy of all information provided by ProjectCo or its advisers in connection with the first QR, which is more fully set out in DoFV 2 clause 5.1.

or reduction shall have effect from the beginning of the Operating Year.

**13.2** The Variable Element of the Gate Fees payable by the Department and the amount of Abatements payable by ProjectCo shall be reviewed on each Price Review Date and:

**13.2.1** shall be adjusted fairly to take into account any reduction in the cost of providing the Services which ProjectCo has made (or should reasonably have made) by reason of technological change in the waste management industry net of any reasonable costs necessarily incurred by ProjectCo to obtain such reduction. In the event of there being any disagreement between ProjectCo and the Department over any matters relating to this Clause 13.2.1 the matter should be referred for determination in accordance with Clause 19;

**13.2.2** shall be reduced to take account of any financial assistance from a Government Department PROVIDED THAT this clause 13.2.2 shall not apply to Abatements;

**13.2.3** shall be adjusted to take fairly into account any additional expense which ProjectCo has reasonably incurred or savings which have been (or which reasonably could have been) made by ProjectCo over the previous five years in connection with compliance with any Applicable Laws for the purpose of providing the Services, or any of them to the extent to which adjustment to the Variable Element of the Gate Fees was not made in connection with the agreement of any Services Change. Where the Variable Element of the Gate Fees are to be adjusted in accordance with this Clause, ProjectCo shall take all reasonable steps to mitigate the impact of such legislative requirements but so that any costs reasonably incurred in such mitigation shall be taken into account as additional expenses for the purpose of this Clause. In the event of there being any disagreement between ProjectCo and the Department over any matters relating to this Clause the matter should be referred for determination in accordance with Clause 19.

**13.2.4** shall be adjusted to take fairly into account exceptional changes in the chemical composition of waste which have resulted in increased or reduced use of consumables. In the event of there being any disagreement between ProjectCo and the Department over any matters relating to this Clause 13.2.4 the matter should be referred for determination in accordance with Clause 19.

**13.2.5** shall be adjusted to take fairly into account any reasonable changes in the cost of operating the Facility where such costs were identified in ProjectCo's Proposal, the changes to them were not reasonably foreseeable at the Base Date and are

beyond the control of ProjectCo and ProjectCo has used all reasonable endeavours to mitigate the effect of such changes. For the avoidance of doubt, no double counting will be permitted where changes in the cost of operating the Facility are, or have been, compensated under Clause 13.1 further to changes in the Relevant Indices since the last Quinquennial Review.

- 13.2.6** any alteration to the Variable Element of the Gate Fees sought by ProjectCo pursuant to this Clause 13 will be calculated by reference to the pricing schedules in ProjectCo's Proposal.

## **14 INCOME GENERATION**

- 14.1** ProjectCo acknowledges that it is only entitled to use the Facility and the Site in order to undertake the Works and perform the Services and that any other activities carried on at or from the Site require the prior written consent of the Department.
- 14.2** If ProjectCo seeks consent for any other activities carried on at the Site, or if in undertaking the Works and performing the Services at the Site ProjectCo is able to sell any products or services to third parties, it shall account to the Department for 50% of the net realisable profits (having deducted reasonable approved expenses from the gross revenue or other benefit receivable by ProjectCo) in connection with the same. For the avoidance of doubt, this clause does not apply to the Electricity Agreement and income derived from the disposal of Scrap Metal only.

## **15 FORCE MAJEURE**

- 15.1** In the event of Force Majeure occurring during the Agreement Period then either party shall give written notice to the other specifying the nature and extent of Force Majeure forthwith on becoming aware of and being affected by the Force Majeure. ProjectCo shall also notify the Department's Representative of any proposals including (without limitation) any reasonable alternative means of performance of its obligations as soon as reasonably practicable but shall not effect such proposals without the consent of the Department's Representative.
- 15.2** Each party shall also notify the other of any events of which it is aware which may reasonably be expected, with the lapse of time or otherwise, to become an event of Force Majeure.
- 15.3** The Department and ProjectCo shall during any event of Force Majeure:
- 15.3.1** liaise and co-operate and use all reasonable endeavours to avoid and/or overcome and/or reduce and/or mitigate the effects of the Force Majeure; and
  - 15.3.2** continue to perform their obligations under this Agreement where unaffected by Force Majeure; and

- 15.3.3** implement the elements of the Emergency Plan stipulated by the Department unless prevented from so doing by the Force Majeure; and
- 15.3.4** resume full performance as soon as possible after the cessation of the Force Majeure.
- 15.4** Provided the parties shall have complied with their obligations under Clauses 15.1 and 15.2, then for so long as they comply with their obligations under Clause 15.3, the parties shall be relieved from performance of their obligations hereunder (save with regard to implementation of the Emergency Plan) to the extent they are affected by the event of Force Majeure and this shall include ProjectCo's obligation to provide the Works and the Services and the Department's obligation to pay for the provision of the Works and the Services. The Department will pay a fair and reasonable amount on a quantum meruit basis for Works and Services which are provided by ProjectCo during the continuance of the circumstances of Force Majeure including Works and Services provided by ProjectCo in performing its obligations to implement the stipulated Emergency Plan. Abatements shall not be made to the extent the relevant breach is attributable to the event of Force Majeure.
- 15.5** In the event that:
- 15.5.1** any continuing and uninterrupted period of Force Majeure exceeds six months; or
- 15.5.2** the aggregate periods of Force Majeure in any period of twelve months exceed six months
- which in either event adversely affects a material part of ProjectCo's obligations under this Agreement then either party shall subject to Clause 15.6 thereafter be entitled to terminate this Agreement by notice to the other but without prejudice to any existing rights or remedies of either party in respect of any antecedent breach of this Agreement.
- 15.6** Either party shall only be entitled to terminate in accordance with Clause 15.5 provided that the parties shall within 30 days of the expiry of the period referred to in Clauses 15.5.1 or 15.5.2 have consulted to determine whether it may or may not be possible to either resolve matters or agree on the provision of an alternative service at a price satisfactory to both parties.
- 15.7** Any dispute about Force Majeure shall be notified by either party to the other in writing within seven days of the relevant notification and shall be referred to the dispute procedure established under this Agreement.
- 15.8** The Department shall (without prejudice to other rights and obligations of the parties under this Agreement) have the right to make alternative arrangements for the provision of the Works or Services and to suspend payment to ProjectCo of the Fixed Element and the Variable Element of the Gate Fees forthwith where

Force Majeure prevents the performance by ProjectCo of any material part of the Services for a period of 24 hours or more and ProjectCo fails to comply with Clause 15.3 in relation to that part of the Services.

**15.9** Where ProjectCo is unable to demonstrate to the Department's reasonable satisfaction that Force Majeure has prevented its performance of the Works or the Services as the case may be and the cost of making alternative arrangements under Clause 15.8 above exceeds the Gate Fees due for those Services, ProjectCo shall bear the whole of the additional cost (without prejudice to the other rights and obligations of the parties under this Agreement).

**15.10** In the event this Agreement is terminated pursuant to Clause 15.5 above, the Department shall pay ProjectCo compensation equivalent to the Relevant Break Costs together with the value of work performed up to the date of termination for which ProjectCo has not otherwise received payment.

## **16 RELIEF EVENTS**

**16.1** If a Relief Event occurs in relation to the provision of the Services then it shall be dealt with in accordance with this Clause. If a Relief Event occurs in relation to the carrying out of the Works the provisions of Clause 7 of Schedule 2 shall apply.

**16.2** If a Relief Event occurs during an Operating Year then either party shall give written notice to the other specifying the nature and extent of the Relief Event forthwith on becoming aware of and being affected by the Relief Event.

**16.3** Each party shall also notify the other of any events of which it is or becomes aware which may reasonably be expected, with the lapse of time or otherwise, to become a Relief Event.

**16.4** ProjectCo shall during a Relief Event:

**16.4.1** liaise and co-operate with the Department and use all reasonable endeavours to avoid and/or overcome and/or reduce and/or mitigate the effects thereof; and

**16.4.2** continue to perform its obligations under this Agreement where unaffected by the Relief Event; and

**16.4.3** implement the elements of the Emergency Plan stipulated by the Department unless prevented from doing so by the Relief Event; and

**16.4.4** resume full performance of its obligations as soon as possible after the cessation of the Relief Event.

**16.5** Provided the parties shall have complied with their obligations under Clauses 16.2 and 16.3, then for so long as they comply with their obligations under Clause 16.4,

the parties shall be relieved from performance of their obligations hereunder (save with regard to implementation of the Emergency Plan) to the extent they are affected by the Relief Event and this shall include ProjectCo's obligation to provide the Services and the Department's obligation to pay for the provision of the Services. The Department will pay a fair and reasonable amount on a quantum meruit basis for Services which are provided by ProjectCo during the continuance of the Relief Event including Works and Services provided by ProjectCo in performing its obligations to implement the stipulated Emergency Plan. Abatements shall not be made to the extent the relevant breach is attributable to the Relief Event.

**16.6** The Department shall (without prejudice to other rights and obligations of the parties under this Agreement) have the right to make alternative arrangements for the provision of the Services affected by the Relief Event and to suspend payment to ProjectCo of the appropriate proportion of the Variable Element of the Gate Fees forthwith where a Relief Event prevents the performance by ProjectCo of any material part of the Services for a period of 24 hours or more and ProjectCo fails to comply with Clause 16.4 in relation to that part of the Services.

**16.7** Where ProjectCo is unable to demonstrate to the Department's reasonable satisfaction that a Relief Event has prevented the performance of the Services and the cost of making alternative arrangements under Clause 16.6 above exceeds the Gate Fees due for those Services, ProjectCo shall bear the whole of the additional cost (without prejudice to the other rights and obligations of the parties under this Agreement).

## **17 INSURANCE<sup>26</sup>**

**17.1** ProjectCo shall take out with a reputable insurer the insurance cover described in Schedule 5 at the times and for the duration specified therein. Such insurances shall cover the Insured Risks.

**17.2** The insurances shall provide cover to ProjectCo and the other insured parties described as such and at the levels of indemnity specified in Schedule 5.

**17.3** ProjectCo shall on the renewal date of each individual policy of insurance and before taking possession of the Site (including for the avoidance of doubt to carry out any survey works and/or services prior to the Effective Date) and at such other times as the Department may reasonably require:-

**17.3.1** produce sight of the original insurance documentation (including policies, the terms and conditions of the policies, cover notes, premium receipts and any other related documents);

**17.3.2** supply copies of such insurance documentation (including the policies and evidence that the premiums have been paid); or

<sup>26</sup> This clause was inserted by Clause 2.2 of DofV 2 (it replaces the insurance provisions contained in this Agreement when it was signed on 27th October, 2000.) These changes had effect from 22nd February, 2012.

- 17.3.3** in the case of any professional indemnity insurance policy where a condition has been imposed by the underwriters in terms that the insured shall not disclose the policy documents or their contents, then ProjectCo shall instead provide other documentary evidence to prove to the reasonable satisfaction of the Department that such compliant insurance cover has been taken out and is being maintained and renewed.
- 17.3.4** procure the production to the Department of documentary evidence of the professional indemnity insurances required to be taken out and maintained by the D&B Contractor and D&B Subcontractors.
- 17.4** The Department shall be entitled to notify ProjectCo in writing if any policy of insurance required by Clause 17.1 does not provide any or sufficient cover to comply with this Clause 17 and Schedule 5. On receipt of such notice, ProjectCo shall forthwith procure and maintain such insurance as shall be compliant, failing which the Department itself may cause such insurance to be effected and the premium and any additional or associated costs and expenses reasonably suffered or incurred by the Department shall be due on 28 days' notice and recoverable from ProjectCo as a debt.
- 17.5** ProjectCo shall deal speedily and efficiently with all claims submitted to it by the Department or third parties.
- 17.6** ProjectCo and the Department hereby undertake:-
- 17.6.1** immediately to disclose to the other in writing all material facts likely to affect the decision of any insurer to underwrite or grant or continue insurance of any of the Insured Risks;
- 17.6.2** to comply with the conditions stipulated in each of the insurance policies. ProjectCo shall make no material alteration to the terms of any insurance without the prior approval of the Department. If an insurer makes (or purports to make) any such alteration, ProjectCo shall notify the Department immediately it is made aware of the same;
- 17.6.3** to comply with all the requirements and recommendations of the insurers and the fire authority in relation to the Site and/or the Facility but so far as possible not to interfere with the performance and fulfilment of the powers and duties of the Department;
- 17.6.4** not to obstruct the access to any fire equipment or means of escape from the Facility or the Site;
- 17.6.5** not to do or allow anything to be done which would or might vitiate any policy of insurance but so as not so far as possible to interfere with the performance and fulfilment of the powers and responsibilities of the Department; and



- 17.6.6** if any requirement or recommendation of the insurers or fire authority is incompatible with the powers and duties of the Department, ProjectCo shall notify the Department as soon as it becomes aware of the same.

**17.7** ProjectCo shall:-

- 17.7.1** ensure that each policy of insurance shall include provisions to the effect that:-
- 17.7.1.1** the insurers shall provide 30 days' notice in writing to the Department prior to any cancellation, non-renewal, change of coverage of the policy or of their becoming aware of any circumstance by which the cover hereby may become invalid or ineffective; and
  - 17.7.1.2** details of the notice required by the insurer to make a claim which notice shall be sufficient to invoke protection under the policy (provided the claim itself is a valid one);
  - 17.7.1.3** violation of any of the terms of any particular policy issued by the insurer shall not in itself invalidate the policy issued by the insurer;
  - 17.7.1.4** the insurers agree to waive all rights of subrogation howsoever arising which they may have or acquire against any of the insured and their officers, directors, employees and assigns arising out of any occurrence in respect of which any claim is admitted hereunder save where such rights of subrogation are acquired in consequence of fraud;
  - 17.7.1.5** each of the parties comprising the insured shall for the purpose of the policy be considered a separate entity, the words "the Insured" applying to each as if they were separately and individually applying to each as if they were separately and individually insured provided that the total liability of the insurers under each section of the policy to the insured collectively shall not (unless the policy specifically permits otherwise) exceed the limit of indemnity stated to be insured thereby;
  - 17.7.1.6** the insurers undertake to the Department that the policy shall not be invalidated as regards their respective rights and interests and that the insurers will not seek directly or indirectly to avoid any liability under this policy because of any act, neglect, error or omission made by any other insured (whether occurring before or after the inception of the policy), including without limitation, any failure by any other insured to disclose any material fact, circumstance or occurrence, any misrepresentation by any other insured, any breach or

non-fulfilment by any other insured whether or not any such act, neglect, error or omission, could, if known at any time, have affected any decision of the insurers to grant the policy, to agree to any particular term or terms of the policy (including without limitation this provision) and the amount in relation to this policy or to liability which might arise thereunder;

**17.7.1.7** the insurers waive all rights of contribution against any insurance effected by the Department other than insurance which has been specifically arranged by them for the project; ~~and~~

**17.7.1.8** the Department shall be loss payee under the insurance for any claims in excess of £250,000 in relation to the Site and/or the Facility, but excluding any insurance proceeds paid under the business interruption insurance specified in Schedule 5 (Insurances) and for all claims where the insured incurring the loss is the Department and in ~~which~~ each such event all such monies shall be dealt with in accordance with Clause 17.11; and

**17.7.2** keep the Site and the Facility supplied with such fire fighting equipment as the insurers and the fire authority may require and maintain the same to their satisfaction.

**17.8** Nothing in this Clause 17 shall relieve ProjectCo of any of its general or specific liabilities under or in connection with this Agreement unless specifically provided in this Clause 17.

**17.9** All policies of insurance shall be written on a damage or claims arising basis and not a claims made basis save for professional indemnity insurance.

**17.10** In the event of any claim described in Clause 17.7.1.8 all monies paid under any insurances effected under this Agreement shall be promptly paid and applied towards the reinstatement or replacement of all property damaged and satisfaction of the losses or liabilities in respect of which they were received, provided that no claim on any such insurances effected shall be made without the prior approval of the Department and the Department shall not unreasonably withhold its consent to the proper and reasonable application of any monies so received. Each policy insuring against loss or damage during the D&B Phase shall provide for payments to be made in the currencies required to rectify such loss or damage (if appropriate).

**17.11** Where the Department is loss payee under Clause 17.7.1.8 all money recovered under any insurance policy in respect of reparation of damage to and/or reinstatement of the Site and/or the Facility shall be paid into an "Insurance Proceeds Account" on account terms to be agreed with the Department who shall act reasonably in all the circumstances and (subject to the provision of Clauses 17.14 and 17.17.1) the amounts paid into this account shall be expended exclusively in rebuilding and reinstating the Facility and/or the Site or such part thereof as shall have been destroyed or damaged

and ProjectCo shall make good any deficiency in the amount of such money as compared with the costs of such rebuilding and reinstatement so that the Facility and/or the Site or part thereof shall be totally rebuilt or reinstated by ProjectCo at no cost to the Department. For the avoidance of doubt the Department shall pay to ProjectCo all sums recovered under the insurances specified by this Agreement and standing to the credit of the Insurance Proceeds Account for the rebuilding and reinstatement of the ~~facility~~Facility and/or Site (subject to the performance by ProjectCo of its obligations under this Agreement in respect of the same) and such sums shall be payable monthly in arrears in proportion to that part of ProjectCo's liability for rebuilding and reinstatement which ProjectCo has properly satisfied in accordance with this Agreement.

#### 17.11A The Parties:

17.11A.1 acknowledge their agreement that the maximum deductible referred to in paragraph 6.4 of Schedule 5 (Insurances) of the Project Agreement has been increased from £15,000 (fifteen thousand pounds) to £240,000 (two hundred and forty thousand pounds);

17.11A.2 agree that notwithstanding any other provision of the Project Agreement the Department's liabilities under the Project Agreement shall not increase in any way and the Department's rights under the Project Agreement shall not be diminished in any way (including the amount of any payment to which the Department is entitled, being reduced) as a result of the increase to such maximum deductible and accordingly (but without limitation), ProjectCo:

17.11A.2.1 and not the Department shall be responsible for all additional costs, payments and liabilities incurred by the Department under the Project Agreement as a result of such increase in maximum deductible; and

17.11A.2.1 shall keep the Department whole in respect of any payments to which the Department would have otherwise been entitled under the Project Agreement, but for such increase in maximum deductible.

in each case, including (but not limited to) the Department's liabilities under Clauses 17.14.2 and/or 17.24 and rights under Clauses 17.14.3 and/or 17.17.2 of the Project Agreement.

**17.12** Without prejudice to the right of the Department to terminate this Agreement pursuant to Clause 17.14 where the Facility and/or the Site is partially damaged or destroyed by the occurrence of an Insured Risk, ProjectCo shall use all reasonable endeavours to obtain all and any necessary planning and other Requisite Consents to permit any reinstatement of the Site and/or the Facility as soon as practicable following such damage or destruction and shall commence the reinstatement of the Site and/or the Facility as soon as practicable following receipt of such consents. ProjectCo shall thereafter continue such works of reinstatement until the same are completed and in so doing shall lay out and apply the proceeds of the insurance policy received by ProjectCo

towards the reinstatement of the Site and/or the Facility making up any shortfall at its own expense.

**17.13** Where the Site and/or the Facility is damaged or destroyed in whole (but not in part) due to an Insured Risk and/or is not Available due to an Insured Risk and/or the Services are not capable of being delivered to a standard other than one falling below the standards of performance required of ProjectCo by this Agreement and (in respect of each of the foregoing) where the necessary reinstatement works are likely to take in excess of 12 months, the provisions of the next following Clause shall apply.

**17.14** In the circumstances described in the immediately preceding Clause:-

**17.14.1** the Department shall be entitled to terminate this Agreement provided it does so within three months of the occurrence of the Insured Risk;

**17.14.2** if the Department terminates this Agreement in accordance with the immediately preceding Clause 17.14.1 ProjectCo shall be entitled to a sum equivalent to the payment of compensation which it would have received under Schedule 1 Part 3 (plus ProjectCo's reasonable and proper costs incurred between the occurrence of the Insured Risk and the date of termination) which sums shall be constituted by the insurance proceeds and to the extent that there is a shortfall between the insurance proceeds and ProjectCo's entitlement that shortfall will be made up by the Department and payable in accordance with the provisions of Schedule 1 Part 3;

**17.14.3** where the insurance proceeds referred to in the immediately preceding sub-paragraph exceed the sum equivalent to a payment of compensation under Schedule 1 Part 3 then the Department shall be paid that excess.

**17.15** If the Department does not terminate the Agreement pursuant to and within the period referred to in Clauses 17.13 and 17.14, ProjectCo shall as soon as possible use all reasonable endeavours to obtain all and any necessary planning and other Requisite Consents to permit the reinstatement of the Site and/or the Facility as soon as practicable following such damage or destruction and shall commence the reinstatement of the Site and/or the Facility as soon as possible following receipt of such consents. ProjectCo shall thereafter continue such works of reinstatement until the same are completed and in so doing shall lay out and apply the proceeds of the insurance policy received by ProjectCo towards the reinstatement of the Site and/or the Facility making up any shortfall at its own expense except to the extent any shortfall is due to an act or omission of the Department (subject to Clause 12.12). All such reinstatement works shall be carried out by ProjectCo under the terms of this Agreement (insofar as the same shall apply) with any further amendments as may be agreed. For the avoidance of doubt the term "shortfall" in this Clause 17.15 shall mean any difference between the sum required to be insured and that actually required to reinstate.

**17.16** The provisions of Clause 17.17 shall have effect:-

**17.16.1** in any event where the Site and/or the Facility has not following damage or

destruction, whether in part or in whole, by an Insured Risk been reinstated or rebuilt in its entirety by ProjectCo by the expiry of a period equivalent to the original building period from the date of receipt of all necessary planning and Requisite Consents;

**17.16.2** where, in breach of its obligation to use all reasonable endeavours, ProjectCo has not obtained all necessary planning and other Requisite Consents necessary for the reinstatement or rebuilding of the Site and/or the Facility by the expiry of the period of six months from the date of such damage or destruction; or

**17.16.3** where the Department reasonably considers that, because of such breach, ProjectCo is unlikely to obtain such planning or other Requisite Consents within six months or is unlikely to complete the reinstatement or rebuilding of the Site and/or the Facility within the period referred to in 17.16.1.

**17.17** In the event of the occurrence of any of the circumstances described in the immediately preceding Clause 17.16:-

**17.17.1** the Department shall be entitled to terminate this Agreement on reasonable notice;

**17.17.2** where the Department terminates this Agreement in accordance with Clause 17.17.1 it shall be entitled to the entirety of all insurance proceeds specific to the reparation and/or reinstatement of the Site and/or the Facility and associated losses of the Department;

**17.17.3** if the Department terminates this Agreement in accordance with Clause 17.17.1 and receives the insurance proceeds in accordance with Clause 17.17.2 it shall subject to such, if any, entitlement as ProjectCo may have under Schedule 1 Part 3 pay to ProjectCo the compensation calculated and payable in accordance with the provisions of Schedule 1 Part 3; and

**17.17.4** if the Department terminates this Agreement under 17.17.1 and (i) insurance proceeds and/or, (ii) and any balance (including accrued interest) on the Insurance Proceeds Account, in each case specific to the reparation and/or reinstatement of the Site and/or the Facility and/or associated losses of the Department have been spent by ProjectCo for other purposes then the Department shall be entitled to deduct from compensation payable to ProjectCo under this Agreement, a sum equivalent to the insurance proceeds and/or amounts from the Insurance Proceeds Account, so spent.

**17.18** Where notwithstanding all its reasonable endeavours ProjectCo is unable to obtain the necessary planning or other Requisite Consents:-

**17.18.1** the Department shall be entitled to terminate this Agreement on reasonable notice;

- 17.18.2** where the Department terminates in accordance with Clause 17.18.1 the parties shall share the insurance proceeds in proportion to their respective losses.
- 17.19** The provisions of this Clause are without prejudice to the rights of either party in respect of any antecedent breaches of the Agreement by the other party.
- 17.20** In any circumstances in which the Department is entitled to the proceeds of insurance ProjectCo shall:-
- 17.20.1** if in possession of the proceeds, forthwith pay them to the Department;
- 17.20.2** if not in possession of the proceeds, use all reasonable endeavours to assist the Department to obtain possession of them; and
- 17.20.3** in any event, at all times protect the Department's interest in any policy and proceeds.
- 17.21** Where any policy of insurance is cancelled or expires and cannot be renewed or replaced at reasonable commercial rates in accordance with this Agreement ProjectCo shall inform the Department.
- 17.22** In the event that any risk cannot be insured at reasonable commercial rates ProjectCo shall be deemed not to be in breach of this Agreement save where the reason that ProjectCo cannot renew or replace any policy of insurance at reasonable commercial rates is due to any default or negligence by it or its staff or because of its record of claims against or under the expired or cancelled policy in question or against the insurer or any other insurer under any other policy.
- 17.23** ProjectCo shall pay to the Department for each remaining year prior to the Expiry Date a sum equivalent to the premium last paid for any policy required under this Agreement which has become incapable of renewal or replacement (each an "Unavailable Insurance") as annually increased by the Relevant Indices. One twelfth of such sum shall be deducted from the monthly Availability Fee.
- 17.24** Any excess or deductible under ~~such insurances~~ any Unavailable Insurances shall be shared in the proportion of the parties' respective benefit thereunder save that where and to the extent the event giving rise to a claim on any insurance policy maintained by ProjectCo derives from the default or negligent act of either party or its contractors, agents or employees in which case the defaulting or negligent party shall bear the cost of the relevant excess or deductible or reasonable proportion thereof as the case may be. Without prejudice to the foregoing, any excess or deductible incurred solely as a result of a Relief Event, other than item (j) of the definition shall be shared equally.
- 17.25** All policies of insurance identified in Schedule 5 shall be taken out with a European insurer of repute approved by the Department (such approval not to be unreasonably withheld or delayed) on normal commercial terms and shall be endorsed to preclude any

rights of subrogation against the Department or any employee or agent of the Department or any employee or agency of the Waste Management Board.

**17.26** All monetary maxima and minima in this Clause 17 and Schedule 5 (including for the avoidance of doubt insured amounts, minimum insurance cover, maximum excesses and deductibles ~~and~~ any minima and maxima in relation to levels of claims and any limit of liability specified in the broker's letter of undertaking issued pursuant to Clause 17.28) shall be indexed annually in accordance with the D & B Indices or Relevant Indices as appropriate, (unless any amount is expressed as "not indexed") provided that (save in respect of the limit of liability in the broker's letter of undertaking) each such monetary amount shall only be increased on the relevant renewal date of the insurance policy to which it relates such that the amount that is indexed does not become equal to or exceed the whole of the relevant deductible, insurable amount or other monetary amount (as the case may be) available in the relevant insurance market, following such indexation.

**17.26A** The minimum limit of indemnity referred to in Clause 17.26 above shall not be required to increase in increments of less than £5,000,000 (five million pounds) (not indexed) for Third Party Public and Products liability insurance.

**17.26B** The maximum deductibles referred to in Clause 17.26 above shall not be required to increase in multiples of less than £5,000 (five thousand pounds) (not indexed).

**17.27** ProjectCo shall (on the Department's written request) promptly provide copies of correspondence with the insurers in respect of any documentation in which the Department has an interest including without limitation any claims affecting the Department and any surveys or reports concerning the Facility.

**17.28** ProjectCo shall procure that at all times during the Agreement Period the Department is in receipt of a valid letter from each of ProjectCo's insurance brokers for the time being responsible for placing any of the insurances required pursuant to this Clause 17 and Schedule 5 to this Agreement, in each case in the form set out in Part 2 of Schedule 5 to this Agreement or if an undertaking in that form is not available in the market, on terms reasonably acceptable to the Department, having regard to what is available on the market at the relevant time.

**17.29** As part of the annual meeting referred to in paragraph 4.14.2.2 of the Department's Requirements and in any event prior to any renewal of any of the insurances required by this Clause 17 and/or Schedule 5 (Insurances):

**17.29.1** the Contractor shall provide to the Department, in advance of such meeting (or renewal date):

**17.29.1.1** a schedule setting out in summary the insurance cover in place and the insurance required by this Agreement including as a minimum the indemnity limit/sum insured and any deductible for each such insurance;

17.29.1.2 the Contractor's proposals (if any) for any amendment to the provisions of this Clause 17 and/or Schedule 5 (Insurances);

17.29.2 the Parties shall review and discuss the insurance of the Facility including whether in the reasonable opinion of either Party there is a requirement to amend the provisions of this Clause 17 and/or Schedule 5 (Insurances). Any amendment shall be implemented in accordance with the provisions of Clause 8 (Variations and Service Changes).

## **18 DELEGATION**

- 18.1** The Department's Representative shall carry out the duties specified in this Agreement. The Department's Representative shall have no authority to amend this Agreement.
- 18.2** The Department's Representative may exercise the authority specified in or necessarily to be implied from this Agreement. Any requisite approval shall be deemed to have been given by the Department for any such authority exercised by the Department's Representative subject to Clause 18.4 below.
- 18.3** Except as expressly stated in this Agreement, the Department's Representative shall have no authority to relieve ProjectCo of any of its duties, obligations or responsibilities under this Agreement. Without limitation any proposal, inspection, examination, testing, consent, approval or similar act by the Department's Representative or the Department (including absence of disapproval) shall not relieve ProjectCo from any responsibility, including without limitation responsibility for its errors, omissions, discrepancies, and non-compliance with this Agreement.
- 18.4** The Department's Representative shall not authorise Variations or Services Changes and ProjectCo shall not rely on any such authorisation without written confirmation from the project director acting on behalf of the Department whose identity shall be confirmed to ProjectCo from time to time.
- 18.5** The Department's Representative may from time to time delegate any of its duties to assistants, and may at any time revoke any such delegation. Any such delegation or revocation shall be in writing and shall not take effect until a copy has been delivered to the Department and ProjectCo.
- 18.6** Any determination, instruction, inspection, examination, testing, consent, approval or similar act by any such assistant of the Department's Representative, in accordance with the delegation, shall have the same effect as though it had been an act of the Department's Representative. However:
- 18.6.1** any failure to disapprove any Plant, Materials, design or workmanship shall not prejudice the right of the Department's Representative to reject such Plant, Materials, design or workmanship;
- 18.6.2** if ProjectCo questions any determination or instruction of an assistant of the Department's Representative, ProjectCo may



refer the matter to the Department's Representative, who shall confirm, reverse or vary such determination or instruction. Any decision of the Department's Representative may be referred to dispute resolution.

- 18.7** Unless it is legally or physically impossible, ProjectCo shall comply promptly and fully with instructions given by the Department's Representative in accordance with this Agreement.
- 18.8** When the Department's Representative is required to determine conditions of payment, value, Cost, Profit or extension of time, he shall consult with ProjectCo in an endeavour to reach agreement. If agreement is not achieved, the Department's Representative shall determine the matter fairly, reasonably and in accordance with this Agreement. For the avoidance of doubt either party shall be entitled to refer any such determination to the dispute procedure.
- 18.9** Where ProjectCo wishes to change the identity of ProjectCo's Representative, it shall, submit to the Department's Representative in advance the name and particulars of the person ProjectCo proposes to appoint. ProjectCo shall not revoke the appointment of ProjectCo's Representative without the prior consent of the Department's Representative such consent not to be unreasonably withheld or delayed.
- 18.10** ProjectCo's Representative shall give its whole time during the D & B Phase to managing the procurement and the preparation of the Construction Documents and the execution of the Works. Except as otherwise stated in this Agreement, ProjectCo's Representative shall receive (on behalf of ProjectCo) all notices, instructions, consents, approvals, certificates, determinations and other communications under this Agreement. Whenever ProjectCo's Representative is to be absent from the Site, a suitable replacement person shall be appointed, and the Department's Representative shall be notified accordingly.
- 18.11** ProjectCo's Representative may delegate any of its powers, functions and authorities to any competent person, and may at any time revoke any such delegation. Any such delegation or revocation shall be in writing and shall not take effect until the Department's Representative has received prior notice signed by ProjectCo's Representative, specifying the powers, functions and authorities being delegated or revoked. ProjectCo's Representative and such persons shall be fluent in the English language.

## **19 DISPUTE RESOLUTION**

### **19.1 Mediation**

- 19.1.1** The Department or ProjectCo may at any time (whether before or after service of a Notice to Refer to Arbitration under Clause 19.3) by notice in writing seek the agreement of the other for the dispute to be mediated by a mediator appointed by the Centre

for Dispute Resolution of 7 St Katherine's Way, London, E1 9LB, England or any other appropriate or substitute impartial organisation set up for such a purpose.

## **19.2 Adjudication**

- 19.2.1** The Department and ProjectCo shall each have the right to refer any dispute under or arising out of this Agreement for adjudication and either party may give notice in writing (hereinafter called "the Notice of Adjudication") to the other at any time of his intention so to do. The adjudication shall be conducted under the Adjudication Rules.
- 19.2.2** Unless the adjudicator has already been appointed he is to be appointed with the object of securing his appointment and referral of the dispute to him within 7 days of the Notice of Adjudication .
- 19.2.3** The adjudicator shall reach a decision within 28 days of such referral or such longer period as is agreed by the parties after the dispute has been referred to the adjudicator.
- 19.2.4** The adjudicator may extend the period of 28 days by up to 14 days with the consent of the party by whom the dispute was referred.
- 19.2.5** The adjudicator shall act impartially.
- 19.2.6** The adjudicator may take the initiative in ascertaining the facts and the law.
- 19.2.7** The decision of the adjudicator shall be binding until the dispute is finally determined by arbitration or by agreement.
- 19.2.8** The adjudicator shall not be liable for anything done or omitted in the discharge or purported discharge of its functions as adjudicator unless the act or omission is in bad faith and any employee or agent of the adjudicator is similarly not liable.
- 19.2.9** The intention of the parties is that the practice, procedure and enforcement in respect of any adjudication in accordance with this Clause 19 shall reflect the practice, procedure and enforcement of adjudication in England (having regard to (without limitation) the Housing Grants Construction and Regeneration Act 1996 and any statutory modification, amendments thereto and any regulations made thereunder).

- 19.2.10** For the avoidance of doubt the parties shall not be obliged to adjudicate prior to commencing arbitration proceedings.

**19.3 Arbitration**

- 19.3.1** All disputes arising under or in connection with this Project Agreement other than failure to give effect to a decision of an adjudicator shall be finally determined by reference to arbitration. The parties seeking arbitration shall serve on the other party a notice in writing (called the "Notice to Refer") to refer the dispute to arbitration.
- 19.3.2** Where an adjudicator has given a decision under Clause 19.2 in respect of the particular dispute, the Notice to Refer shall be served within 3 months of the giving of the decision otherwise the adjudicator's decision shall be final as well as binding.
- 19.3.3** The arbitrator shall be a person appointed by agreement of the parties.
- 19.3.4** If the parties fail to appoint an arbitrator within one month of either party serving on the other party a notice in writing (hereinafter called the Notice to Concur) to concur in the appointment of an arbitrator the dispute shall be referred to a person to be appointed on the application of either party by the President for the time being of the Chartered Institute of Arbitrators of the International Arbitration Centre, 24 Angel Gate, City Road, London, EC1V 2RS.
- 19.3.5** If an arbitrator declines the appointment or after appointment is removed by order of a competent court or is incapable of acting or dies and the parties do not within one month of the vacancy arising fill the vacancy then either party may apply to the President of the time being of the Chartered Institute of Arbitrators to appoint another arbitrator to fill the vacancy.
- 19.3.6** In any case where the President for the time being of the Chartered Institute of Arbitrators is not able to exercise the functions conferred on him by this Clause the said function shall be exercised on his behalf by a Vice-President of the Chartered Institute of Arbitrators for the time being or any other officer of the Institute to whom such functions have been delegated by either the President or Vice-President.
- 19.3.7** Any reference to arbitration under this Clause 19.3 shall be deemed to be a submission to arbitration within the meaning of the Arbitration Act 1976 (as amended) or any statutory re-enactment or amendment thereof for the time being in force

and the seat of the arbitration shall be the Isle of Man. Such arbitrator shall have full power to open up review and revise any decision opinion, instruction, directions certificate or valuation of the Department's Representative or an adjudicator.

**19.3.8** Neither party shall be limited in the arbitration to the evidence or arguments put to the Department's Representative or to any mediator or to any adjudicator pursuant to Clause 19.1. or 19.2 respectively.

**19.3.9** Unless the parties otherwise agree in writing any reference to arbitration may proceed notwithstanding that the Works are not then complete or alleged to be complete.

#### **19.4 Witnesses**

**19.4.1** No decision, opinion, instruction, direction, certificate or valuation given by the Department's Representative shall disqualify him from being called as a witness and giving evidence before an adjudicator or arbitrator on any matter whatsoever relevant to the dispute.

**19.4.2** All matters and information placed before a mediator pursuant to a reference under Clause 19.1 shall be deemed to be submitted to him without prejudice and the mediator shall not be called by the parties or anyone claiming through them in connection with any adjudication or any other legal proceedings arising out of or connection with any matters so referred to him.

### **20 ELECTRICITY AGREEMENT**

**20.1** The Department shall make an Order pursuant to Section 75(4) of the Public Health Act 1990 to provide that Sections 74(1) and 74(3) shall apply to ProjectCo and shall procure the approval of Tynwald to such Order as soon as practicable following the date of this Agreement.

**20.2** Subject to Clause 20.1, ProjectCo shall execute and deliver to the MEA prior to the Conditions Cut-Off Date an agreement substantially in the form of the draft in Schedule 6 duly executed by an authorised person on behalf of ProjectCo and shall supply promptly to the Department a certified copy of the completed Electricity Agreement.

**20.3** ProjectCo shall not agree to any alteration, variation, surrender, assignment or novation of the Electricity Agreement.

**20.4** ProjectCo shall be relieved of its obligations in relation to the Electricity Agreement at all times during the Agreement Period when the MEA fails to

purchase the electricity generated or the Electricity Agreement is terminated as a result of breach by the MEA or for extended Force Majeure.

- 20.5** Subject to Clause 20.6, ProjectCo shall pay to the Department 90% of the income (net only of any associated charges for export and taxes, if any) received by it pursuant to the Electricity Agreement within five Business Days of receipt and shall make available to the Department all information reasonably required by the Department to satisfy itself as to the amounts properly payable under this clause. This clause is without prejudice to any other provisions in this Agreement relating to income generation or provision of information.
- 20.6** ProjectCo may utilise electricity generated at the Facility for its own purposes pursuant to this Agreement.
- 20.7** The Department shall procure the delivery of waste to the Facility during the Trial Period and no Gate Fees shall be payable in respect of such waste.
- 20.8** ProjectCo shall be entitled to retain for its own account all income arising from electricity generated during the Trial Period (or, if shorter, the first three months of the Trial Period).
- 20.9** In the event the price for electricity paid by the MEA under the Electricity Agreement falls below 2.85 pence per unit, the Department shall reimburse ProjectCo to the extent of such shortfall and ProjectCo shall be entitled to set off the extent of such shortfall against the sums payable to the Department pursuant to Clause 20.5 above.

## **21 OPEN BOOK ACCOUNTING, ACCESS AND AUDIT**

- 21.1** ProjectCo shall at all reasonable times in addition to any obligations set out in Schedules 2 and 3:-
- 21.1.1** maintain a full record of particulars of the costs of undertaking the Works and performing the Services, including those relating to the design, construction, operation and maintenance of the Facility;
  - 21.1.2** when requested by the Department, provide a summary of any of the costs referred to in Clause 21.1.1 in such form and detail as the Department may reasonably require to enable the Department to monitor the performance by ProjectCo of its obligations under this Agreement;
  - 21.1.3** provide such facilities as the Department may reasonably require for its representatives to visit any place where the records are held and examine and take copies of the records maintained under this Clause;

- 21.1.4** permit the Department's Representative to have access to the premises, facilities and records of ProjectCo (including premises which are not the Facility) and procure that the employees, agents and subcontractors of ProjectCo promptly provide any information and assistance to which the Department is entitled under this Clause;
  - 21.1.5** give the Department's Representative a right of access to the Facility and the Site in order that any survey or assessment may be carried out for the purpose of Clause 21.9.
- 21.2** ProjectCo shall keep (and where appropriate procure that any Approved Service Provider D & B Contractor and D&B Subcontractor also keeps) books of account in accordance with good accounting practice with respect to this Agreement showing in detail:-
  - 21.2.1** direct labour and indirect labour costs;
  - 21.2.2** direct materials and subcontract costs;
  - 21.2.3** overhead costs analysed to identify appropriate categories such as administration;
  - 21.2.4** payment details to suppliers and subcontractors;
  - 21.2.5** capital expenditure and such revenue expenditure as not detailed above;
  - 21.2.6** third party revenue;
  - 21.2.7** income received and receivable pursuant to the Electricity Agreement;
  - 21.2.8** such other items as the Parties shall agree the Department reasonably requires to conduct cost audits for verification of cost expenditure or estimated expenditure for the purpose of Clauses 8 (Variations and Services Changes), 13 (Price Review), 14 (Income Generation), 15 (Force Majeure), 16 (Relief Event), 20 (Electricity Agreement), Clause 1.4.2 of Schedule 1 and any provisional sums payable pursuant to this Agreement; and
  - 21.2.9** such other items as the Department may reasonably require to record the nature, quality and quantity of all the work carried out and all the services performed by ProjectCo in undertaking the Works and performing the Services and to ensure that they are undertaken and provided in a proper and timely fashion

and ProjectCo shall have (and shall procure that any Approved Service Provider and D & B Contractor shall also have) the items referred to in Clause 21.2 available for inspection by or on behalf of the Department upon reasonable notice (in the case of items to be made available for inspection by any Approved Service Provider and D&B Contractor only where such items are necessary to verify expenditure for the purposes referred to in Clause 21.2.8) and shall present a report of them to the Department and any adjudicator as and when requested.

**21.3** ProjectCo shall maintain or procure that the following are maintained:-

- 21.3.1** a full record of all incidents (including 'near misses') relating to health, safety and security which occur prior to the Expiry Date;
- 21.3.2** full records of all maintenance procedures carried out prior to the Expiry Date; and
- 21.3.3** current and accurate records of all persons who are employed by ProjectCo in connection with undertaking Works and providing the Services and such records shall include without limitation the numbers, capacities, job descriptions, identities and qualifications of such persons

and ProjectCo shall have the items referred to in Clauses 21.3.1 to 21.3.3 available for inspection by the Department and any adjudicator appointed pursuant to Clause 19.2 upon reasonable notice and shall present a report of them to the Department as and when requested.

**21.4** Without prejudice to any other provisions of this Agreement, ProjectCo shall as soon as reasonably practicable provide the Department with copies of any documents or any information relating to undertaking the Works or providing the Services and in connection with the Construction Documents which the Department may reasonably request.

**21.5** ProjectCo shall permit the records referred to in this Clause to be examined and copied by the Department or by the Department's Representative or persons authorised in writing by the Department's Representative.

**21.6** ProjectCo shall retain security safeguards against the destruction, loss, unauthorised use of or alteration to information and data required to be produced to, or to representatives of, the Department.

**21.7** The records referred to in this Clause shall be retained for the periods specified from time to time in the relevant Statute of Limitations and Isle of Man VAT Act.

**21.8** ProjectCo shall afford all reasonable assistance to the Department in the carrying out of surveys or searches of waste delivered to the Facility and shall from time to time when required by the Department on reasonable notice make available

areas, equipment and personnel at the Facility to enable waste to be discharged and sorted by or on behalf of the Department. ProjectCo acknowledges that the Department shall be entitled to remove items of waste for the purpose of investigation or analysis. ProjectCo shall be entitled to recover reasonable charges for the use of its equipment and personnel for these purposes.

**21.9** Until the Expiry Date ProjectCo shall monitor the performance of its obligations under this Agreement to ensure that the Works are undertaken and the Services are provided as required by this Agreement and, without prejudice to the generality of the foregoing, ProjectCo shall make available records to the reasonable satisfaction of the Department to show full compliance with the Department's Requirements.

**21.10** ProjectCo shall carefully inspect and test all materials, goods and equipment used in the provision of the Services or otherwise provided pursuant to this Agreement to ensure their quality, suitability and state of repair.

**21.11** During the Operating Period ProjectCo shall carry out such tests on such materials, goods and equipment as may reasonably be requested in writing by the Department's Representative where the Department's Representative has genuine concerns as to the likely failure of such materials, goods or equipment and supply such test results to the Department's Representative.

**21.12** Without prejudice to its obligations pursuant to the Health and Safety Obligations and the requirement to make and hold records pursuant to Clause 4 of Schedule 2, all such records and results of such assessments, surveys, inspections and tests shall be provided forthwith to the Department on request and shall be kept at the Facility or some equally accessible location and (if they are computerised) the Department's Representatives shall be notified of all necessary access codes.

**21.13** For the purpose of:-

**21.13.1** the examination and certification of the Department's accounts;  
or

**21.13.2** any examination pursuant to the Audit Act 1983 and the Accounts and Audit Regulations 1994 or any re-enactment thereof

the Internal Audit Division of Treasury of the Government may examine all documents including computerised records and data directly relating to the provision of the Works and the performance of the Services as they may reasonably require which are owned, held or otherwise within the control of ProjectCo and may require ProjectCo to produce such oral or written explanations as it considers necessary. For the avoidance of doubt it is hereby declared that the carrying out of an examination under the Audit Act 1983 and the Accounts and Audit Regulations 1984 in relation to ProjectCo is not a function exercisable under this Agreement.



**21.14** ProjectCo will permit the Department's Representative and other persons acting with the written authority of the Department's Representative to have access to the data and records referred to in this Clause 21 as well as the employees, agents and subcontractors of ProjectCo in order to assess ProjectCo's performance of the Services in relation to the Department's Requirements.

**21.15** All information in this Clause 21 is subject to the obligations set out in Clause 29.

## **22 TERMINATION**

### **Termination at the Department's Convenience**

**22.1** Without prejudice to any other right or remedy it may possess the Department shall be entitled to terminate this Agreement:-

**22.1.1** at the Department's convenience at any time giving six months' prior notice to ProjectCo. In the event of such termination:-

**22.1.1.1** prior to Take Over ProjectCo shall proceed in accordance with Clause 14.3 of Schedule 2;

**22.1.1.2** following Take Over ProjectCo shall proceed in accordance with Clause 22.20 and the Department shall return all Parent Company Guarantees;

**22.1.1.3** the parties shall proceed in accordance with Clause 22.24 of this Agreement.

**22.1.2** if ProjectCo or ProjectCo's Parent or the D & B Contractor or any of its D & B Subcontractors or the Approved Service Provider or any of their employees agents or servants gives or offers to give to any person any bribe, gift, gratuity or commission as an inducement or reward for doing or forbearing to do any action in relation to this Agreement or any other contract with the Department or for showing or forbearing to show favour or disfavour to any person in relation to this Agreement or to any other contract with the Department or otherwise committing an offence under the Corruption Act 1986

PROVIDED THAT the Department shall not exercise its rights or remedies under this Clause 22.1.2 if ProjectCo promptly upon notice thereof:

**22.1.2.1** procures the termination of any agreement with a subcontractor where the prohibited act is that of a subcontractor; and/or

**22.1.2.2** procures the dismissal of any Staff (whether its own or that of a subcontractor or other person or body) where the prohibited act is that of such member of Staff.

**22.1.3** forthwith, by notice, if any agreement is made or option granted to transfer any shares in ProjectCo and/or any transfer of any shares in ProjectCo takes place (other than between members of the group of companies of which ProjectCo's Parent is a member where the Department's prior written consent has been obtained to such agreement or transfer) or any agreement is made or option granted to issue any new shares or any new shares are issued (whether enjoying the same rights as existing shareholders or not) or a holder of shares in ProjectCo ceases to be a member of the group of companies of which it was a member when it acquired such shares and fails on leaving the group to transfer its shares to another member of that group.

**22.2** If the Department terminates this Agreement on the grounds specified in Clause 22.1.2 above, the Department may expel ProjectCo from the Site and the provisions of this Clause shall apply as if the termination and expulsion had been made under Clause 22.3.

#### **Termination for ProjectCo default during D & B Phase**

**22.3** If ProjectCo:

**22.3.1** fails to complete the Works so that the Taking Over Certificate has been issued by the Long Stop Date; or

**22.3.2** abandons or repudiates this Agreement; or

**22.3.3** assigns this Agreement or subcontracts the Works without any prior written approval required under this Agreement;

or on the occurrence of any of the events set out in Clause 22.14 during the D&B Phase then the Department may, by notice, forthwith terminate this Agreement. ProjectCo shall then deliver all Construction Documents, and other design documents made by or for it to the Department's Representative. ProjectCo shall not be released from any of its obligations or liabilities under this Agreement existing prior to or at the time of termination. The rights and authorities conferred on the Department and the Department's Representative by this Agreement shall not be affected.

**22.4** The Department may upon such termination prior to Take Over complete the Works itself and/or by any other contractor. The Department or such other contractor may use for such completion so much of the Construction Documents, other design documents made by or on behalf of ProjectCo, ProjectCo's

Equipment, Temporary Works, Plant and Materials and the benefit, subject to the burden, of all agreements and arrangements in the course of negotiation, or made, by ProjectCo in relation to Directly Procured Items as the Department or they may think proper and ProjectCo shall be compensated appropriately for such use. Upon completion of the Works, or at such earlier date as the Department's Representative thinks appropriate, the Department's Representative shall give notice that ProjectCo's Equipment and Temporary Works will be released to ProjectCo at or near the Site. ProjectCo shall remove or arrange removal of the same from such place without delay and at its cost.

**22.5** The Department's Representative shall, as soon as possible after termination under Clause 22.3 determine and advise ProjectCo of the value of the Construction Documents, Plant, Materials, ProjectCo's Equipment and Works and all sums then due to ProjectCo as at the date of termination including any amounts properly due under Clause 22.4.

**22.6** After termination under Clause 22.3:

**22.6.1** the Department shall not be liable to make any further payments to ProjectCo until the costs of design, execution, completion and remedying of any defects, damages for delay in completion, if any, and all other costs incurred by the Department shall have been established;

**22.6.2** the Department shall be entitled to recover from ProjectCo the extra costs, if any, of completing the Works after allowing for any sum due to ProjectCo under Clause 22.5. If there are no such extra costs, the Department shall pay any balance to ProjectCo.

#### **ProjectCo default during an Operating Year**

**22.7** If at any time ProjectCo has failed to perform the whole or any part of the Services then the Department may serve an O & M Default Notice on ProjectCo. Any such O & M Default Notice shall require ProjectCo (at ProjectCo's own cost and expense) to remedy such failure or breach (and any damage resulting from such failure or breach) in a manner and within such a period as the Department may reasonably direct. Where the failure or breach is not capable of remedy the Department shall require ProjectCo to improve its performance in a manner and within such period as the Department may reasonably direct.

**22.8** The Department may in the following circumstances issue to ProjectCo a Warning Notice:

**22.8.1** where there have been persistent breaches of the O & M Obligations (whether or not an O & M Default Notice has been issued) and whether or not remedied so that as a result the Department's confidence in the ability of ProjectCo to provide

the Services is reasonably and seriously undermined or the reputation of the Department has been or will be reasonably and seriously undermined or reasonably and materially adversely affected; or

**22.8.2** where there has been a material breach of the O & M Obligations but which has not led to termination under this Clause and ProjectCo has failed to remedy such breach within 15 Business Days of receipt of notice of such breach from or on behalf of the Department; or

**22.8.3** where the Department has issued nine O & M Default Notices in any period of twelve months.

**22.9** The Department may in any such Warning Notice require ProjectCo at its own cost and expense to remedy the failure or breach (and any damage resulting from such failure or breach), if such failure or breach is capable of remedy, and/or to improve its performance in such a manner and within a period as the Department may reasonably direct. Where such failure or breach is incapable of remedy the Department may require ProjectCo to improve its performance in a manner and within a period as the Department may reasonably direct. For the purposes of this Clause any Warning Notice shall be deemed to have been issued (in addition to its actual issue) in each and every month after the end of the period reasonably directed by the Department during which ProjectCo is required to remedy the failure or breach or to improve its performance and until such time as ProjectCo has done so to the reasonable satisfaction of the Department under this Clause.

**22.10** The O & M Default Notices and Warning Notices will be in writing, save in urgent or other appropriate circumstances, where the O & M Default Notice or Warning Notice may be given orally and will be confirmed in writing within two Business Days .

**22.11** ProjectCo shall comply with any O & M Default Notice and the requirements (if any) of any Warning Notice and shall inform the Department in writing when it has so complied.

**22.12** If ProjectCo does not comply with the O & M Default Notice or Warning Notice within such reasonable period as the Department may specify then that in itself will constitute grounds for the Department to issue a further O & M Default Notice or Warning Notice as the case may be.

**22.13** Without prejudice to any other right or remedy it may possess the Department shall be entitled to enter the Site during an Operating Year with such workers as are reasonably required to remedy an outstanding breach which materially and adversely affects the performance of the Services and which has been notified to ProjectCo and ProjectCo has failed to remedy the same within the specified time and the reasonable and proper costs incurred by the Department in so doing shall be payable by ProjectCo on demand.

### **Termination for ProjectCo Default**

- 22.14** Without prejudice to any other right or remedy it may possess the Department shall be entitled to terminate this Agreement forthwith in writing specifying the event in question on the happening of any of the following events :-
- 22.14.1** an order being made for the administration of ProjectCo; or
  - 22.14.2** a petition being presented or a meeting being convened to consider the passing of a resolution or any other action being taken for or with a view to the winding up of ProjectCo in any case other than frivolously or vexatiously and ProjectCo failing within 14 days of the date of presentation of such petition or prior to the date of such meeting to take appropriate steps to challenge the relevant procedure; or
  - 22.14.3** ProjectCo entering into liquidation whether compulsorily or voluntarily (except for the purposes of amalgamation or reconstruction of a solvent company); or
  - 22.14.4** ProjectCo ceasing trading; or
  - 22.14.5** ProjectCo suffering any process of execution to be levied on its assets and the same not having been lifted within 14 days; or
  - 22.14.6** an administrative receiver or a receiver being appointed of all or any material part of the undertaking, property or assets of ProjectCo; or
  - 22.14.7** ProjectCo stopping its payments to creditors generally; or
  - 22.14.8** ProjectCo convening a meeting of its creditors or any class or group of its creditors with a view to proposing or making any assignment arrangement or composition with, or for the benefit of, its creditors or any class or group thereof except for the purpose of an amalgamation or reconstruction and ProjectCo then being solvent; or
  - 22.14.9** any act by ProjectCo which vitiates any policy of insurance belonging to the Department which relates to an asset or risk material to the Works or the Services or the Department's interest in the Facility and the Site provided that ProjectCo has been made fully aware of all of the terms and conditions of any such policy and has been given the opportunity to make representations to the insurer; or

- 22.14.10** ProjectCo is in breach of its obligations under Clause 4.2.1 to 4.2.4 having received notice of such breach from the Department and having failed to remedy such breach within a reasonable time; or
- 22.14.11** any written representation, warranty or undertaking made by ProjectCo during the procedure for the award of the Project Agreement or in any agreement, certificate, instrument or notice contemplated thereby or by the Project Agreement or made or delivered in writing pursuant thereto or hereto being incorrect in any material respect with the result that there is no reasonable likelihood of ProjectCo being able to perform the Works or Services or any material part of either of them; or
- 22.14.12** there is a fundamental breach (within the meaning of that expression in Clause 22.15) of any of its obligations under this Agreement by ProjectCo; or
- 22.14.13** Abatements have been imposed on ProjectCo in respect of one of the matters numbered 1-3 inclusive in Clause 2.4.4 of Schedule 1 for three consecutive months in respect of that one matter or for five months in any period of twelve consecutive months; or
- 22.14.14** the Department receiving from ProjectCo less than fifty per cent of the anticipated income from the Electricity Agreement over a period of twelve consecutive months save where ProjectCo is itself in receipt of less than sixty per cent of such income and is not in default under the Electricity Agreement relating to such deficiency in income received; or
- 22.14.15** the Bottom Ash Disposal Contract is terminated due to ProjectCo default.
- 22.15** A breach is to be treated as fundamental for the purposes of Clause 22.14.12 and Clause 22.18.2.6 if :-
- 22.15.1** either alone or where taken with other breaches (whether or not themselves fundamental breaches) it materially prevents the implementation or the continuing implementation of all or a material part of the Works and/or the Services by ProjectCo; or
- 22.15.2** the Department has issued nine Warning Notices in any period of twelve consecutive months; or
- 22.15.3** a breach is incapable of remedy or is pursuant to the relevant provisions of this Agreement expressed to be or deemed to be incapable of remedy and materially prevents the implementation

or the continuing implementation of all or a material part of the Works and/or the Services by ProjectCo.

**22.16** The parties hereby agree that save for a fundamental breach under Clause 22.15.3, a fundamental breach may be cured (and be deemed to have been cured) if:-

**22.16.0.1** all physical damage and effects caused by the breach have been promptly and completely remedied and corrected; and

**22.16.0.2** all reasonable steps have been taken to prevent a recurrence of the breach.

**22.17** The ability of the parties to cure any such fundamental breach under and in accordance with Clause 22.16 shall obtain once only for any one breach or type of breach and accordingly unless the parties otherwise agree, the same breach occurring again will give rise to the right of the Department or ProjectCo (as appropriate) to terminate this Agreement.

#### **Termination for Department Default**

**22.18** Without prejudice to any other right or remedy it may possess, ProjectCo shall, having served written notice on the Department of the relevant breach, be entitled to terminate this Agreement on 30 Business Days' notice which may be given to the Department upon the happening of any of the following events and on the expiry of such notice this Agreement shall automatically determine unless before such date, the Department has in fact paid the outstanding sum or sums referred to in Clause 22.18.1 or otherwise remedied its breach referred to in this Clause:

**22.18.1** during the D & B Phase:

**22.18.1.1** the Department fails to pay ProjectCo the amount due under any certificate of the Department's Representative within 30 Business Days after the expiry of the time stated in Clause 12.8 of Schedule 2, within which payment is to be made (except for any deduction that the Department is entitled to make under this Agreement) or;

**22.18.1.2** a breach or series of breaches by the Department of its obligations under this Agreement which substantially frustrates or renders it impossible for ProjectCo to perform its obligations hereunder for a continuous period of three months; or

**22.18.1.3** the Department assigns this Agreement or any of its obligations hereunder other than in accordance with the terms of this Agreement; or

**22.18.1.4** a prolonged suspension affects the whole of the Works as described in Clause 7.18 of Schedule 2

and if this Agreement terminates pursuant to this Clause 22.18.1 the provisions of Clause 14.3 of Schedule 2 shall apply; or

**22.18.2** at any time during the Agreement Period;

**22.18.2.1** the Department has failed to pay to ProjectCo within 30 Business Days of a Monthly Invoice the full amount due in accordance with this Agreement; or

**22.18.2.2** any act by the Department which vitiates any policy of insurance taken out by ProjectCo pursuant to any obligations under this Agreement or with the Department's consent, provided that the Department has been made fully aware of all of the terms and conditions of any such policy and has been given the opportunity to make representations to the insurer and that all such representations have been taken into account; or

**22.18.2.3** Applicable Laws are introduced into Tynwald which has the effect of removing from the Department or any successor to or assignee from the Department or materially restricting its ability or any power to make or fund any payment when due from it under this Agreement (including on termination) and such power or obligation is not transferred to or does not otherwise become exercisable by any other person or body with whom ProjectCo is able to enter into arrangements which are in all material respects as satisfactory as those previously in place; or

**22.18.2.4** the Department (or another Department of the Isle of Man Government) sequesters, requisitions or otherwise seizes the Site and/or Facility or any material part of it other than pursuant to the exercise of any right or remedy



given to the Department by this Agreement or the Lease in a manner which is likely to prejudice compliance by ProjectCo with its obligations under this Schedule; or

**22.18.2.5** the Bottom Ash Disposal Contract is terminated due to default by the Department; or

**22.18.2.6** there is a fundamental breach (within the meaning of that expression in Clause 22.15) of the Department's obligations under this Agreement by the Department.

#### **Effect of Termination Event**

**22.19** Upon the occurrence of a Termination Event, (but subject always to any other provisions of this Clause 22):-

**22.19.1** ProjectCo shall on the Termination Date (subject to Clause 22.21) cease to occupy the Facility and/or perform any of the Services;

**22.19.2** any such termination shall be without prejudice to any accrued rights or remedies of either party in respect of any antecedent breach of this Agreement;

**22.20** On and from the Termination Date:

**22.20.1** the licence to occupy contained in Clause 10.1 or the Lease (as appropriate) shall determine and ProjectCo shall vacate the Site and the Facility and hand over or deliver or relinquish custody of the complete, accurate and up to date Construction Documents, the Operational Plan, records, manuals, drawings, information and data which ProjectCo was required to keep pursuant to this Agreement and all property of the Department relating to the performance of the Works and/or the Services to the Department or, at the Department's direction, to the Successor Operator;

**22.20.2** ProjectCo shall further use its reasonable endeavours to transfer to the Successor Operator, its rights as ProjectCo under any subcontracts entered into in the performance of its obligations under this Agreement provided that the Successor Operator promptly executes an agreement with ProjectCo reasonably satisfactory to ProjectCo;

**22.20.3** in relation to all other contracts relating to the Works and/or the Services ProjectCo shall use its reasonable endeavours to hold

its rights and interests thereunder on trust for and to the order of the Successor Operator; and

**22.20.4** if any Staff have undertaken a continuing and assignable obligation to ProjectCo in connection with any of the Works or Services and if such obligation subsists at the Termination Date ProjectCo shall assign the benefit of such obligation to the Department for its unexpired duration, at the request and cost of the Department.

**22.21** In the event of any termination of this Agreement by the Department, ProjectCo shall if required by the Department operate the Facility for a period specified by the Department but not exceeding 90 days from the Termination Date. After such date ProjectCo shall have no further rights or obligations under this Agreement except as specifically provided herein. During such period ProjectCo shall continue to act in all respects in accordance with this Agreement as if the same had not been terminated and ProjectCo's obligations hereunder continued during such period. The Department shall pay ProjectCo during such period the same amount as would have fallen due during such period if this Agreement had not been terminated and all obligations of the Department under this Agreement shall remain in effect during such period. ProjectCo shall provide its reasonable assistance to the Department and the Successor Operator to transfer the obligations under this Agreement to the Successor Operator in order to prevent, limit or mitigate any harm or disruption to the carrying out of the Works or performance of the Services and the activities of the Department.

**22.22** Subject to Clause 22.20, at least 6 months prior to the Expiry Date or within 7 days after the Termination Date, the parties shall meet and agree upon the inventories of Strategic Spare Parts and Wear Parts to be transferred to the Department (or to a third party nominated by the Department) on the Expiry Date and the mechanics of the transfer and the appropriate security arrangements. Such inventories shall be adequate to meet the normal needs of the Facility for the period of 12 months after the Expiry Date or the Termination Date as the case may be.

**22.23** Subject to Clause 22.21, ProjectCo shall at its own cost and risk remove all objects owned by it from the Facility on or before the Expiry Date unless otherwise agreed by the parties. The objects to be removed should be limited to the personal items of the employees and articles having nothing to do with the operation, maintenance and handback or handover of the Facility. ProjectCo shall not remove any equipment, tools, parts, design, drawings and technical information necessary for the operation, maintenance and handback or handover of the Facility. The Department shall be entitled to remove and store at the risk and expense of ProjectCo any items which ProjectCo is entitled to remove pursuant to this Agreement.

**22.24** If this Agreement is terminated in accordance with Clause 22.1.1 or 22.18 the Department shall pay to ProjectCo compensation calculated and paid in

accordance with the provisions of Schedule 1 Part 3 taking into account any insurance proceeds received by ProjectCo in accordance with Clause 17 of this Agreement (and where such termination occurs prior to Take Over the Department shall return the D & B Performance Bond).

- 22.25** ProjectCo shall be under a duty to use all reasonable endeavours to mitigate any loss in respect of which compensation is payable under this Agreement.
- 22.26** Without prejudice to its rights under Clause 22.24 ProjectCo shall not be entitled to any further compensation (other than as allowed for in this Agreement) relating to the termination or the reasons for the termination which are the subject of this Clause.
- 22.27** The Department shall be entitled to deduct from any payment of compensation any sum to which it is entitled by virtue of antecedent breach or otherwise of this Agreement (including Liquidated Damages and Abatements but subject to the limit referred to in Clause 12.12. and if the amount to be so deducted from the compensation is greater than the compensation, the balance shall be immediately due and payable by ProjectCo to the Department as a debt.

## **23 ASSIGNMENT/SUBCONTRACTING**

- 23.1** ProjectCo shall not assign its interest in and/or rights and benefits in or novate or transfer its obligations, liabilities and burden under this Agreement.
- 23.2** Subject to Clause 23.4 the Department shall only be entitled to assign its interest in and/or rights and benefits in or to novate or transfer its obligations, liabilities and burden under this Agreement to any third party being a Government Department in whom all or some of the functions of the Department relating to the collection and disposal of Conforming Waste are or are to become vested pursuant to the exercise of powers of Tynwald and/or any Government Department or by order of the Governor in Council.
- 23.3** In the event of any assignment, novation or transfer by the Department in accordance with Clause 23.2, the Department shall:
- 23.3.1** procure that ProjectCo shall receive evidence satisfactory to ProjectCo (acting reasonably) that such assignment, novation or transfer is lawful; and
  - 23.3.2** assign or transfer its interest in the Site to the assignee or transferee.
- 23.4** Without prejudice to its obligations under this Agreement, the Department shall be entitled to assign its interest in and/or rights and benefits in this Agreement and any of the agreements entered into pursuant to or in connection with this Agreement by way of security to any lender providing finance to the Department without the consent of ProjectCo and upon any such assignment the Department

shall procure that written notice thereof is given to ProjectCo within ten Business Days of such assignment taking place.

**23.5** ProjectCo shall itself perform and shall not sub-contract any material part of the Services, the O & M Obligations or any part of them other than to the Approved Service Provider and ProjectCo shall not be relieved from any liabilities or obligations under this Agreement as a result of such subcontracting and shall be responsible for all acts, defaults, errors, omissions, negligence, breach of statutory duty and breach of contract by the Approved Service Provider as if they were ProjectCo's own.

**23.6** ProjectCo shall not sub-contract the Works other than in accordance with Clause 3 of Schedule 2 and shall not be relieved from any liabilities or obligations under this Agreement as a result of any subcontracting and shall be responsible for all acts, defaults, errors, neglects, omissions, negligence, breach of statutory duty and breaches of contract of any D & B Contractor and/or D & B Subcontractor carrying out any part of the Works as if they were ProjectCo's own.

## **24 SEVERANCE**

**24.1** If any provision of this Agreement shall become or shall be declared by any Court of competent jurisdiction to be void, invalid, illegal or unenforceable in any way, such invalidity or unenforceability shall in no way impair or affect any other provision, all of which shall remain in full force and effect.

**24.2** The parties shall negotiate in good faith and with all reasonable speed in order to agree the terms of a mutually satisfactory lawful Clause to be substituted for the Clause so found to be void, invalid, illegal or unenforceable.

## **25 GOVERNING LAW**

**25.1** The Agreement shall be governed by and construed in accordance with the laws of the Isle of Man.

## **26 ENTIRE AGREEMENT**

**26.1** This Agreement shall constitute the entire agreement between the parties hereto and no variation shall be effective unless it is evidenced in writing and signed by or on behalf of the parties to this Agreement by individuals with the express authority to sign or execute the relevant document effecting such variation on behalf of the Department or ProjectCo as appropriate.

**26.2** ProjectCo hereby represents and warrants to the Department that as at the Execution Date:

**26.2.1** it shall be deemed to have satisfied itself before entering into this Agreement as to the accuracy and sufficiency of the Gate Fees and shall be deemed to have obtained for itself all

necessary information as to risks contingencies and any other circumstances which might influence or affect the Gate Fees.

**26.2.2** it shall have no claim whatsoever against the Department in respect of such matters referred to in Clause 26.2.1 and in particular but without limitation the Department shall not make any payments to ProjectCo other than the Gate Fees unless specifically agreed elsewhere in accordance with this Agreement.

**26.2.3** it has for all purposes connected with this Agreement carried out all inspections, researches, investigations and enquiries and satisfied itself as to the nature, extent volume and character of the Works and the Services and this Agreement the extent of the Staff and equipment which may be required and the nature of all local, physical, environmental, ground subsurface and subsoil and other conditions and circumstances, the form and nature of the Site, the means of communication and restrictions on access to the Site and any other matter which may affect the provision of the Works and the performance of the Services and this Agreement.

**26.2.4** it has verified for itself the accuracy of all information provided by or on behalf of the Department prior to or on the Execution Date and shall be deemed to have obtained for itself all relevant information as to risks, contingencies and any other circumstances which might have influenced or affected its tender for this Agreement and/or the level of Gate Fees and shall not be entitled to rely on any such information without prejudice to the generality of the foregoing.

**26.2.5** it has taken appropriate professional advice (including, without limitation, legal financial and technical advice) before entering into this Agreement and does so having received, understood and considered such advice.

## **27 WAIVER**

**27.1** The rights, powers and remedies provided by this Agreement are cumulative and are not, nor to be construed as, exclusive of any rights, powers and remedies provided by law, save as expressly provided in this Agreement.

**27.2** Failure by either party at any time to enforce the provisions of this Agreement shall not be construed as a waiver or revision of or as creating an estoppel in connection with any such provision and shall not affect the validity of this Agreement or any part thereof or the right of either party to enforce any provision in accordance with its terms and no waiver or any default in the performance of any of the provisions of this Agreement shall operate or be construed as a waiver

of any other or further default or defaults, whether of a like or different character, nor shall any single or partial waiver of any right or power preclude any further or other exercise of that right or power, or the exercise of any other right or power save that the parties may effectively waive their rights in respect of any matter but only if the waiver is in writing and signed by the Department's Representative (in the case of any O & M Obligations) or ProjectCo's Representative, as the case may require and is stated to be a waiver and it is clear on its face what is being waived and the duration of the waiver.

- 27.3** The Department may reasonably grant time or other indulgence or make any other arrangement, variation or release with any person not a party hereto without in any way prejudicing, affecting or impairing any of the Department's rights or powers hereunder or the exercise of the same.

## **28 NOTICES**

Notice may only be served in writing by hand delivery, recorded delivery post or facsimile (for which there is a transmission sheet followed by hand delivery or recorded delivery post despatched within 48 hours of transmission):

- 28.1** as regards the Department or the Department's Representative as required by this Agreement, at the office specified at the head of this document or such address or facsimile number (if any) as the Department shall notify in writing to ProjectCo from time to time.
- 28.2** as regards ProjectCo to ProjectCo's Representative (if given by hand) or at ProjectCo's registered office or its trading address or facsimile number (if any) as ProjectCo shall notify in writing to the Department from time to time.

## **29 CONFIDENTIALITY AND PROPRIETARY INFORMATION**

- 29.1** ProjectCo shall keep confidential and shall ensure that Staff and all D&B Contractors, D&B Subcontractors and Approved Service Providers keep confidential any and all information which is learnt or obtained by them in relation to the Site and/or the Facility and/or Works and/or the Services and/or relating to the Department and shall (and shall procure that Staff and all D&B Contractors, D&B Subcontractors and Approved Service Providers shall) enter into confidentiality agreements with the Department in such form as the Department may reasonably require from time to time.
- 29.2** The confidentiality obligations of the parties shall not apply to the following:
- 29.2.1** any matter which a party can demonstrate is already generally available and in the public domain otherwise than as a result of a breach of this Clause; or
  - 29.2.2** any disclosure necessarily required for the performance of that party's obligations under this Agreement; or

- 29.2.3** disclosure of information which is required by any law (including any order of a court of competent jurisdiction) or required or recommended by the rules of any stock exchange or governmental or regulatory authority; or
- 29.2.4** disclosure of any information which is already lawfully in the possession of the receiving party prior to its disclosure by the disclosing party; or
- 29.2.5** any disclosure made with the specific prior approval in writing of the other party; or
- 29.2.6** the necessary provision of information:-
- 29.2.6.1** to the professional advisors of either party or any financier; or
- 29.2.6.2** to suppliers or subcontractors necessarily required for the performance of the obligations under this Agreement; or
- 29.2.6.3** to any successor contractor (or potential successor contractor) and its employees, agents, advisors and subcontractors, but only to the extent reasonably necessary to enable any such successor contractor to bid for the contract and to perform the Services.
- 29.3** Where disclosure is permitted under this Clause 29 the recipient of the information shall be made subject to a similar obligation of confidentiality as that contained in this Agreement.
- 29.4** The provisions and obligations set out in this Clause shall remain in full force and effect notwithstanding termination of the Agreement.
- 29.5** Notwithstanding the foregoing, the Department shall not be obliged to treat as confidential any information in relation to this Agreement it is required to disclose from time to time to Tynwald or for its own internal purposes.
- 29.6** Photographs and images of the Facility may only be used by ProjectCo with the written consent of the Department (which shall not be unreasonably withheld).

## **30 AGENCY**

- 30.1** Save as expressly provided for in this Agreement, ProjectCo is not, and shall in no circumstances hold itself out as being, the agent of the Department for any purpose.

### **31 NON-PARTNERSHIP**

- 31.1** Neither this Agreement nor anything done pursuant to or contained or referred to in it shall create or constitute evidence of a partnership between the parties.

### **32 PASSING OFF**

- 32.1** The parties shall not and shall ensure that none of their employees at any time use the name, style or logo of the other party or any other entity on any letter, brochure, document, sign, display or badge so as, or in any other way, to convey the meaning or impression of being the other party or a director, employee or agent of the other party.

### **33 INTELLECTUAL PROPERTY RIGHTS**

- 33.1** The Department hereby grants to ProjectCo and Staff acting in the performance of the Works and the Services a licence to use such Intellectual Property Rights as belong to the Department which are in the Department's reasonable opinion necessary for the fulfilment of those obligations.
- 33.2** ProjectCo hereby grants to the Department and its employees, contractors and agents a perpetual, irrevocable, transferable, immediate, unlimited, unconditional, non-exclusive, royalty free licence to use, copy and reproduce all such Intellectual Property Rights which are or become vested in ProjectCo arising out of or in connection with the Site and/or the Works and/or the provision of the Services for all and any purposes relating to the performance of the Works (or any of them), the completion, commissioning or testing of the Facility or the management and provision and performance of the Services.
- 33.3** To the extent that any of the data, materials and documents which ProjectCo is required by this Clause to provide or make available to the Department on the Expiry Date is generated by or maintained on a computer or in any other machine readable format, ProjectCo shall use all reasonable endeavours to procure for the benefit of the Department, at no charge, the grant of a licence or sub-licence for any supply of any relevant software or database to enable the Department and any Successor Operator to have access to and otherwise to use such data for the purposes set out in this Agreement.
- 33.4** ProjectCo shall be liable for and shall indemnify, defend and hold harmless the Department, its employees and agents and any Successor Operator from and against all and any claims made or brought by any person for, or on account of, infringement or alleged infringement of any Intellectual Property Rights in which the Department has been granted a licence by ProjectCo or otherwise arising out of or in connection with such licence, save where such claims or allegations arise from any adaptations, modifications or alterations to the Intellectual Property Rights by or on behalf of the Department.



**33.5** Within 20 Business Days of Take Over, ProjectCo shall submit to the Department its proposals for backing up and storage in safe custody of the data, materials and documents referred to in this Clause 33.

**33.6** At the Expiry Date, ProjectCo shall deliver to the Department up to date copies or versions of the Construction Documents and any other manuals, drawings, information and Know-How, books, records, and inventories related to the technology and the data, software or database referred to in Clause 33.3 used for the purposes of operating and maintaining the Facility, and shall transfer and assign, including by way of licence or sub-licence, to the Department or any Successor Operator, free of charge, all technology and Know-How used at the time of transfer and required to operate and maintain the Facility, to the fullest extent that such technology and Know-How is transferable or assignable by ProjectCo and in any event to the extent necessary to enable the Department or its assignees, including any Successor Operator, to operate and maintain the Facility and such transfer shall be for the sole purpose of operating and maintaining the Facility.

## **34 PUBLIC RELATIONS**

**34.1** ProjectCo shall comply with the obligations in respect of public relations associated with the design construction operation and maintenance of the Facility contained in the Department's Requirements in the manner set out in ProjectCo's Proposal.

## **35 HANDBACK**

**35.1** ProjectCo shall comply with the Handback Obligations so that on the Expiry Date the Facility is returned to the ownership, possession and control of the Department in the state and condition required by the Handback Obligations and the Department is in a position either itself or through a Successor Operator to continue the operation of the Facility to the standard required under this Agreement PROVIDED THAT in the event the Expiry Date occurs owing to early termination of this Agreement pursuant to Clause 22 ProjectCo shall comply with the Handback Obligations to the extent it is possible to do so.

**35.2** In the event of termination pursuant to Clauses 22.1.1 or 22.18 the Department shall pay ProjectCo the reasonable and proper costs it incurs in complying with the Handback Obligations save to the extent that a proper provision for such costs would have accrued on a straight line basis (whether or not ProjectCo has made such provision).

**35.3** On the Expiry Date and in the event that the Department wishes to enter into another contract for, inter alia, the operation and maintenance of the Facility, ProjectCo shall (and shall ensure that the Approved Service Provider any D & B Contractor and D & B Subcontractors shall) comply with all reasonable requests of the Department to provide information relating to ProjectCo's costs of operating

and maintaining the Facility and complying with its obligations under the Handback Obligations.

### **36 COST OF FUEL USED IN SECONDARY WASTE STREAM<sup>27</sup>**

**36.1** It is agreed that the cost of fuel oil used in the Secondary Waste Stream (“SWS Oil”) will not be taken into account in calculation and adjustment of the Availability Fee and instead will be reimbursed by the Department to ProjectCo in accordance with the following:

(a) the SWS Oil cost will be adjusted to reflect the efficiency of consumption in accordance with the graph set out in Appendix 20 of the Deed of Variation No 2<sup>28</sup>.

(i) the horizontal scale of the graph shows the actual average monthly rate of use of SWS Oil per tonne of Secondary Waste incinerated;

(ii) the vertical scale of the graph shows the percentage of the monthly average actual price of SWS Fuel purchased by ProjectCo;

(iii) the blue line in the graph shows the percentage of the monthly average price of SWS Oil purchased by ProjectCo which will be reimbursed by the Department to ProjectCo dependant on the monthly rate of use

(b) the weighted monthly cost of SWS Fuel calculated as above will be reimbursed by the Department to ProjectCo within 30 days of the end of each month.

(c) If the Department is of the opinion that that the actual rate of use of SWS Oil exceeds the reasonable rate of consumption (“**Reasonable Rate**”) using Prudent Engineering and Operating Practices then it may request that with effect from the next Price Review Date the quantity of SWS Oil for which the cost is reimbursed under this clause 36 is restricted to the quantity (“**the Reimbursed Quantity**”) which would have been used with a Reasonable Rate. If the parties fail to agree on the Reasonable Rate or the Reimbursed Quantity then the Department may refer the dispute for determination under the dispute resolution procedure in clause 19 of the Project Agreement.

(d) The parties acknowledge and agree that the removal of the requirement to treat animal waste and the operation of the Secondary Waste Stream on a occasional or batch basis as opposed to a more continuous operation has and will result in an increase in the rate of consumption of SWS Oil which

<sup>27</sup> This Clause was added by DoFV2, clause 5.3.

<sup>28</sup> Set out in Appendix 11 to this PA.

will be taken into account and allowed in determining whether the actual rate of consumption is reasonable.

**IN WITNESS WHEREOF** this Agreement has been duly executed as a deed and delivered the day and year first before written

**EXECUTED** by the Department under the hand  
of the Minister for the Department of Local  
Government and the Environment in the  
presence of:

W. Gilbey

Anthony Hamilton

Witness

R A Hamilton

Name

Murray House

Address

Douglas

Isle of Man

**EXECUTED** as a deed by United Waste  
(Isle of Man) Limited acting by:

Robert Wheatley

Director

Jean-Claude Sartenaer Director / Secretary

## SCHEDULE 1 SCHEDULE OF PAYMENTS

### 1 PART 1 : D & B SCHEDULE OF PAYMENTS

1

#### 1.1 D&B Contract Price

- 1.1.1 The D&B Contract Price shall be **THIRTY SEVEN MILLION THREE HUNDRED AND SEVENTY FOUR THOUSAND FIVE HUNDRED AND FIFTY ONE POUNDS (£37,374,551)**<sup>29</sup> adjusted in proportion to any adjustment in the D&B Indices between the figures for June 2000 and the figures for those indices for the month prior to the Effective Date (other than in respect of Stage Payments 1 and 2 which shall be adjusted in proportion to any adjustment in the D&B Indices between the figures for June 2000 and the figures for those indices for the month prior to the Execution Date) and save to the extent any delay in the Effective Date is attributable to failure by ProjectCo to use its best endeavours to obtain a Reserved Matters Approval pursuant to Clause 4.2.4 of this Agreement. The D & B Contract Price shall be payable in the amounts of Local Currency and Nominated Currency identified in Clause 1.3 of this Schedule 1.
- 1.1.2 Each stage payment shall include the amount payable by the Department to a DPI Supplier so that the amount in Local Currency or Nominated Currency paid to ProjectCo shall reduce by the same amount of such currency payable by the Department to a DPI Supplier.

#### 1.2 General conditions for all stage payments

The following conditions must be satisfied (where relevant) for the release of each stage payment:

- 1.2.1 Submission of relevant VAT invoices for Directly Procured Items in accordance with Clause 6.7.2 of this Agreement
- 1.2.2 Submission of all applicable applications, statements and invoices in accordance with Clause 12 of Schedule 2 and Clause 7 of this Agreement
- 1.2.3 Submission of the Programme in accordance with Clause 3.22 of

<sup>29</sup> This is the original Contract Price. Subsequent changes made to the D&B Contract Price are tabulated in Appendix 2 to this Conformed Copy.<sup>1</sup>

Schedule 2.

1.3 Stage Payments<sup>30</sup>

Stage Payment No.		Total Value		NDPI (In Euros)	NDPI Escalation (in £)	DPI (in Euros)	DPI Escalation (in £)	Value of Directly Procured Items in Nominated Currency (ECU)	Conditions for Release of Payment	Planned Stage Completion Date
		Local Currency (£)	Nominated Currency (ECU)							
1. <sup>31</sup>		329,484*	135,757					102,377	1. PSO Application submitted to the Department in accordance with Clauses 4.2.1, 4.2.2 and 4.2.3 of the Project Agreement and 1.8 of the Department's Requirements	4

\* Plus 30% of Savage & Chadwick's fee (subject to the maximum amount for that fee of £50,000).<sup>1</sup>

\*\* Plus 30% of Savage & Chadwick's fee (subject to the maximum amount for that fee of £50,000).<sup>1</sup>

<sup>30</sup> The Department and ProjectCo agreed to change the D & B Schedule of Payments in VO 7, DoFV 1 and DoFV 2, Appendix 6, paragraph 2. The Stage Payment table in Paragraph 1.3 of this Schedule 1 should be read in light of the changes provided by VO 7 and DoFV 2, Appendix 6, paragraph. These changes are set out below in paragraph 1.3A of this Schedule.

<sup>31</sup> Adjustment to this Stage Payment is set out in paragraph 1.3A below.

~~\*plus 70% of Savage & Chadwick's fee (subject to the maximum amount for that fee of £50,000)~~

		<u>Total Value</u>								
Stage Payment No.		Local Currency (£)	Nominated Currency (ECU)	<u>NDPI (In Euros)</u>	<u>NDPI Escalation (in £)</u>	<u>DPI (in Euros)</u>	<u>DPI Escalation (in £)</u>	Value of Directly Procured Items in Nominated Currency (ECU)	Conditions for Release of Payment	Planned Stage Completion Date
2.(a) <sup>32</sup>		555,887.50 <sup>**</sup>	71,732					38,352	1. Completion of the public enquiry as part of the PSO Application <u>2. Completion of the Feasibility Study.</u>	7
<u>2aa</u> <u>[New]</u> <sup>1</sup>									<u>3.</u>	
<u>2ab</u> <u>[New]</u> <sup>2</sup>									<u>4.</u>	
2.(b) <sup>3</sup>		555,887.50	71,732					38,352	1. Design Completion achieved	

<sup>32</sup> Adjustment to this Stage Payment is set out in paragraph 1.3A below.

<sup>\*</sup> ~~plus 30% of Savage & Chadwick's fee (subject to the maximum amount for that fee of £50,000)~~

<sup>1</sup> This new Stage Payment is introduced by Appendix 6 of DoV2. See Paragraph 1.3A below.

<sup>2</sup> This new Stage Payment is introduced by Appendix 6 of DoV2. See Paragraph 1.3A below.

<sup>3</sup> Adjustment to this Stage Payment is set out in paragraph 1.3A below.



Stage Payment No.		Total Value		NDPI (In Euros)	NDPI Escalation (in £)	DPI (in Euros)	DPI Escalation (in £)	Value of Directly Procured Items in Nominated Currency (ECU)	Conditions for Release of Payment	Planned Stage Completion Date
		Local Currency (£)	Nominated Currency (ECU)							
3. <sup>4</sup>		884,675	987,846					987,846	2. Health and Safety Plan submitted.  1. SHEP 3 (HAZOP review) completed 2. Final release of orders for: <ul style="list-style-type: none"> <li>• Water treatment plant</li> <li>• Turbine generator set</li> <li>• Air condenser</li> <li>• Bag house filter</li> <li>• Secondary Incinerator stream</li> </ul>	10

<sup>4</sup> Adjustment to this Stage Payment is set out in paragraph 1.3A below.

Stage Payme nt No.		<u>Total Value</u>		<u>NDPI (In Euros)</u>	<u>NDPI Escalatio n (in £)</u>	<u>DPI (in Euros)</u>	<u>DPI Escalatio n (in £)</u>	Value of Directly Procured Items in Nominate d Currency (ECU)	Conditions for Release of Payment	Planned Stage Completi on Date
		Local Currency (£)	Nominate d Currency (ECU)							
									3. Civil works ordered 4. Orders placed for: <ul style="list-style-type: none"> <li>• Shredder</li> <li>• Compactor/baler</li> <li>• Boiler feed water preheater</li> <li>• Boiler feed water pumps</li> </ul> 5. Site established by the civil contractor carrying out initial mobilisation, placing site cabins on site and establishing a permanent site	

Stage Payment No.		Total Value		NDPI (In Euros)	NDPI Escalation (in £)	DPI (in Euros)	DPI Escalation (in £)	Value of Directly Procured Items in Nominated Currency (ECU)	Conditions for Release of Payment	Planned Stage Completion Date
		Local Currency (£)	Nominated Currency (ECU)							
									presence 6. Enquiry for Structural steelwork issued	
4. <sup>5</sup>		395,105	888,949					661,476	1. PFD's and PID's issued at AFD (Approved for design) status 2. Plant layout drawings issued at AFD status 3. Control description and philosophy issued at AFD status	12

<sup>5</sup> Adjustment to this Stage Payment is set out in paragraph 1.3A below.

Stage Payment No.		Total Value		<a href="#">NDPI (in Euros)</a>	<a href="#">NDPI Escalation (in £)</a>	<a href="#">DPI (in Euros)</a>	<a href="#">DPI Escalation (in £)</a>	Value of Directly Procured Items in Nominated Currency (ECU)	Conditions for Release of Payment	Planned Stage Completion Date
		Local Currency (£)	Nominated Currency (ECU)							
									4. Order placed for structural steelworks 5. Enquiry issued for MCC switchgear 6. Detail design of Primary Incinerator issued at AFD status.	
5. <sup>6</sup>		1,188,839	4,437,302					2,886,000	1. Orders placed for: <ul style="list-style-type: none"> <li>Plant control system</li> <li>MCC switchgear</li> </ul> 2. Excavation of	15

<sup>6</sup> Adjustment to this Stage Payment is set out in paragraph 1.3A below.

Stage Payme nt No.		Total Value		<a href="#">NDPI (In Euros)</a>	<a href="#">NDPI Escalatio n (in £)</a>	<a href="#">DPI (in Euros)</a>	<a href="#">DPI Escalatio n (in £)</a>	Value of Directly Procured Items in Nominate d Currency (ECU)	Conditions for Release of Payment	Planned Stage Completi on Date
		Local Currency (£)	Nominate d Currency (ECU)							
									primary waste bunker complete 3. Primary Incinerator and turbine generator foundations complete 4. Structural erection contractor mobilised 5. Construction tower crane erected 6. Structural steelworks erection commenced	

Stage Payment No.		Total Value		NDPI (In Euros)	NDPI Escalation (in £)	DPI (in Euros)	DPI Escalation (in £)	Value of Directly Procured Items in Nominated Currency (ECU)	Conditions for Release of Payment	Planned Stage Completion Date
		Local Currency (£)	Nominated Currency (ECU)							
6. <sup>7</sup>		<del>1,915,942</del> <u>1,305,780</u>	8,820,194	<u>4,584,896</u>	<u>154,851</u>	<u>5,249,862</u>	<u>167,704</u>	<del>4,235,298</del>	1. SHEP 4 (HAZOP prior to construction) complete <u>(*****)</u> 2. First shipment made of Primary Incinerator to Site. 3. PID's issued at AFC (Approved for construction) status <u>Except Seghers</u> 4. Lime silo delivered to Site 5. <del>Air condenser ready for shipment</del> <u>Gas</u>	18/ <u>12/02</u>

<sup>7</sup> Changes as per paragraph 2.1 of DoV 1/ Table annexed to DoV 1. This Stage Payment has also been adjusted by DoV2 – see paragraph 1.3A below.

Stage Payment No.		Total Value		<a href="#">NDPI (In Euros)</a>	<a href="#">NDPI Escalation (in £)</a>	<a href="#">DPI (in Euros)</a>	<a href="#">DPI Escalation (in £)</a>	Value of Directly Procured Items in Nominated Currency (ECU)	Conditions for Release of Payment	Planned Stage Completion Date
		Local Currency (£)	Nominated Currency (ECU)							
									<a href="#">Plant C.I.S Floor (6m Lev.) constructed.</a> 6. <del>Structural steelworks complete</del> <a href="#">Treated Water, Ammonia Storage &amp; Low Sulphur Oil Tanks Installed. Bottom ash conveyors, installation commenced.</a> 7. <del>Primary Incinerator mechanical erection commenced</del> <u>7.</u> <del>8.</del> <a href="#">Piping general arrangements</a>	

Stage Payment No.		Total Value		NDPI (In Euros)	NDPI Escalation (in £)	DPI (in Euros)	DPI Escalation (in £)	Value of Directly Procured Items in Nominated Currency (ECU)	Conditions for Release of Payment	Planned Stage Completion Date
		Local Currency (£)	Nominated Currency (ECU)							
									issued at AFC status 8. 9. Structural steelworks 40% (by weight, excluding cladding) erected. <del>10. Civil construction (excluding building finishes, and punch listing) complete</del> 9.	
6a. <sup>8</sup>		832,779		1,625,584	54,903	2,142,531	72,362	2,142,531	1. Primary Incinerator installation commenced 2. Secondary incinerator	20/01/03

<sup>8</sup> Changes as per paragraph 2.1 of DoV 1/ Table annexed to DoV 1. This Stage Payment has also been adjusted by DoV2 – see paragraph 1.3A below.<sup>1</sup>



Stage Payment No.		Total Value		NDPI (In Euros)	NDPI Escalatio n (in £)	DPI (in Euros)	DPI Escalatio n (in £)	Value of Directly Procured Items in Nominate d Currency (ECU)	Conditions for Release of Payment	Planned Stage Completi on Date
		Local Currency (£)	Nominate d Currency (ECU)							
									<a href="#">installation commenced</a> <a href="#">3. Air Condenser ready for shipment.</a> <a href="#">4. Turbine and Turbine Hall Crane delivered to site.</a> <a href="#">5. Pipework installation commenced.</a> <a href="#">6. Structural Steelworks Fabrication complete.</a> <a href="#">7. Pri. &amp; Sec. Air Preheaters delivered to site.</a>	
<a href="#">6b.</a> <sup>9</sup>		<a href="#">832,779</a>		<a href="#">1,625,584</a>	<a href="#">54,903</a>	<a href="#">2,142,531</a>	<a href="#">72,362</a>		<a href="#">1. Secondary Waste Heat Boiler</a>	<a href="#">20/02/03</a>

<sup>9</sup> Changes as per paragraph 2.1 of DoFV 1/ Table annexed to DoFV . This Stage Payment has also been adjusted by DoV2 – see paragraph 1.3A below.<sup>1</sup>

Stage Payment No.		Total Value		NDPI (In Euros)	NDPI Escalation (in £)	DPI (in Euros)	DPI Escalation (in £)	Value of Directly Procured Items in Nominated Currency (ECU)	Conditions for Release of Payment	Planned Stage Completion Date
		Local Currency (£)	Nominated Currency (ECU)							
									<a href="#">Installation Commenced</a> <a href="#">2. Underground Drains and Mains completed</a> <a href="#">3. Seghers PID's issued at AFC (Approved for Construction) status.</a>	
7. <sup>10</sup>		<del>2,437,072</del> <a href="#">903,044</a>	11,574,189	<a href="#">1,625,586</a>	<a href="#">54,903</a>	<a href="#">2,426,937</a>	<a href="#">72,362</a>	<del>6,697,435</del> <a href="#">697,435</a>	<a href="#">4. <del>1. Draft commissioning procedures submitted</del>2. <del>Draft Procedures for Commissioning the</del></a>	<del>21</del> <a href="#">20/03/03</a>

<sup>10</sup> Changes as per paragraph 2.1 of DoV 1/ Table annexed to DoV 1. This Stage Payment has also been adjusted by DoV2 – see paragraph 1.3A below.<sup>1</sup>

Stage Payme nt No.		Total Value		<a href="#">NDPI (In Euros)</a>	<a href="#">NDPI Escalatio n (in £)</a>	<a href="#">DPI (in Euros)</a>	<a href="#">DPI Escalatio n (in £)</a>	Value of Directly Procured Items in Nominate d Currency (ECU)	Conditions for Release of Payment	Planned Stage Completi on Date
		Local Currency (£)	Nominate d Currency (ECU)							
									<a href="#">Facility submitted</a> Steam turbine, <a href="#">Gearbox</a> , <a href="#">Generator</a> and ancillaries mechanically erected <a href="#">5. 3. MCC switchgear</a> delivered and landed <del>4. Primary Incinerator</del> <del>and Boiler delivered</del> <del>(complete)</del> <a href="#">6. Air Cooled</a> <a href="#">Condenser</a> <a href="#">installation</a> <a href="#">commenced.</a>	

Stage Payment No.	Total Value		Nominated Currency (ECU)	NDPI (in Euros)	NDPI Escalation (in £)	DPI (in Euros)	DPI Escalation (in £)	Value of Directly Procured Items in Nominated Currency (ECU)	Conditions for Release of Payment	Planned Stage Completion Date
	Local Currency (£)									
									<p><del>7. 5. Primary and secondary incinerator spray</del> <u>Spray</u> drier absorbers mechanically erected.</p> <p><del>8. 6. Structural steelworks 80% (by weight excluding cladding) erected.</del></p>	
<u>7a.</u> <sup>11</sup>	<u>762,195</u>		<u>1,081,167</u>	<u>36,515</u>	<u>2,028,282</u>	<u>68,503</u>			<p><u>1. All Stack modules delivered to site.</u></p> <p><u>2. Excavate Primary Waste Bunker Complete.</u></p>	<u>22/04/03</u>

<sup>11</sup> Changes as per paragraph 2.1 of DoV 1/ Table annexed to DoV 1. This Stage Payment has also been adjusted by DoV2 – see paragraph 1.3A below.

Stage Payment No.		Total Value		NDPI (In Euros)	NDPI Escalation (in £)	DPI (in Euros)	DPI Escalation (in £)	Value of Directly Procured Items in Nominated Currency (ECU)	Conditions for Release of Payment	Planned Stage Completion Date
		Local Currency (£)	Nominated Currency (ECU)							
									3. Building Cladding commenced.	
8. <sup>12</sup>		1,490,775 1,607,986	6,398,794	1,369,430	46,251	1,242,834	35,572	4,236,460 236,460.	1. <del>Primary Incinerator-mechanically-erected</del> Civils at and below ground level within the Building Footprint complete (This includes building and equipment foundations, bunkers and ground floor slabs but excludes	23/20/05/03

<sup>12</sup> Changes as per paragraph 2.1 of DoV 1/ Table annexed to DoV 1. This Stage Payment has also been adjusted by DoV2 – see paragraph 1.3A below.<sup>1</sup>

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Stage Payme nt No.		Total Value		<a href="#">NDPI (In Euros)</a>	<a href="#">NDPI Escalatio n (in £)</a>	<a href="#">DPI (in Euros)</a>	<a href="#">DPI Escalatio n (in £)</a>	Value of Directly Procured Items in Nominate d Currency (ECU)	Conditions for Release of Payment	Planned Stage Completi on Date
		Local Currency (£)	Nominate d Currency (ECU)							
									<a href="#">concrete works at higher levels, internal partition walls, roads and pavings outside the building footprint).</a> <del>2. Bag house filter mechanically erected</del> 2. <del>3. Bag house filter mechanically erected.</del> Secondary Incinerator mechanically erected. 3. <del>4. Pipework 50% mechanically erected</del> (by	

Stage Payment No.		Total Value		NDPI (In Euros)	NDPI Escalation (in £)	DPI (in Euros)	DPI Escalation (in £)	Value of Directly Procured Items in Nominated Currency (ECU)	Conditions for Release of Payment	Planned Stage Completion Date
		Local Currency (£)	Nominated Currency (ECU)							
									meters).	
									4. <del>5.</del> Building cladding delivered on Site. <u>(complete).</u>	
9. <sup>13</sup>		<del>308,948</del> <u>186,232</u>	1,157,875	<u>288,264</u>	<u>9,736</u>	<u>585,085</u>	<u>843</u>	<del>581,349</del>	1. <del>Refractory in Primary Incinerator and Boiler installed</del> <u>Stack installation complete</u> 2. First systems ready for construction handover to commissioning <del>(start of Testing</del>	<del>25</del> <u>18/07/03</u>

<sup>13</sup> Changes as per paragraph 2.1 of DoV 1/ Table annexed to DoV 1. This Stage Payment has also been adjusted by DoV2 – see paragraph 1.3A below.<sup>1</sup>

Stage Payme nt No.		Total Value		<a href="#">NDPI (In Euros)</a>	<a href="#">NDPI Escalatio n (in £)</a>	<a href="#">DPI (in Euros)</a>	<a href="#">DPI Escalatio n (in £)</a>	Value of Directly Procured Items in Nominate d Currency (ECU)	Conditions for Release of Payment	Planned Stage Completi on Date
		Local Currency (£)	Nominate d Currency (ECU)							
									<del>Period)</del> <a href="#">3. as defined by</a> Safety Transfer certificate issued for: <ul style="list-style-type: none"> <li>• 13,3 kV incoming electrical system</li> <li>• Towns water incoming supply</li> <li>• Instrument air compressors</li> <li>• <a href="#">Primary Incinerator Slag and Ash Handling Systems</a></li> </ul>	



Stage Payment No.		Total Value		NDPI (In Euros)	NDPI Escalation (in £)	DPI (in Euros)	DPI Escalation (in £)	Value of Directly Procured Items in Nominated Currency (ECU)	Conditions for Release of Payment	Planned Stage Completion Date
		Local Currency (£)	Nominated Currency (ECU)							
									<a href="#">mechanically installed.</a>	
<a href="#">9a.</a> <sup>14</sup>		<a href="#">310,507</a>		<a href="#">72,365</a>	<a href="#">2,444</a>	<a href="#">642,831</a>	<a href="#">21,711</a>		<a href="#">1. Civil Construction (excluding Building Finished and Punch Listing) complete.</a> <a href="#">2. Primary Incinerator and Boiler delivered (complete).</a> <a href="#">3. Services setting to work commenced. Water &amp; Air.</a>	<a href="#">20/08/03</a>
<a href="#">9b.</a> <sup>15</sup>		<a href="#">310,507</a>		<a href="#">72,365</a>	<a href="#">2,444</a>	<a href="#">642,831</a>	<a href="#">21,711</a>		<a href="#">1. Primary Incinerator mechanically erected.</a>	<a href="#">19/09/03</a>

<sup>14</sup> Changes as per paragraph 2.1 of DoV 1/ Table annexed to DoV 1. This Stage Payment has also been adjusted by DoV2 – see paragraph 1.3A below.

<sup>15</sup> Changes as per paragraph 2.1 of DV No.1/ Table annexed to DV No.1. This Stage Payment has also been adjusted by DoV2 – see paragraph 1.3A below.

Stage Payment No.		Total Value		NDPI (In Euros)	NDPI Escalation (in £)	DPI (in Euros)	DPI Escalation (in £)	Value of Directly Procured Items in Nominated Currency (ECU)	Conditions for Release of Payment	Planned Stage Completion Date
		Local Currency (£)	Nominated Currency (ECU)							
									<u>2. Commence Gas Cleaning cold commissioning.</u> <u>3. Services commissioning completed.</u> <u>4.</u>	
<u>10.<sup>16</sup></u>		<u>522,679</u>	<u>2,222,503</u>	<u>72,366</u>	<u>2,444</u>	<u>723,896</u>	<u>21,711</u>		<u>1. Grid Connection Tests complete (for electricity import).</u> <u>2. MCC checked.</u> <u>3. Refractory and Inconel in primary Incinerator and Boiler installed.</u> <u>4. Primary Boiler</u>	<u>20/10/03</u>

<sup>16</sup> Changes as per paragraph 2.1 of DoV 1/ Table annexed to DoV 1. This Stage Payment has also been adjusted by DoV2 – see paragraph 1.3A below.

Stage Payment No.		Total Value		NDPI (in Euros)	NDPI Escalation (in £)	DPI (in Euros)	DPI Escalation (in £)	Value of Directly Procured Items in Nominated Currency (ECU)	Conditions for Release of Payment	Planned Stage Completion Date
		Local Currency (£)	Nominated Currency (ECU)							
									pressure test completed.	
									5.	
10.10a. <sup>17</sup>		1,096,117,371.412	2,222,503	66,384	2,242	597,613	20,184	2,005,407	<del>1. Utility performance test complete</del> <del>1. MCC checked</del> Safety systems test achieved. <del>2. Primary Incinerator Refractory dried out</del> <del>3. Steam blowing complete</del> Systems test achieved. Primary Incinerator Refractory dried out. Steam Blowing complete.	28/01/04

<sup>17</sup> Changes as per paragraph 2.1 of DoV 1/ Table annexed to DoV 1. This Stage Payment has also been adjusted by DoV2 – see paragraph 1.3A below.

Stage Payment No.		Total Value		NDPI (In Euros)	NDPI Escalation (in £)	DPI (in Euros)	DPI Escalation (in £)	Value of Directly Procured Items in Nominated Currency (ECU)	Conditions for Release of Payment	Planned Stage Completion Date
		Local Currency (£)	Nominated Currency (ECU)							
									4. <del>6.</del> Plant ready for waste introduction <u>Waste Introduction</u> (Start of Trial Period) <u>4</u>	
11. <sup>18</sup>		<del>1,650,629</del> <u>1,356,826</u>	2,488,301	<u>147,837</u>	<u>4,993</u>	<u>1,695,119</u>	<u>44,949</u>	<del>2,274,080</del>	1. Reliability test (proving trials and functional test) completed. 2. <u>Tests demonstrating</u> Minimum Performance	<del>31</del> <u>12/04/04</u>

<sup>18</sup> Changes as per paragraph 2.1 of DV No.1/ Table annexed to DV No.1. Compensation to the value of £54,729 exclusive of VAT shall be made to the Department in respect of Variation Order No.15 as provided in paragraph 1.4.1 of DoV 2. The Availability Fee shall not be affected by this variation. The Operating Costs shall not be affected by this variation. This variation has effect from and including 11 August 2004. This Stage Payment has also been adjusted by DoV2 – see paragraph 1.3A below.<sup>1</sup>

Stage Payme nt No.		Total Value		NDPI (In Euros)	NDPI Escalatio n (in £)	DPI (in Euros)	DPI Escalatio n (in £)	Value of Directly Procured Items in Nominate d Currency (ECU)	Conditions for Release of Payment	Planned Stage Completi on Date
		Local Currency (£)	Nominate d Currency (ECU)							
									<del>Tests</del> <u>Standards</u> achieved 3. Take Over of the Works 4. Taking Over Certificate issued	
<b>SUM<sup>19</sup></b>		<del>12,809,360</del> <u>13.</u> <u>212,604</u> <u>[+25,000]</u>	<del>39,255,175</del> <u>6,593,318</u>	<u>12,631,82</u> <u>8</u>	<u>426,629</u>	<u>20,120,35</u> <u>2</u>	<u>619974</u>	<del>24,744,432</del> <u>4,714,403</u>		

<sup>19</sup> Changes as per paragraph 2.1 of DV No.1/ Table annexed to DV No.1<sup>1</sup>

**1.3A Adjustments to Payment Schedule**<sup>20</sup>

**1.3A (1)** The Parties acknowledge that the Payment Schedule was amended as set out below pursuant to Variation Order Number 7 of DoV2, and that the Payment Schedule was subsequently amended by Deed of Variation Number 1 dated 12 February 2003.

<u>Stage Payment Number</u>	<u>Adjustment to Stage Payment totals*</u>	<u>Payment Date</u>
<u>1</u>	<u>0</u>	<u>June 2001</u>
<u>2a</u>	<u>0</u>	<u>August 2001</u>
<u>2aa [New]</u>	<u>185,432</u>	<u>September 2001</u>
<u>2ab [New]</u>	<u>185,433**</u>	<u>End of Remedial Works</u>
<u>2b</u>	<u>203,282</u>	<u>December 2001</u>
<u>3</u>	<u>-122,108***</u>	<u>March 2002</u>
<u>4</u>	<u>21,947</u>	<u>May 2002</u>
<u>5</u>	<u>-71,409</u>	<u>August 2002</u>
<u>6</u> <sup>21</sup>	<u>-51,244</u>	<u>November 2002</u>
<u>7</u> <sup>22</sup>	<u>0</u>	<u>February 2003</u>
<u>8</u>	<u>0</u>	<u>April 2003</u>
<u>9</u>	<u>0</u>	<u>June 2003</u>
<u>10</u>	<u>-10,989</u>	<u>September 2003</u>
<u>11</u>	<u>-10,989</u>	<u>December 2003</u>
<b><u>Total</u></b>	<b><u>329,455</u></b>	

\*(ie Difference in cashflow for Land Remediation and associated D&B)

\*\* during the course of the Remediation Works the figure shall be updated to reflect the value of work contracted for and the amount invoiced shall be adjusted accordingly

<sup>20</sup> This clause is added pursuant to Appendix 6 of DoV 2. The variation takes effect from and including 11 October 2001.

<sup>21</sup> In addition, payment for the dioxin monitoring system as set out at paragraph 1.18 of Schedule 1 shall become part of this stage payment by £31,203 and €133,811 (see Variation Order 12 (Appendix 10) of DoV2, page 25).

<sup>22</sup> In addition, payment for the dioxin monitoring system as set out at paragraph 1.18 of Schedule 1 shall become part of this stage payment by £13,460 and €133,812 (see Variation Order 12 (Appendix 10) of DoV2, page 25).

\*\*\*to be adjusted if applicable following audit on Remediation Works final invoices

1.3A (2) The adjustments applicable to Stage Payments 2aa, 2ab and 2b shall be paid within 10 days of the relevant Payment Date.

#### **1.4 Stage Payment 2**

**1.4.1** In the event the PSO Application is determined but the Reserved Matters Approval is not obtained the only conditions to be satisfied for release of stage payment 2(b)<sup>23</sup> shall be Design Completion achieved in accordance with section 4.12.5 of the Department's Requirements and the effective transfer to the Department of all Intellectual Property Rights relating to those matters comprising Design Completion.

**1.4.2** In the event the PSO Application is not determined within seven months of the Execution Date, on determination of the PSO Application the Department shall pay ProjectCo, in addition to the stage payment 2, a sum in respect of additional costs incurred by ProjectCo in performing its obligations pursuant to this Agreement during the period commencing on the first day of the eighth month following the Execution Date and expiring on the date of the determination of the PSO Application (or the Conditions Cut-Off Date if earlier) calculated at a rate of SIXTY THOUSAND POUNDS (£60,000) per month and apportioned on a pro rata basis for any uncompleted month PROVIDED such sums shall only be payable on receipt of evidence of such costs having been incurred by ProjectCo which is satisfactory to the Department (acting reasonably).

#### **1.5 Liquidated Damages**

**1.5.1** If ProjectCo fails to complete the Works by the Time for Completion the Department may either;

**1.5.1.1** require in writing ProjectCo to pay to the Department liquidated and ascertained damages at the rate stated in Clause 1.5.2 below (or at such lesser rate as may be specified in writing by the Department) for the period between the Time for Completion and Take Over and the Department may recover the same as a debt; or

**1.5.1.2** give a written notice to ProjectCo that it will deduct from monies due to ProjectCo liquidated and ascertained damages at the rate stated in Clause 1.5.2 below (or at such lesser rate as may be

<sup>23</sup> Manuscript amendment in executed PA<sup>1</sup>

specified in the notice) for the -period between the Time for Completion and Take Over.

**1.5.2** For every day or part thereof which shall elapse between the Time for Completion and Take Over the rate of liquidated and ascertained damages shall be £10,000 PROVIDED THAT if the Department exercises its option to accept sectional completion of the Works in accordance with Clause 9.3 of Schedule 2 the rate of liquidated and ascertained damages for the delayed completion of the Secondary Waste incineration facility shall be £1,000 per day or part thereof.

**1.5.3** The Liquidated Damages received by the Department pursuant to this Clause 1.5 shall be the Department's exclusive remedy in respect of losses, costs, claims and damages caused by any delay to the Time for Completion save for any right of termination under Clause 22.

**1.5.4** The Department shall not claim Liquidated Damages under this Clause 1.5 in excess of 10% of the D&B Contract Price.

## **1.6 Electricity Connection**

**1.6.1** ProjectCo shall provide a suitable substation within the Site to accommodate MEA equipment (the specification for which is set out in Drawing M72C previously supplied to ProjectCo). ProjectCo may determine whether the substation is provided within the Facility or as a stand alone building. Any costs incurred by the MEA for the provision of additional metering, protection, or for the supply and for the export of electricity as a result of the private generation installation (but not the cost of the substation civil works which shall be included in the D&B Contract Price) will fall with the provisional sum referred to in Clause 1.6.2 below. ProjectCo shall supply and lay appropriate cabling from the Facility to the substation.

**1.6.2** The Department shall pay ProjectCo the provisional sum of £500,000 excluding VAT or, if different, the actual amount reasonably and properly incurred by ProjectCo in complying with Clause 1.6.1.

## **1.7 Site Remediation**

**1.7.1** The Department shall reimburse ProjectCo the amounts properly paid by it to the Environmental Consultant under the E C Appointment on receipt of evidence satisfactory to the Department (acting reasonably) that such payments are properly due and payable.

**1.7.2** The Department shall reimburse ProjectCo the amounts properly paid to the D & B Subcontractor carrying out the Remediation Works under



the relevant subcontract and the reasonable insurance costs properly incurred pursuant to Clause 4A.4.5 on receipt of evidence satisfactory to the Department (acting reasonably) that such payments are properly due and payable.

**1.7.3** The sums due to Project Co pursuant to this Clause 1.7 shall be additional sums due pursuant to Clause 12.2.2 of Schedule 2 and the terms of Clause 12 of Schedule 2 shall apply accordingly.

**1.7.4** Project Co shall not be entitled to any sums in addition to the sums payable under the EC Appointment and/or under the contract for the Remediation Works entered into in accordance with Clause 4A of this Agreement including for the avoidance of doubt any overheads or profit other than management and supervisory costs agreed with the Department (acting reasonably) which would not be required otherwise in relation to the Works and are in respect of staff not exceeding the level of specialist or site engineer.

## **1.8 Increased Costs of Remediation Works<sup>24</sup>**

**1.8.1** Subject to paragraph 1.8.2 below the Department grants authority with effect from 7 September 2001 for the commencement of the Remediation Works in accordance with the revised estimated costs as set out in the letter and accompanying enclosures dated 4 September 2001 from Kvaerner Engineering & Construction UK Ltd.

**1.8.2** The Revised Estimated Costs are indicative and there will be a commitment by ProjectCo to minimise costs and improve on the schedule.

**1.8.3** Financial matters will be carried out by ProjectCo in accordance with clause 21 ('Open Book Accounting, Access and Audit') of this Agreement.

**1.8.4** The Department and/or the Department's Representative shall be entitled to audit the accounts relating to the Remediation Works to ensure compliance prior to certification by the Department's Representative and payment of the new milestone.

**1.8.5** No additional costs are to be incurred as a consequence of claimed delay on the part of the Department in the grant of authorisation.

<sup>24</sup> This is a variation introduced by Appendix 5 of DoV2. It takes effect from and including 7 September 2001.

## 1.9 Additional Landscaping<sup>25</sup>

- 1.9.1 ProjectCo shall carry out the landscaping of the land adjacent to the Kewagque Road as hatched in green on the Site Plan (attached to Schedule 4, Part 1 of the Project Agreement) and referred to as the 'Buffer Strip'.
- 1.9.2 The supply of landscaping services in relation to the Buffer Strip shall include all activities connected with the landscaping, including (but not limited to) planning, delivery of plants and others and completion of the physical aspects of the landscaping.
- 1.9.3 The additional landscaping shall be carried out in accordance with the landscaping requirements set out in the Department's Requirements at Schedule 7 of this Agreement.
- 1.9.4 ProjectCo shall provide a description of the Buffer Strip landscaping services to form an addendum to the Contractor's Proposals at Schedule 8 to this Agreement.
- 1.9.5 The fee for the services shall not exceed £27,196 (exclusive of VAT) without the prior written approval of the Department's Representative. The £27,196 limit shall be deemed to include all costs otherwise recoverable by ProjectCo in accordance with clause 13.1 of Schedule 2 to this Agreement.
- 1.9.6 The fee for the Additional Landscaping Services shall be calculated in accordance with Annex 4 of the Financial Proposal at Schedule 8 to this Agreement.
- 1.9.7 Payment of the fees for the Additional Landscaping Services shall be made under Schedule 1 to this Agreement in the manner set out below:
- Stage payment 1:           £1,546.46;
- Stage payment 3:           £69.30;
- Stage payment 9:           £12,902.25; and
- Stage payment 10:       £12,677.52
- Payment will be made as an addition to the D&B Contract Price.
- 1.9.8 The services required under this variation are not Directly Procured Items.

<sup>25</sup> Change made as per Variation Order No 3 of Deed of Variation No 2. This variation has effect from and including 5 July, 2001.<sup>1</sup>

The reference in the D&B Performance Bonds to the D&B Contract Price contained in this Agreement shall remain unchanged.

**1.10 Plume Suppression system<sup>26</sup>**

**1.10.1** The Department shall pay ProjectCo to change the technical design of the plume suppression systems as per [clause ?] of Schedule 8. This service is not a Directly Procured Item.

**1.10.2** Payment shall be of €142,373 plus £14,782.08, both amounts being exclusive of any VAT. Payment will be made as an add-on to the D&B Contract Price.

**1.10.3** Payment shall become part of the stage payments as follows:

Stage payment 6: 100% of costs in € and 50% of costs in £.

Stage payment 7: 50% of costs in €.

**1.10.4** This payment shall be deemed to cover all of ProjectCo's Costs in accordance with Schedule 2 Clause 13.1.

**1.10.5** The Availability Fee will increase by £8,180/annum.

**1.11 Dioxin Monitoring<sup>27</sup>**

**1.11.1** The Department shall pay ProjectCo to change the dioxin monitoring system as per [clause ?] of Schedule 8. This service is not a Directly Procured Item.

**1.11.2** Payment shall be of €267,623 plus £44,663 (in total and converted corresponding to £212,136.72), both amounts being exclusive of any VAT. Costs will be covered as an add-on to the D&B Contract Price.

**1.11.3** Payment shall become part of the stage payments as follows:

Stage payment 6: £31,203 and €133,811.

Stage payment 7: £13,460 and €133,812

**1.11.4** It is a condition for payment of the last Stage Payment (No. 11) that the following conditions concerning this supply are fulfilled:  
The supply is delivered.

Installation is complete.

<sup>26</sup> Change made as per Variation Order No 9 [A copy of Variation Order No 9 was not included in DoFV2 and we have not seen a copy of Variation Order No 9, however we understand that the text at paragraph 1.10 was agreed by the parties by Variation Order No 9.]<sup>1</sup>

<sup>27</sup> Change made as per Variation Order No 12 of Appendix 10 of DoFV2 (see page 25 of DoFV2)

Thee Supply is connected to the CMS (If applicable).

Ear Parts and Strategic Spare Parts are available at the Plant.

Operation & Maintenance Manual is delivered.

1.11.5 This payment shall be deemed to cover all of ProjectCo's Costs in accordance with Schedule 2 Clause 13.1.

1.11.6 The Availability Fee will increase by £35,875/annum.

1.11.7 Operating Costs will increase by £0.15/tonne.

1.12 Onerous Licence Conditions<sup>28</sup>

1.12.1 The Department shall pay ProjectCo to comply with Onerous Licence Conditions as per Schedule 8.

1.12.2 The D & B Contract Price shall increase by £33,297 exclusive of any VAT.

1.12.3 The Availability Fee will increase by £14,391/annum in respect of the Onerous Licence Conditions.

1.12.4 The payments referred to in Clauses 1.12.2 and 1.12.3 shall be deemed to cover all of ProjectCo's Costs in accordance with Schedule 2 Clause 13.1.

1.12.5 Operating Costs will remain unchanged.

1.13 ~~1.8~~ Provisional Sum Payments

The payments referred to in Clauses 1.6.2, ~~1.7.1 and 1.7.1~~, 1.7.2 and 1.8.2<sup>29</sup> of this Schedule 1 and any other payments of Provisional Sums (including any interim payments of such Provisional Sums) shall be made by the Department with the stage payment made by the Department in accordance with Clause 1.3 of this Schedule 1 first following the date on which such payments fall due.

1.14 Department's Representative's Administration Costs<sup>30</sup>

ProjectCo shall pay to or allow the Department the reasonable costs of the Department's Representative associated with the administration of the Stage Payments 6a, 6b, 7a, 9a, 9b and 10a referred to in Clause 1.3above. Payment for such costs

<sup>28</sup> Changes made as per Variation Order No17, Appendix 14 of DoFV 2. This variation takes effect from and including 14 March 2005. The reference in the D&B Performance Bonds to the D&B Contract Price as contained within the Project Agreement shall remain unchanged.

<sup>29</sup> Change made as per Variation Order No 2

<sup>30</sup> Changes as per paragraph 2.4 of DV No.1

shall be due 21 days from receipt of a copy of the Department's Representatives invoice therefore, provided that any such reasonable costs payable pursuant to this Clause 1.14 shall not, in the aggregate exceed £10,000 (excluding any VAT thereon as is properly chargeable) to ProjectCo.

**1.15 Interest Rebate<sup>31</sup>**

ProjectCo shall pay to or allow the Department, on first written demand, the sum of £125,000 (net of VAT) in the event that any sums become due to ProjectCo pursuant to this Project Agreement in connection with any claim by ProjectCo for additional monies (as a result of a Variation or otherwise) by the Department in addition to the Stage Payments provided for in Paragraph 1.3 above.

<sup>31</sup> Changes as per paragraph 2.5 of DV No.1

## 2 PART 2 : O & M SCHEDULE OF PAYMENTS

### 2.1

#### Part 2.1

##### Gate Fees

**2.1.1** The Fixed Element of the Gate Fees shall be an amount equal to the rent reserved under the Lease payable by equal monthly payments in advance on the Due Date PROVIDED THAT the first such payment shall be made on Take Over in respect of the period from the date of Take Over until the end of the month in which Take Over falls.

**2.1.2** The Variable Element of the Gate Fees shall be the Availability Fee plus the Operating Fee for the previous month PROVIDED THAT the first such payment shall be made at the end of the month in which Take Over falls in respect of the period from the date of Take Over.

**2.1.3** Notwithstanding the tonnage of Conforming Waste delivered to and accepted at the Facility but subject to any Abatements applicable pursuant to Clause 2.4 of Schedule 1 the Department shall make a minimum payment equivalent to the Availability Fee each month in respect of the Variable Element of the Gate Fees.

**2.1.4** It is agreed that the cost of fuel oil used in the Secondary Waste Stream ("SWS Oil") will not be taken into account in calculation and adjustment of the Availability Fee and instead will be reimbursed by the Department to ProjectCo in accordance with the following<sup>32</sup>:

(a) the SWS Oil cost will be adjusted to reflect the efficiency of consumption in accordance with the graph set out in Appendix 11 of this Agreement<sup>33</sup>:

(iv) the horizontal scale of the graph shows the actual average monthly rate of use of SWS Oil per tonne of Secondary Waste incinerated;

(v) the vertical scale of the graph shows the percentage of the monthly average actual price of SWS Fuel purchased by ProjectCo;

(vi) the blue line in the graph shows the percentage of the monthly average price of SWS Oil purchased by ProjectCo which will be reimbursed by the Department to ProjectCo dependant on the monthly rate of use

(b) the weighted monthly cost of SWS Fuel calculated as above will be reimbursed by the Department to ProjectCo within 30 days of the end of each month.

<sup>32</sup> This clause 2.1.4 was inserted pursuant to Clause 5.3 of DoV2.

<sup>33</sup> Appendix 20 of DoV2.

- (c) If the Department is of the opinion that that the actual rate of use of SWS Oil exceeds the reasonable rate of consumption (“**Reasonable Rate**”) using Prudent Engineering and Operating Practices then it may request that with effect from the next Price Review Date the quantity of SWS Oil for which the cost is reimbursed under this clause 5.3 is restricted to the quantity (“**the Reimbursed Quantity**”) which would have been used with a Reasonable Rate. If the parties fail to agree on the Reasonable Rate or the Reimbursed Quantity then the Department may refer the dispute for determination under the dispute resolution procedure in clause 19 of the Project Agreement.
- (d) The parties acknowledge and agree that the removal of the requirement to treat animal waste and the operation of the Secondary Waste Stream on a occasional or batch basis as opposed to a more continuous operation has and will result in an increase in the rate of consumption of SWS Oil which will be taken into account and allowed in determining whether the actual rate of consumption is reasonable.

## 2.2

### Part 2.2

#### Gate Fee invoicing mechanism

- 2.2.1** The Department will pay to ProjectCo the Gate Fees due to ProjectCo for the proper performance of the Services in accordance with this Agreement in any month in the Local Currency in immediately available and freely transferable cleared funds for value on the Due Date. Such payments shall be made to an account or accounts notified to the Department by ProjectCo for the purpose.
- 2.2.2** The whole amount of the Variable Element of the Gate Fees payable each month will be reduced by the amount of any Abatements referable to ProjectCo's performance in that or any preceding month identified in a Monthly Invoice.
- 2.2.3** Notwithstanding the right to reduce the Variable Element of the Gate Fees by reason of Abatements, the Department reserves the right to claim damages in respect of loss or damage suffered by the Department as a consequence of the failure by ProjectCo to comply with its obligations under this Agreement and reserves its rights under all other provisions of this Agreement.
- 2.2.4** Invoices for Gate Fees shall be valid VAT invoices which comply with the requirements of Schedule 1 Part 2.3 and shall be calculated in accordance with Schedule 1 Part 2.1 which calculations shall be

provisionally prepared by ProjectCo on the basis of records and information to be kept by ProjectCo under this Agreement.

- 2.2.5** ProjectCo shall provide within two Business Days of any request from the Department such additional information in support of an invoice as the Department may reasonably require.
- 2.2.6** On receipt of an invoice from ProjectCo the Department's Representative shall take steps to determine the correctness of the invoice and of the amount of Gate Fees whether the Services were properly provided and whether there were any Abatements.
- 2.2.7** Within ten Business Days of receipt from ProjectCo of the invoice, the Department's Representative shall, if satisfied that the invoice is correct and accurate, issue a certificate to that effect which shall have the effect of converting the invoice into a Monthly Invoice.
- 2.2.8** If the Department's Representative is not satisfied (acting reasonably) that the invoice is complete, clear, correct, or accurate, or that the information concerning Abatements (or otherwise) which was supplied with the invoice or supplied as a result of a request under Clause 2.2.5 is complete, clear, correct and accurate, or the Department's Representative is not satisfied with the invoice for any other reason, then the Department's Representative shall within ten Business Days of receipt from ProjectCo of the invoice issue a Payment Notice which shall set out a copy of the invoice and any reductions from it which the Department's Representative considers should be made.
- 2.2.9** If ProjectCo accepts the sums set out in the Payment Notice, it shall notify its satisfaction in writing to the Department's Representative which shall have the effect of converting the Payment Notice into a Monthly Invoice.
- 2.2.10** If ProjectCo disputes the sums set out in the Payment Notice, it shall raise the matter with the Department's Representative and the two parties shall endeavour to resolve the matter amicably. If it is considered by the Department's Representative that the Payment Notice was inaccurate and the invoice was accurate, he shall issue a revised Payment Notice within 21 days which shall immediately constitute a Monthly Invoice.
- 2.2.11** If ProjectCo reasonably and properly, and acting with the utmost good faith, disputes the sums set out in the Payment Notice and the matter is not resolved in accordance with Clause 2.2.10 then:



- 2.2.11.1** the parties shall refer the dispute in accordance with Clause 19 (Dispute Resolution); and
  - 2.2.11.2** the Department shall pay the sum claimed in the invoice less any set off in accordance with Clause 2.2.13 as though it was a Monthly Invoice.
- 2.2.12** ProjectCo shall be entitled to be paid the sums shown on the Monthly Invoice on the Due Date.
- 2.2.13** If the sum determined is less than the sum claimed by ProjectCo in its invoice, then the Department shall be entitled to set off from any next payment or payments due to ProjectCo or to recover as a debt :
  - 2.2.13.1** the shortfall between the amount determined and the sum claimed in the invoice; and
  - 2.2.13.2** interest from the date of payment under Clause 2.2.11 to the date the sum is determined in accordance with this Clause on the shortfall referred to in Clause 2.2.13.1 at the Prescribed Rate.
- 2.2.14** Nothing issued by the Department's Representative in accordance with the provisions of this Clause shall be conclusive evidence that ProjectCo has performed all or any of its obligations strictly in accordance with this Agreement and, for the avoidance of doubt, it is hereby agreed that adjustments may be made by the Department's Representative in relation to later invoices in order to correct errors or omissions contained in earlier Monthly Invoices.

## **2.3**

### **Part 2.3**

#### Invoices

- 2.3.1** Invoices shall be submitted to the Department monthly by ProjectCo during the Operating Years on the first Business Day of each month for the Fixed Element of the Gate Fees for the current month and separately for the Variable Element of the Gate Fees comprising the Availability Fee for the previous month and the Operating Fee for the previous month.
- 2.3.2** Each invoice in respect of the Variable Element of the Gate Fees shall contain the following and be accompanied by any relevant supporting information in respect of the previous month:
  - 2.3.2.1** the amount of and reasons for Abatements applicable

- |                 |  |
|-----------------|--|
| <b>2.3.2.2</b>  | the identity of the Local Authority or registered contractor or other third party making each delivery of Primary Waste to the Facility and the date of such delivery      |
| <b>2.3.2.3</b>  | the tonnage of Primary Waste delivered by each Local Authority or registered contractor or other third party   |
| <b>2.3.2.4</b>  | the nature of the Primary Waste delivered by each Local Authority or registered contractor or other third party  |
| <b>2.3.2.5</b>  | the applicable rates charged in respect of the Primary Waste delivered by each Local Authority or registered contractor or other third party                               |
| <b>2.3.2.6</b>  | the date of the delivery, the identification number of the Wheelie Bin, the type of waste delivered and the weight of waste delivered for each delivery of Secondary Waste |
| <b>2.3.2.7</b>  | details of any non-Conforming Waste delivered to the Facility  |
| <b>2.3.2.8</b>  | details of the disposal of Residues  |
| <b>2.3.2.9</b>  | details of energy production   |
| <b>2.3.2.10</b> | details of heat dissipation and emissions  |
| <b>2.3.2.11</b> | details of the Thermal Load as set out in Clause 2.2.3.4 of Schedule 3 to this Agreement   |
| <b>2.3.2.12</b> | a detailed performance report on the Facility including activities during Planned Outage and Unplanned Outages   |
| <b>2.3.2.13</b> | updates of the Annual Maintenance Plan if appropriate  |
| <b>2.3.2.14</b> | confirmation that ProjectCo is not aware of any breach of its obligations to insure as set out in Clause 17 and Schedule 5 of this Agreement                               |

**2.3.2.15** any other information reasonably required by the Department which is produced by the software used by ProjectCo to produce the Monthly Invoice

**2.3.2.16** any other information reasonably required by the Department to be satisfied that the calculations of the Variable Element of the Gate Fees are accurate

**2.4**

**Part 2.4**

Abatements

**2.4.1** In the circumstances identified in Clause 2.4.4 below the Department shall be entitled to make Abatements from the Variable Element of the Gate Fees ~~(and in the case of Abatement 1 only the Fixed Element of the Gate Fees)~~<sup>34</sup> as set out in that Clause other than in the event of Force Majeure or a Relief Event or where the circumstance giving rise to the Abatement is a direct consequence of the act or omission of the Department or its employees, agents or contractors (other than a Local Authority or ProjectCo or their employees, agents or contractors).

**2.4.2** The Department shall not be entitled to make Abatements where (or to the extent to which) the circumstance giving rise to the Abatement is caused by the Department its employees, agents or contractors (other than any Local Authority or ProjectCo or their employees, agents or contractors) or is attributable to a Relief Event or Force Majeure.

**2.4.3** The Department shall not be entitled to deduct more than the Abatement Cap each month. In the first Operating Year the Abatement Cap in respect of the Primary and Secondary Waste Streams respectively shall be the Operating and Availability Fees applicable to each tonne of such fractions as shown in ProjectCo's Proposal multiplied by 4,583.3 in the case of Primary Waste and 416.66 in the case of Secondary Waste. Thereafter it shall equate to the Availability Fee and Operating Fee (before any deductions) for the equivalent month in the preceding Operating Year. Where there have been Unplanned Outages in the equivalent month, the Department may choose the next preceding or following month as the reference period.

<sup>34</sup> The words "(and in the case of Abatement 1 only, the Fixed Element of the Gate Fees)" were deleted by agreement between the Department and ProjectCo which is recorded in DoFV2, clause 2.4.1.

## 2.4.4

	Circumstance	Abatement	Cure Period
1.	<p>a) The Facility is not Available.<sup>35</sup></p> <p>b) The Primary Waste Stream only is not Available.<sup>36</sup></p> <p>c) The Secondary Waste Stream only is not Available.<sup>37</sup></p>	<p><del>The Fixed Element of the Gate Fees and £10,000 (ten thousand pounds) per day</del>, the Availability Fee, calculated at a daily rate, for each day, or part of a day, during which the Facility is not Available.</p> <p><del>90% of the Fixed Element of the Gate Fees £9,000 (nine thousand pounds) per day</del> and the Availability Fee, calculated at a daily rate, for each day, or part of a day, during which the Primary Waste Stream only is not Available.</p> <p><del>10% of the Fixed Element of the Gate Fees £1,000 (one thousand pounds) per day</del> and the Availability Fee, calculated at a daily rate, for each day, or part of a day, during which the Secondary Waste Stream only is not Available.</p>	<p>24 hours from receipt of a written notice of breach served on ProjectCo by or on behalf of the Department.</p> <p>24 hours from receipt of a written notice of breach served on ProjectCo by or on behalf of the Department.</p> <p>24 hours from receipt of a written notice of breach served on ProjectCo by or on behalf of the Department.</p>
2.	There is an Emergency and there is no encapsulation equipment at the Facility to enable the baling of waste.	£500 per day or part of a day so long as the failure continues.	-
3.	For each occasion on which ProjectCo is served with a formal notice of breach of the Regulator's Licence	£5,000 per incident.	-
4.	For each occasion on which the relevant authority notifies	£1,000 per day, or part of a day, per waste stream until the day	-

<sup>35</sup> When this Agreement was signed on 27<sup>th</sup> October 2000, the Abatement was "the Fixed Element of Gate Fees and the Availability Fee....". DoFV 2, clause 2.4.2.1, recorded that the Parties had agreed to remove the reference to "the Fixed Element of the Gate Fees" and to replace them with "£10,000 (ten thousand pounds) per day".

<sup>36</sup> When this Agreement was signed on 27<sup>th</sup> October 2000, the Abatement was "90% of the Fixed Element of the Gate Fees and the Availability Fee....". DoFV 2, clause 2.4.2.2 recorded that the Parties had agreed to remove the reference to "90% of the Fixed Element of the Gate Fees" and replace it with "£9,000 (nine thousand pounds) per day".

<sup>37</sup> When this Agreement was originally signed on 27<sup>th</sup> October 2000, this Abatement was "10% of the Fixed Element of the Gate Fees and the Availability Fee....". DoFV 2, clause 2.4.2.3, recorded that the Parties had agreed to remove the reference to "10% of the Fixed Element of the Gate Fees" and replace it with "£1,000 (one thousand pounds) per day".

	<b>Circumstance</b>	<b>Abatement</b>	<b>Cure Period</b>
	ProjectCo in writing of a breach of any of the conditions set out in the Planning Scheme Order.	on which full compliance is achieved.	
<b>5.</b>	For each occasion (so that there may be more than one occasion in a day) on which any Residues delivered to the Department for disposal fail to comply with applicable specifications set out in the Department's Requirements.	£5,000 per occasion.	24 hours from receipt of a written notice of breach served on ProjectCo by or on behalf of the Department.
<b>6.</b>	Failure to produce the guaranteed annual electricity export in any Operating Year with due consideration to the Allowance.  Reference is made to Annex 1.	90% of the product of (the difference between the actual amount of electricity exported and sold to the MEA at the unit rate as set out in Schedule 6, Clause 6.1 and the guaranteed minimum annual electricity export) multiplied with the MEA tariff applying at that time.	
<b>7.</b>	Failure to provide complete monthly, annual, quinquennial and (in any Emergency) daily reports at the times required by the Project Agreement.	£500 per day, or part of a day, until the day on which all such reports shall have been provided.	24 hours from receipt of a written notice of breach served on ProjectCo by or on behalf of the Department.
<b>8.</b>	Failure to maintain the Site in the state and condition (including internal and external appearance) specified in the Department's Requirements.	£500 per day, or part of a day, until the end of the day on which full compliance is achieved.	72 hours from receipt of a written notice of breach served on ProjectCo by or on behalf of the Department.
<b>9.</b>	All weighbridges are unavailable for use.	£300 per failure plus £500 per day, or part of a day, for so long as the failure continues.	24 hours from receipt of a written notice of breach served on ProjectCo by or on behalf of the Department.
<b>10.</b>	For each occasion on which the vehicle turnaround time for delivery of Primary Waste to the Facility exceeds fifteen minutes, where such delivery has been reasonably uniform	£300 per occasion.	-

	Circumstance	Abatement	Cure Period
	throughout the day and before and after the relevant vehicle turnaround.		
11.	The failure of the internet home page described in the Department's Requirements to provide Internet users with the information specified in the Department's Requirements where such failure is wholly attributable to persons or property for which ProjectCo is responsible.	£1,000 per failure plus £500 per day, or part of a day, for so long as the failure to continues.	24 hours from receipt of a written notice of breach served on ProjectCo by or on behalf of the Department.

**2.4.5** Where an Abatement is applied in circumstances where the Facility is not Available the Department shall pay to ProjectCo the Availability Fee in respect of any day for which an Abatement was applied once the Conforming Waste dealt with in accordance with the Emergency Plan has been delivered to the Facility. For the avoidance of doubt, where the Availability fee is paid by the Department pursuant to this Clause 2.4.5 its previous deduction shall not be taken into account for the purpose of calculating the level of ProjectCo's liability under this Agreement in respect of Clauses 12.12.3 and 12.12.5 of this Agreement.

**2.4.6** ProjectCo shall be entitled to payment of the Operating Fee once the Conforming Waste dealt with in accordance with the Emergency Plan has been delivered to the Facility.

**2.4.7**<sup>38</sup> The Parties acknowledge and agree that:

2.4.7.1 the Abatements for non-Availability set out in paragraphs 1a), b) and c) of the table in clause 2.4.4 above (as amended) are a genuine pre-estimate of the lost use value of the Facility to the Department; and

2.4.7.2 the Abatements under clause 2.4.4 above (as amended) shall be subject to review and indexation on 1 April first following Take Over and at the start of each subsequent Operating Year and shall be increased or reduced by a percentage equivalent to the percentage increase or reduction (if any) shown by the Relevant Indices since the start of the immediately preceding Operating Year

<sup>38</sup> Clause 2.4.7 was not in this Agreement when it was signed on 27<sup>th</sup> October, 2000. DoFV 2, clause 2.4.3, recorded that the Parties agreed to its addition.

and such increase or reduction shall have effect from the beginning of the relevant Operating Year."

### **3 PART 3: COMPENSATION SCHEDULE OF PAYMENTS**

**3.1** If the Department exercises its right to termination for convenience pursuant to Clause 22.1.1 of the Project Agreement or the Project Agreement is terminated pursuant to Clause 22.18 the compensation payable to ProjectCo shall be a sum equal to the value of work performed up to the date of termination for which ProjectCo has not otherwise received payment and the aggregate of the Relevant Break Costs and the loss of Profit suffered by ProjectCo arising out of this Agreement only calculated by reference the lesser of:

**3.1.1** a period of five years from the date of termination of this Agreement;  
or

**3.1.2** the period from the date of termination of this Agreement to the date by which this Agreement would have determined by effluxion of time.

**3.2** The compensation shall be paid in a lump sum 21 days following the Termination Date (subject to receipt of a valid VAT invoice if appropriate).

**3.3** Any such compensation shall not be classed as a non-taxable ex gratia payment.



**Annex 1 : Calculation of Abatement no. 7**

If the difference between the actual amount of electricity exported,  $Q_{\text{act.el.annual}}$  and the guaranteed calculated minimum annual electricity export,  $Q_{\text{min.el.annual}}$  is negative at the end of any Operating Year, then the following abatement applies:

$$\text{Abatement} = 90\% \times [Q_{\text{act.el.annual}} - Q_{\text{min.el.annual}}] \times \text{MEA}_{\text{actual tariff}}$$

Where

$\text{MEA}_{\text{actual tariff}}$	is the average MEA tariff over that particular Operating Year
$Q_{\text{act.el.annual}}$	is the actual measured amount of electricity exported in that particular Operating Year measured at the Pullrose Power Station.
$Q_{\text{min.el.annual}}$	is the guaranteed calculated minimum annual electricity export in that particular Operating Year

The Abatement shall be calculated by ProjectCo and reported on an annual basis in relation to release of annual accounts. Negative figures shall be amount to be paid. Positive figures are not transferable.

$$Q_{\text{min.el.annual}} = Q_{\text{min.el.PWI,annual}} + Q_{\text{min.el.PWI+SWI,annual}}$$

$Q_{\text{min.el.PWI,annual}}$	is the guaranteed calculated minimum annual electricity export in that particular year, when the Primary Waste incinerator is in operation and the Secondary Waste incinerator is not in operation.
$Q_{\text{min.el.PWI+SWI,annual}}$	is the guaranteed calculated minimum annual electricity export in that particular year, when the Primary Waste incinerator and the Secondary Waste incinerator is in operation at the same time.

$$Q_{\min,el,PWI,annual} = \sum Q_{el,PWI,hour} \text{ of that Operating Year}$$

$$Q_{el,PWI,hour} = TL_{PWI} \cdot (\eta_{load,PWI} - Allowance) \cdot \eta_{TA} \cdot \eta_{BP} - P_{LT}$$

$TL_{PWI}$  Operating hour: Means any full hour by the clock in which the Primary Waste incinerator is in operation and is incinerating waste.

$\eta_{load,PWI}$  Guaranteed electric efficiency in any Operating hour of Primary Waste incinerator when the Secondary Waste incinerator is not in operation. Calculation method :

$$\eta_{load,PWI} = 14 \cdot 10^{-3} \cdot \frac{TL_{PWI}}{TL_{PWI,100\%}} + 0.2123$$

$TL_{PWI,100\%}$  The total heat input of the Primary Waste incinerator, when operating at a load point with 100 % thermal input according to the Capacity Diagram.

$\eta_{TA}$  Efficiency variation due to turbine ageing of each Operating hour.  
Calculation method :

first 4 months after Take Over :

$$\eta_{TA} = 1$$

following 8 months :

$$\eta_{TA} = \frac{1}{1,001^m}$$

following 12 months period :

$$\eta_{TA} = \frac{1}{1,001^8} \cdot \frac{1}{1,0006^{m-12}}$$

m = months after Take Over, with a maximum of 24 months.

$\eta_{BP}$ 

Efficiency correction due to changes in ambient temperature conditions of each specific Operating hour.

Calculation method :

[UWL to work out ambient temperature vs. efficiency curves at following three load points: 70,85 and 100% thermal load.

$\eta_{BP}$  shall be interpolated from these curves. The enclosed diagram to the present annex shows the mean curve of all load points].

 $T_{Ambient}$ 

Ambient temperature measured at the Ronaldsway Airport at each specific Operating hour.

 $P_{LT}$ 

Line and transformer losses to the Pullrose Power Station. The power losses shall be calculated on basis of the cable size, route and distance of the lines from the Facility to Pullrose Power Station at each specific Operating hour.

Allowance

0,02

$Q_{min.el.PWI+SWI,annual}$	=	$\sum \eta_{BP} Q_{el.PWI+SWI,hour}$	of that Operating Year
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$$Q_{el,PWI+SWI,hour} = TL_{PWI+SWI} \cdot (\eta_{load,PWI+SWI} - Allowance) \cdot \eta_{TA} \cdot \eta_{BP} - P_{LT}$$

 $\eta_{load,PWI+SWI}$ 

Electric efficiency of the Primary Waste incinerator and the Secondary Waste incinerator in any Operating hour when the Primary Waste incinerator and the Secondary Waste incinerator are in operation at the same time.

Calculation method :

$$\eta_{load,PWI+SWI} = 5.67 \cdot 10^{-2} \cdot \frac{TL_{PWI}}{TL_{PWI,100\%}} + 0.1513$$

 $TL_{PWI+SWI}$ 

The thermal load from the Primary Waste and Secondary Waste [GJ] of each Operating hour

Allowance

0,02

$Q_{el,PWI,hour}$ ,  $Q_{el,PWI+PWI,hour}$  and  $Q_{act,el,annual}$  are to be calculated and registered on an hourly basis in the CMS System of the Facility.  $Q_{el,PWI,hour}$  and  $Q_{el,PWI+PWI,hour}$  only has to be calculated and registered when waste is being incinerated.

$TL_{PWI}$  and  $TL_{PWI+SWI}$  are calculated according to the following :

$$TL_{PWI} = TL_{S,PWI} + TL_{loss,PWI} - TL_{Air,PWI} - TL_{supplementary fuel,PWI}$$

$$TL_{PWI+SWI} = TL_{S,SWI} + TL_{loss,SWI} + TL_{S,PWI} + TL_{loss,PWI} - TL_{Air,SWI} - TL_{Air,PWI} - TL_{supplementary fuel,SWI} - TL_{supplementary fuel,PWI}$$

where  $TL_{S,PWI}$  and  $TL_{S,SWI}$  are the boiler outputs as defined in a),  $TL_{loss,PWI}$  and  $TL_{loss,SWI}$  are the energy losses as defined in b),  $TL_{Air,PWI}$  and  $TL_{Air,SWI}$  are the energys added to each incinerator by the air as defined in c) and  $TL_{supplementary fuel}$

is the energy added to the system from supplementary fuel as defined in d).  $TL_{supplementary fuel}$  will not be deducted when the fuel is used to lift the Net Calorific Value of the Primary Waste above the minimum Net Calorific Value as defined in the Capacity Diagram.

The Thermal Load and the thermal load of the Secondary Waste incinerator is determined indirectly by measuring thermal output from the boilers and measuring the flue gas loss.

In order to appropriately determine the thermal load the following parameters shall be measured and recorded continuously:

1. Boiler output i.e. for steam and feedwater: flow, pressure and temperature
2. Flue gas flow after boiler

3. Flue gas temperature after boiler
4. O<sub>2</sub> content after boiler
5. Air intake temperature
6. Amount of supplementary fuel used.

Continuously calculated values for  $TL_s$ ,  $TL_{loss}$ ,  $TL_{Air}$  and  $TL_{supplementary\ fuel}$  defined by formulas in the following shall be recorded on an hourly basis and integrated in sealed counters.

All measuring values, calculated and integrated values shall be accessible for ProjectCo and the Department's Representative at all times.

Other parameters influencing the boiler loss to be agreed upon after Tests On Take Over as fixed figures throughout the Operating Period.

It is proposed that the detailed calculations shall be carried out as an indirect method in accordance with guidelines in 'DIN 1942, Abnahmeversuche an Dampferzeugern, Februar 1994'.

The implications of adopting this methodology are:

- a. Boiler output is measured/determined
- b. Losses is measured/determined
- c. Energy added to the system by air is measured/determined
- d. Supplementary fuel is measured/determined

Loss contribution such as boiler ash heat loss, unburned matter in the boiler ash, in the flue gas and in the filter ash and filter ash heat loss is in this connection negligent and is not measured.

#### Re. a: Boiler output

Boiler output is determined as:

$$TL_s = M_s \times H_s - M_{fv} \times H_{fv} \text{ [GJ/hour]}$$

in which

$M_s$	=	Steam flow [t/hour]
$P_s$	=	Steam pressure [barg]
$T_s$	=	Steam temperature [°C]
$H_s$	=	Enthalpy of steam at pressure $P_s$ and temperature $T_s$ [GJ/t]
$M_{fv}$	=	Feeding water flow [t/hour]
$P_{fv}$	=	Feeding water pressure [barg]
$T_{fv}$	=	Feeding water temperature [°C]
$H_{fv}$	=	Enthalpy of feeding water at pressure $P_{fv}$ and temperature $T_{fv}$ [GJ/t]
$TL_s$	=	Production

Re. b: Energy loss,  $TL_{loss}$ 

Energy loss comprises:

1. Radiation loss and convection loss,  $Q_{rc}$
2. Flue gas loss,  $Q_{fg}$
3. Heat loss in bottom ash,  $Q_{ba}$
4. Unburned carbon in bottom ash,  $Q_{uba}$

$$TL_{loss} = Q_{rc} + Q_{fg} + Q_{ba} + Q_{uba}$$

Radiation loss and convection loss:  $Q_{rc}$ 

Radiation and convection loss for the boiler is agreed as 1% of the boiler output.

Flue gas loss:  $Q_{fg}$ 

The flue gas loss is determined as.

$$Q_{fg} = V_{fgw} \times H_{fgw} \text{ [GJ/hour]}$$

in which

$V_{fgw}$  = Wet flue gas flow after the boiler outlet [Nm<sup>3</sup>/hour]

$H_{fgw}$  = Enthalpy of flue gas: Is found according to composition of the flue gas and the temperature of the flue gas after the boiler outlet (reference temperature of 25 °C).

Heat loss in Bottom Ash:  $Q_{ba}$ 

$$Q_{ba} = M_{ba} \times C_{pba} \times T_{ba} \text{ [GJ/hour]}$$

$M_{ba}$  = Amount of Bottom Ash [t/hour]

$C_{pba}$  = Heat capacity, Bottom Ash = 1.00 GJ/(t·°C)

$T_{ba}$  = Bottom Ash temperature 300°C – reference temperature 25°C [°C]

Unburned carbon in bottom ash:  $Q_{uba}$ 

The unburned amount of energy, which is bound in the Bottom Ash is determined as:

$$Q_{uba} = M_u \times C_{pba} \text{ [GJ/hour]}$$

in which

$M_u$  = Unburned matter in bottom ash [t/hour] – to be agreed upon based on the result from the Tests on Take Over.

$C_{pba}$  = Calorific value, unburned = 27.2 GJ/t

The amount of unburned carbon in the bottom ash shall be fixed during the first 5 operation years and determined at tests on Take Over. Every 5 operating years a new test shall be performed.

#### Re. c: Energy from air

$$TL_{Air} = \text{Energy in preheated air [GJ/h]} \\ = m_{\text{condensate}} \cdot \Delta H_{\text{steam}}$$

Where

$$m_{\text{condensate}} = \text{Mass of condensate after the airpreheater [kg/h]} \\ \Delta H_{\text{steam}} = \text{Enthalpy difference of the steam/condensate over the airpreheater [GJ/kg]}$$

#### Re. d: Supplementary fuel

$$TL_{\text{supplementary fuel}} = \text{Energy in supplementary fuel [GJ/h]} \\ = m_{\text{fuel}} \cdot H_{\text{fuel}}$$

Where

$$m_{\text{fuel}} = \text{Mass of fuel used during that specific operating hour [kg/h]} \\ H_{\text{fuel}} = \text{Net calorific value of the fuel used [GJ/kg]}$$

#### Calculation of the Net Calorific Value of the waste, NCV

The Net Calorific Value of the Waste is only used for determining whether the waste is Conforming Waste. The following method applies for each fraction of waste and shall be calculated separately.

$$NCV = \frac{TL_x}{\text{Tonnes}}$$

Where

$$TL = \text{Thermal Load} \\ x = \text{PWI or SWI respectively} \\ \text{Tonnes} = \text{Tonnes of waste incinerated}$$

## Ambient air vs efficiency

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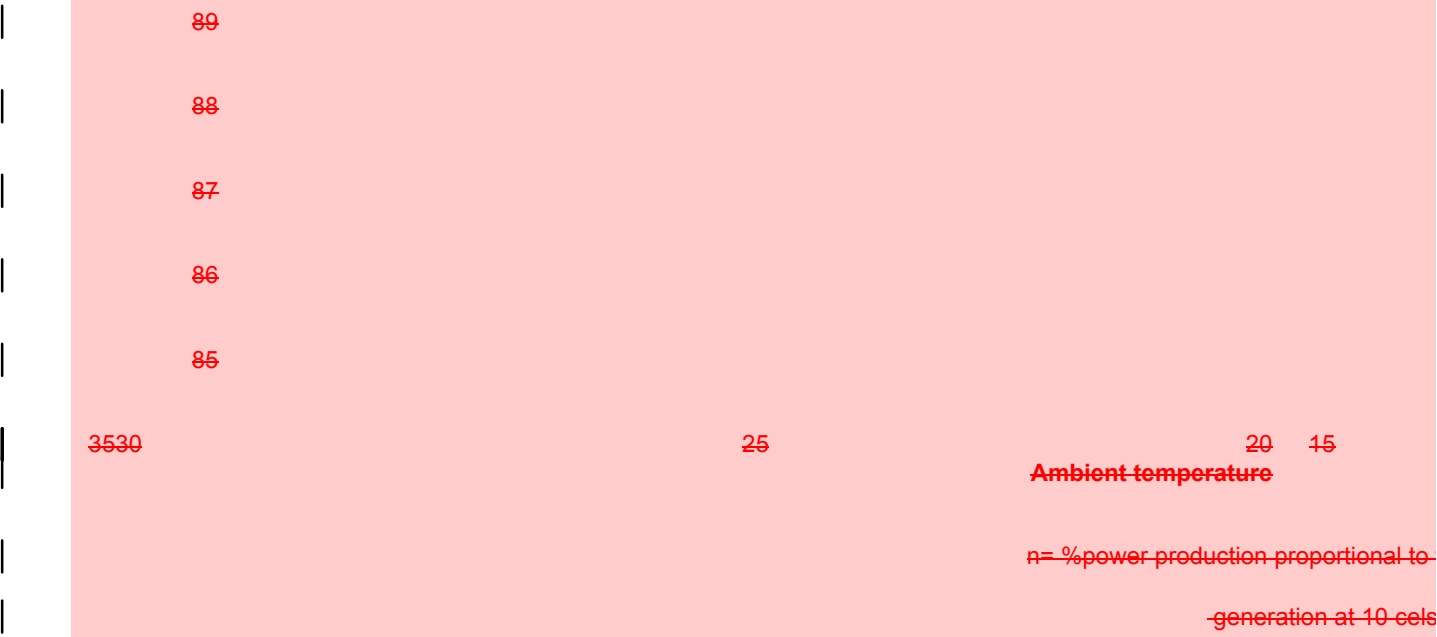
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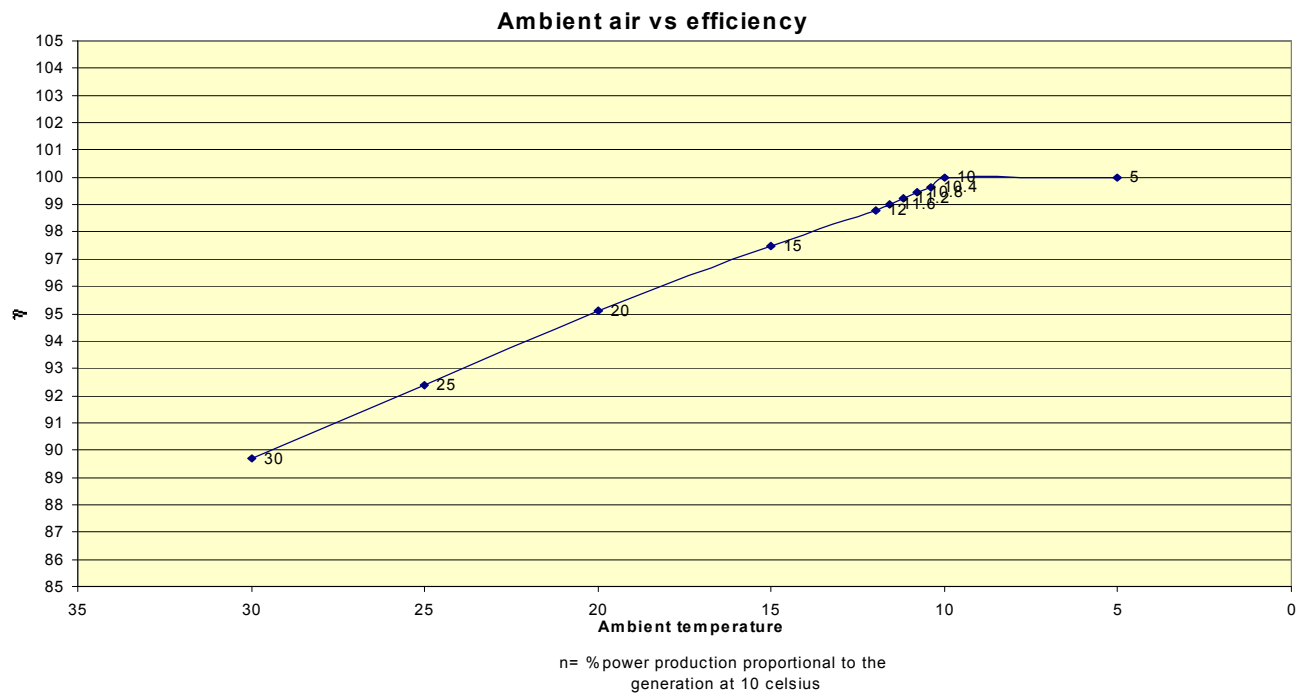
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## **SCHEDULE 2**

### **D & B OBLIGATIONS**

## **1 GENERAL**

### **Documents on Site**

- 1.1** ProjectCo shall keep on the Site one complete set of the Construction Documents, the Programme, Variations, other communications given or issued under Clause 28 of this Agreement and the documents mentioned in Clause 4.3 of this Schedule. The Department, the Department's Representative and the Department's Representatives' assistants (as referred to in Clause 18.5 of this Agreement) shall have access to and the right to use such documents at all reasonable times.

### **Provision of Construction Documents**

- 1.2** The Principal Construction Documents shall be in the custody and care of ProjectCo. Unless otherwise stated in the Department's Requirements, ProjectCo shall provide at Project Co's cost four copies for the use of the Department's Representative and his authorised assistants (as referred to in Clause 18.5 of this Agreement) at the request of the Department's Representative and any further copies requested by the Department provided, up to two further copies shall be at ProjectCo's cost but any more further copies shall be at the reasonable cost of the Department.

### **Department's Use of ProjectCo's Documents**

- 1.3** Without prejudice to the indemnity given in Clause 33.4 of this Agreement, ProjectCo warrants to the Department that the Construction Documents are its own work or the work of its Staff and that their use in connection with the Works and/or Services will not infringe the rights of any third party.
- 1.4** ProjectCo shall provide a copy of all Principal Construction Documents requested pursuant to Clause 1.2 of this Schedule to the Department on or before the dates shown for their production in the Programme and copies of any other Construction Documents at the request of the Department's Representative.
- 1.5** All royalties or other sums payable in respect of the supply and use of any patented articles, processes or inventions required in connection with the Works shall be paid by ProjectCo.

## **2 THE DEPARTMENT**

### **Access to and Possession of the Site**

If ProjectCo suffers delay and/or incurs Cost from failure on the part of the Department to grant right of access to or possession of the Site, ProjectCo shall give notice to the

Department's Representative. After receipt of such notice the Department's Representative shall proceed in accordance with Clause 18.8 of this Agreement to agree or determine:

- 2.1 any extension of time to which ProjectCo is entitled under Clause 7.3 of this Schedule; and
- 2.2 the amount of such Cost plus Profit, subject to any limitations under this Agreement, which shall be added to the D & B Contract Price, and shall notify ProjectCo accordingly.

### **3 PROJECTCO**

#### **General Obligations**

- 3.1 The Facility as completed by ProjectCo shall be wholly in accordance with this Agreement and fit for the purposes for which it is intended, as defined in this Agreement or as may be reasonably inferred from this Agreement. The Works shall include any Works which are necessary to satisfy the Department's Requirements and ProjectCo's Proposal and / or are implied by this Agreement, or arise from any obligation of ProjectCo, and all works not mentioned in this Agreement but which may be inferred to be necessary for stability or completion or the safe, reliable and efficient operation of the Facility or reasonably incidental thereto. The Facility shall have a reasonable level of inherent flexibility for extension and/or increase or reduction in capacity having regard to its design life.
- 3.2 ProjectCo shall procure the execution and completion of the Works, including providing the As Built Documentation, within the Time for Completion, and shall (subject to Clause 11.13 of this Schedule 2) remedy any defects therein. ProjectCo shall provide all superintendence, labour, Plant, Materials, ProjectCo's Equipment, Temporary Works and all other things, whether of a temporary or permanent nature, required in and for such design, execution, completion and remedying of defects.
- 3.3 ProjectCo confirms that prior to the Execution Date it took such steps as were necessary to satisfy itself regarding the Department's Requirements (including any design criteria and calculations, if any). The Department shall not be liable for any additional costs incurred by ProjectCo by reason of its failure to identify any such error, fault, inconsistency or other defect which could have been reasonably identified earlier. ProjectCo shall give notice to the Department's Representative of any error, fault, inconsistency or other defect in the Department's Requirements or such items of reference. After receipt of such notice, the Department's Representative shall determine whether Clause 13 of this Schedule shall apply, and shall notify ProjectCo accordingly.
- 3.4 ProjectCo shall take full responsibility for the adequacy, stability and safety of all Site operations, of all methods of construction and of all the Works, irrespective of any approval or consent (or non approval or consent) by the Department's Representative.

- 3.5** ProjectCo shall provide the Department's Representative with reasonable access at all reasonable times and on reasonable notice to suitable temporary office accommodation and facilities consistent with the requirements of a professional design consultant/project manager including without limitation reasonable access to ProjectCo's working programmes and drawings, a telephone, fax machine and photocopying facilities at no extra cost to the Department. For the avoidance of doubt this Clause 3.5 shall not entitle the Department's Representative to the exclusive use but to the shared use of any such accommodation or facilities.

#### **Co-ordination of the Works**

- 3.6** ProjectCo shall be responsible for the co-ordination and proper execution of the Works, including co-ordination of other contractors (if any) ProjectCo shall afford all reasonable opportunities for carrying out their work to:

- 3.6.1** any other contractors employed by the Department and their workmen;
- 3.6.2** the workmen of the Department; and
- 3.6.3** the workmen (or other personnel) of any legally constituted public authorities employed in the execution on or near the Site of any work not included in this Agreement, which the Department may require and/or responsible for the monitoring or control of any operations related to the Works and/or Services.

- 3.7** ProjectCo shall obtain, co-ordinate and (at the request of the Department's Representative) submit to the Department's Representative for its information all details of Works (including details of work to be carried out off the Site) to be carried out by the D & B Contractor and any D & B Subcontractors. ProjectCo shall be responsible for the locations of their work or materials, in order to ensure that there is no conflict with the work of other contractors or ProjectCo.

#### **ProjectCo Subcontractors**

- 3.8** ProjectCo shall not subcontract the whole of the Works. Unless otherwise stated in this Agreement:
- 3.8.1** the prior written consent of the Department's Representative shall be obtained to any proposed additional or replacement D & B Contractor or D & B Subcontractor such consent not to be unreasonably withheld or delayed;
  - 3.8.2** as soon as reasonably practicable and in any event not less than 7 days before the intended date of any additional or replacement D & B Contractor or any D & B Subcontractor commencing work on the Site,

ProjectCo shall notify the Department's Representative of such intention; and

**3.8.3** where practicable, ProjectCo shall give a fair and reasonable opportunity for contractors from the Isle of Man to be appointed as an additional or replacement D & B Contractor and/or D & B Subcontractor and/or other subcontractor.

**3.9** ProjectCo shall be responsible for the observance by the D & B Contractor and its subcontractors (whether D&B Subcontractors or otherwise) of all the provisions of this Agreement. ProjectCo shall be responsible for the acts or defaults of any D & B Contractor, its subcontractors, agents or employees, as fully as if they were the acts or defaults of ProjectCo, its agents or employees.

**3.10** ProjectCo shall ensure that each D & B Contract contains an obligation on ProjectCo to pay the D & B Contractor its due entitlement under the D & B Contract within 7 days of ProjectCo receiving payment for the D & B Contractor's works from the Department and ProjectCo shall comply with the same. Failure by ProjectCo to so comply or procure compliance shall entitle the Department to withhold a sum equivalent to that withheld from such D & B Contractor until such time as ProjectCo pays or procures payment to the D & B Contractor all sums due.

**3.11** ProjectCo shall not enter into any additional or replacement D & B Contract without the prior approval of the Department. Such D & B Contracts shall be in the form of a document previously approved in writing by the Department (such approval not to be unreasonably withheld or delayed). ProjectCo agrees that it shall be a condition precedent to the Department's consent to the appointment of each and every D & B Contractor that the D & B Contractor shall execute on or before execution of the D & B Contract a deed or deeds of warranty in accordance with Clause 9.1.1 of this Agreement (or, if appropriate, as amended to reflect the extent of those works being performed by the relevant D & B Contractor, any such amendment having been approved previously by the Department).

#### **D & B Subcontractors**

**3.12** Without prejudice to the generality of the foregoing:

**3.12.1** ProjectCo shall appoint or procure the appointment of persons identified in a list of subcontractors to be approved by the Department to carry out the works and services detailed in Annex 1 of this Schedule upon terms and conditions to be approved by the Department such approval not to be unreasonably withheld or delayed. ProjectCo shall not terminate (and where applicable shall procure that D&B Contractor shall not terminate) the appointment of any D&B Subcontractor unreasonably or vexatiously but only for material default of the relevant subcontract and having provided at

least five Business Days' written notice to the Department (other than in the case of an emergency in which case at least one Business Day's notice shall suffice).

**3.12.2** Any subcontractor performing works on the Isle of Man for which there is a list of approved contractors maintained by the Isle of Man Employers' Federation on behalf of the Department of Trade and Industry, or any replacement list, must be registered at the relevant time on that list.

**3.13** If before the completion of the works (including without limitation any design services) (or any remedial works thereto) to be provided by a D & B Subcontractor the employment of such D & B Subcontractor is terminated (except upon the termination (for any reason) of ProjectCo under this Agreement) then ProjectCo shall procure at no extra cost to the Department that such incomplete works (and any remedial works thereto) shall be carried out by a suitable replacement D&B Subcontractor (selected from a list first approved in writing by the Department such approval not to be unreasonably withheld or delayed) capable of fulfilling the requirements of the relevant parts of ProjectCo's obligations under this Agreement and completed with all due diligence so as not to delay the carrying out and completion of the Works.

**3.14** ProjectCo shall be responsible for any design, execution, testing, commissioning and completion of the Facility and any remedial works thereto and compliance of such with ProjectCo's obligations under the arrangements between ProjectCo and any D & B Subcontractor and no agreement, approval, consent or waiver on the part of the Department and / or the Department's Representative or any employee, representative or agent thereof shall in any way relieve ProjectCo from its responsibilities under this Clause 3.14.

#### **Site Data**

**3.15** ProjectCo shall be responsible for interpreting all data contained in the documents and information provided to ProjectCo by the Department which are described in paragraph 1.7 of the Department's Requirements.

**3.16** ProjectCo shall be deemed to have inspected and examined the Site, its surroundings, the above data and other available information, and to have satisfied itself before the Effective Date, as to (inter alia):

**3.16.1** the form and nature the hydrological and climatic conditions;

**3.16.2** of the Site, including the sub-surface conditions;

**3.16.3** the extent and nature of the work and Materials necessary for the execution and completion of the Works, and the remedying of any defects;

**3.16.4** the means of access to the Site and the accommodation it may require; and

**3.16.5** the extent and nature of any contamination present in or affecting the Site or the presence of any deleterious material on or affecting the Site of the nature and extent of the works required to deal with or remediate such contamination or presence.

**3.17** Subject to Clause 4A of this Agreement ProjectCo shall be deemed to have obtained all necessary information as to risks, contingencies and all other circumstances which may influence or affect its obligations under this Agreement and or the D & B Contract Price. For the avoidance of doubt Clauses 3.15, 3.16 and 3.17 of this Schedule shall be subject to Clause 12.11 of this Agreement.

#### **Matters Affecting the Execution of the Works**

**3.18** ProjectCo shall be deemed to have satisfied itself as to the correctness and sufficiency of the D & B Contract Price. Unless otherwise stated in this Agreement, the D & B Contract Price shall cover all ProjectCo's obligations in respect of the Works, including without limitation the design, construction, testing, commissioning, completion of the Facility and the remedying of any defects therein, under this Agreement (including those under Provisional Sums, if any).

#### **Access Routes**

**3.19** ProjectCo shall be deemed to have satisfied itself as to the suitability and availability of the access routes it chooses to use. ProjectCo shall (as between the parties) be responsible for the maintenance of access routes. ProjectCo shall provide any signs or directions which it may consider necessary for the guidance of its staff, labour and others. ProjectCo shall obtain any permission that may be required from the relevant authorities for the use of such routes, signs and directions.

**3.20** The Department will not be responsible for any claims which may arise from the use or otherwise of any access route. The Department does not guarantee the suitability or availability of any particular access route, and will not entertain any claim for any non-suitability or non-availability for continuous use during construction of any such route.

#### **Rights of Way and Facilities**

**3.21** ProjectCo shall bear all costs and charges for special or temporary rights-of-way required by it for access to the Site. ProjectCo shall also provide, at its own cost, any additional facilities outside the Site required by it for the purposes of the Works.

#### **Programme**



- 3.22** ProjectCo shall submit a Programme to the Department's Representative, for information, on or before the Execution Date. The Programme shall include the following:
- 3.22.1** the order in which ProjectCo proposes to carry out the Works (including each stage of design, procurement, manufacture, delivery to Site, construction, erection, testing and commissioning) including the dates (by reference to the Effective Date) on which it is intended the conditions for each stage payment shall be satisfied;
  - 3.22.2** all major events and activities in the production of Construction Documents including (without limitation) the dates proposed for the submission of samples and documents in accordance with Clauses 4.9-4.13 of this Schedule 2 and the Department's Requirements;
  - 3.22.3** the periods for the pre-construction reviews under Clauses 4.3 and 4.4 of this Schedule and for any other submissions, approvals and consents specified in the Department's Requirements; and
  - 3.22.4** the sequence of all tests specified in this Schedule (including without limitation the Tests on Take Over and Tests after Take Over).
- 3.23** The Programme shall be updated regularly and attached to the D&B Progress Report referred to in Clause 3.25 below.
- 3.24** ProjectCo shall, whenever required by the Department's Representative, provide in writing, for information, a general description of the arrangements and methods which ProjectCo proposes to adopt for the execution of the Works. No significant alteration to the Programme, or to such arrangements and methods, shall be made without informing the Department's Representative. If the progress of the Works does not conform to the Programme, ProjectCo shall revise the Programme, showing the modifications necessary to achieve completion within the Time for Completion or satisfactory passing of any Tests after Take Over prior to the expiry of the D&B Phase as the case may be.

### **D & B Progress Reports**

- 3.25** Monthly progress reports shall be prepared by ProjectCo and submitted to the Department's Representative in 6 copies. The first report shall cover the period up to the end of the calendar month after that in which the Execution Date occurred. Reports shall be submitted monthly thereafter, each within 14 days of the last day of the period to which it relates. Reporting shall continue until ProjectCo has completed all work and testing required for Take Over.

It is recognised that ProjectCo will have a view on the reporting procedure it will require from its sub-contractors. Equally the Department has expectations on reporting from ProjectCo as described in outline below. The final format and content of the reporting procedure shall be agreed by ProjectCo and the Department taking into consideration both parties' reasonable expectations. In any event each report shall include:

- 3.25.1** a description of progress supported as necessary by photographs and documents sufficient to illustrate the work which has been completed and that which will commence during the next reporting period;
- 3.25.2** a consideration of the Programme with particular reference to any departures from the planned time-scale and measure proposed to deal with such departures;
- 3.25.3** a financial review to include advice on actual and anticipated cash flow;
- 3.25.4** details of the proposed appointments of any D & B Subcontractors;
- 3.25.5** advice on problems encountered specifically as they relate to the standards and quality of work;
- 3.25.6** advice on direction required from Department particularly as it relates to Variations;
- 3.25.7** any health and safety matters and the updated Health and Safety Plan prepared pursuant to the Health and Safety Obligations;
- 3.25.8** an update on public relations issues;
- 3.25.9** details of any proposals in the part of ProjectCo or the D & B Contractor to sub-let the Works or any part thereof (including for the avoidance of doubt any design);
- 3.25.10** a drawings register setting out details of the Principal Construction Documents reviewed by the Department's Representative and those to be released within the following two months;
- 3.25.11** details of any samples to be notified to the Department's Representative in accordance with Clause 4.9 of this Schedule;
- 3.25.12** details of any tests to be notified to the Department's Representative in accordance with Clause 6.6 of this Schedule;
- 3.25.13** an updated copy of Annex 1 to this Schedule.

### **ProjectCo's Equipment**

- 3.26** ProjectCo shall provide all ProjectCo's Equipment necessary to complete the Works. All ProjectCo's Equipment shall, when brought on to the Site, be deemed to be exclusively intended for the execution of the Works. ProjectCo shall not remove from the Site any such ProjectCo's Equipment unless and until no longer necessary for the execution of the Works without the consent of the Department's Representative.

### **Safety Precautions**

- 3.27** ProjectCo shall comply with all applicable safety regulations (including without limitation the Health and Safety Obligations) in its design, access arrangements and operations on Site. ProjectCo shall, from the commencement of work on Site provide:

**3.27.1** fencing, lighting, guarding and watching of the Works; and

**3.27.2** temporary roadways, footways, guards and fences which may be necessary for the accommodation and protection of owners and occupiers of adjacent land, the public and others.

### **Protection of the Environment**

- 3.28** ProjectCo shall take all reasonable steps to protect the environment (both on and off the Site) and to prevent damage and nuisance to people and property resulting from pollution, noise and other results of its operations. ProjectCo shall ensure that noise, air emissions, surface discharges and effluent from the Site shall not exceed the limits indicated in the Department's Requirements, and shall not exceed the limits prescribed by law from time to time.

### **Electricity, Water and Gas**

- 3.29** ProjectCo shall make and pay for all the necessary connections make arrangements with and pay for such supplies of electricity, water, gas, sewage, telecommunications and other services as may be available on the Site and of which details are given in the Department's Requirements directly with the appropriate statutory undertaker. In relation to electricity only this provision shall apply only until the Electricity Agreement is completed.

### **Clearance of Site**

- 3.30** Without prejudice to the more specific obligations contained in the Department's Requirements during the execution of the Works, ProjectCo shall keep the Site free from all unnecessary obstruction, and shall store or dispose of any ProjectCo's Equipment or surplus materials. ProjectCo shall clear away and remove from the Site

any wreckage, rubbish or Temporary Works no longer required including without limitation the specific obligations in the Department's Requirements.

- 3.31** Upon the issue of any Taking Over Certificate, ProjectCo shall clear away and remove, from that part of the Site and Works to which such Taking Over Certificate refers, all ProjectCo's Equipment, surplus material, wreckage, rubbish and Temporary Works. ProjectCo shall leave such part of the Site and the Works in a clean and safe condition. ProjectCo shall be entitled to retain on Site such ProjectCo's Equipment, Materials and Temporary Works as required by it for the purpose of fulfilling its obligations under this Agreement.

### **Security of the Site**

- 3.32**
- 3.32.1** ProjectCo shall be responsible for keeping unauthorised persons off the Site; and
- 3.32.2** authorised persons until Take Over shall be limited to the employees of ProjectCo, employees of its D & B Contractor and authorised subcontractors staff, the Department's Representative and his authorised assistants and any workmen and/or contractors and/or other personnel authorised by law to which Clauses 3.6 and 3.7 of this Schedule refer.

### **ProjectCo's Operations on Site**

- 3.33** ProjectCo shall confine its operations to the Site, and to any additional areas which may be provided by the Department (if any) and agreed by the Department's Representative as working areas. ProjectCo shall take all necessary precautions to keep its personnel and equipment within the Site and any such additional areas, and to keep and prohibit them from encroaching on adjacent land.

### **Fossils**

- 3.34** This Clause is subject to Clauses 3.15, 3.16 and 3.17 of this Schedule. All fossils, coins, articles of value or antiquity, and structures and other remains or things of geological or archaeological interest discovered on the Site shall (as between the parties) be the property of the Department. ProjectCo shall take reasonable precautions to prevent its staff, labour or other persons from removing or damaging any such article or thing. ProjectCo shall, immediately upon discovery of such article or thing, advise the Department's Representative of such discovery, ProjectCo's proposals for dealing with it and an estimate of any likely delay to the completion of the Works and shall keep the Department's Representative regularly apprised of such details.

### **Hoardings**

**3.35**

- 3.35.1** ProjectCo shall not permit the Site (or any parts of it) to be used for the display of advertisements or other boards notices or signs except such usual developers' and contractors' and other signs relating to and indicating the nature of the Works which as to size position content and appearance shall have previously been approved in writing by the Department (such approval being in the Department's absolute discretion).
- 3.35.2** ProjectCo shall permit the Department (and those authorised by it) until Take Over to erect and display advertisements hoardings and signs of any nature so that all income received or receivable in respect thereof shall belong to the Department along any boundary to the Site and to attach the same to any fencing surrounding the Site save where the position of any such advertisements hoardings and/or signs would impede the Works and ProjectCo properly requires the removal of them in consequence.

**4 DESIGN**

**General Obligations**

- 4.1** ProjectCo shall carry out (or procure the carrying out), and be responsible for, the design of the Facility. The design shall be prepared by qualified and technically competent designers who are engineers or contractors or other professionals with experience in works of a type, scale, nature and complexity similar to the Works who comply with the criteria (if any) stated in the Department's Requirements. Nothing contained in the Project Agreement shall create any contractual relationship or professional obligations between any designer or the D & B Contractor (or its subcontractors) and the Department save as provided for in accordance with Clause 9 of this Agreement.
- 4.2** ProjectCo holds itself out and warrants its designers and design subcontractors as having the experience and capability necessary for the design of the Facility. ProjectCo undertakes that the designers shall be available to attend discussions with the Department's Representative at all reasonable times during the D & B Phase.

**Construction Documents**

- 4.3** ProjectCo shall prepare the Construction Documents in sufficient detail to satisfy all Approvals, to provide suppliers and construction personnel sufficient instruction to execute the Works, and to describe the operation and maintenance of the Facility. The Department's Representative shall have the right to review and inspect the preparation of Construction Documents, on reasonable notice, wherever they are being prepared.

- 4.4** Each of the Principal Construction Documents (and any samples to be submitted in accordance with Clause 4.9 of this Schedule) shall, when considered ready for use, be submitted to the Department's Representative for pre-construction review. The Department's Representative shall provide any comments to ProjectCo on the Principal Construction Documents within the Review Period.
- 4.5** For each part of the Works, and except to the extent that the prior consent of the Department's Representative shall have been obtained:
- 4.5.1** construction shall not commence prior to the expiry of the Review Periods for the Principal Construction Documents which are relevant to the design and construction of such part;
  - 4.5.2** construction shall be in accordance with such Principal Construction Documents as amended following any reasonable comments by the Department's Representative; and
  - 4.5.3** if ProjectCo wishes to modify materially any design or document which has previously been submitted for such pre-construction review, ProjectCo shall immediately notify the Department's Representative, and shall subsequently submit revised documents to the Department's Representative for pre-construction review.
- 4.6** Errors, omissions, ambiguities, inconsistencies, inadequacies and other defects in the Principal Construction Documents shall be rectified by ProjectCo at its cost.

#### **ProjectCo's Undertaking**

- 4.7** ProjectCo undertakes that the design, the Construction Documents and the execution and the completed Works will be in accordance with the following:
- 4.7.1** the Applicable Laws and Approvals; and
  - 4.7.2** the documents forming this Agreement, as altered or modified by any Variations.

#### **Technical Standards and Regulations**

- 4.8** The Works, the Construction Documents and the completed Facility shall comply with British Standards, Codes of Practice, technical standards, building, construction and environmental regulations, regulations applicable to the product being produced from the Works, and the standards specified in the Department's Requirements, applicable to ProjectCo's Proposals and Schedules, or defined by Applicable Laws. References in this Agreement to such specifications and other matters shall be understood to be references to the edition applicable on the Base Date, unless stated otherwise. If substantially changed or new applicable national specifications, technical standards or

regulations come into force after the Base Date, ProjectCo shall submit proposals for compliance to the Department's Representative. In the event that such proposals constitute a Variation, the Department's Representative shall then initiate a Variation in accordance with Clause 13 of this Schedule.

### **Samples**

**4.9** ProjectCo shall notify the Department's Representative of the following samples and relevant information and at the Department Representative's request submit for pre-construction review in accordance with the procedure for Principal Construction Documents described in Clause 4.4 of this Schedule:

- 4.9.1** manufacturer's standard samples of Materials;
- 4.9.2** samples (if any) specified in the Department's Requirements; and
- 4.9.3** additional samples instructed by the Department's Representative under Clause 13 of this Schedule.

Each sample shall be labelled as to origin and intended use in the Works.

### **As-Built Drawings**

**4.10** ProjectCo shall prepare, and keep up-to-date, a complete set of "as-built" records of the execution of the Works, showing the exact "as-built" locations, sizes and details of the works as executed, with cross references to relevant specifications and data sheets. These records shall be kept on the Site and shall be used exclusively for the purposes of this Clause. Two copies shall be submitted to the Department's Representative prior to the commencement of the Trial Period.

**4.11** In addition, ProjectCo shall prepare and submit to the Department's Representative "as-built drawings" of the Works, showing all Works as executed. The drawings shall be prepared as the Works proceed, and shall be submitted to the Department's Representative in such state of completion and/or finality as the context requires for his inspection. ProjectCo shall obtain the consent of the Department's Representative as to their size, the referencing system, and other pertinent details such consent not to be unreasonably withheld or delayed.

**4.12** Prior to the issue of any Taking Over Certificate, ProjectCo shall submit to the Department's Representative the As Built Documentation including (without limitation) one Auto CAD disc, one full-size original copy and 6 printed copies of the relevant "as-built drawings", and any further Construction Documents specified in the Department's Requirements and to which the Programme refers. The Works shall not be considered to be completed for the purposes of Taking Over under Clause 9.1 and 9.2 of this Schedule, until such documents have been submitted to the Department's Representative.

### **Operation and Maintenance Manuals**

- 4.13** Prior to commencement of the Trial Period, ProjectCo shall prepare, and submit to the Department's Representative, draft O & M Manuals in accordance with the Department's Requirements and in sufficient detail for the Department to operate, maintain, dismantle, reassemble, adjust and repair the Facility in accordance with the O & M Obligations, Operation and Maintenance System and the Operational Plan in accordance with the Department's Requirements and in sufficient detail to assist in the smooth running of the Facility. The Works shall not be considered to be completed for the purposes of Taking Over under Clause 9.1 and 9.2 of this Schedule, until the draft O & M Manuals, the draft Annual Maintenance Plan and the draft Operational Plan have been submitted to the Department's Representative.

### **Error by ProjectCo**

- 4.14** If errors, faults, inconsistencies or other defects are found in the Construction Documents, they (and associated errors, faults, inconsistencies or other defects in the Works) shall be corrected at ProjectCo's cost.

### **Intellectual Property Rights**

- 4.15** ProjectCo shall be promptly notified of any claim against the Department to which Clause 33.4 of this Agreement refers. ProjectCo may, at its cost, conduct negotiations for the settlement of such claim and any litigation or arbitration that may arise from it. The Department or the Department's Representative shall not make any admission which might be prejudicial to ProjectCo, unless ProjectCo has failed to take over the conduct of the negotiations, litigation or arbitration within a reasonable time after having been so entitled.
- 4.16** Except to the extent that the Department agrees otherwise, ProjectCo shall not make any admission which might be prejudicial to the Department, until ProjectCo has given the Department such reasonable security as the Department may require. The security shall be for an amount which is a reasonable assessment of the compensation, damages, charges and costs for which the Department may become liable, and to which the indemnity under Clause 33 of this Agreement applies.
- 4.17** The Department shall, at the request and cost of ProjectCo, assist in contesting any such claim or action, and shall be repaid all reasonable costs incurred.
- 4.18** No review of, approval of or comments on any design by the Department or Department's Representative shall relieve ProjectCo of any of its obligations under this Agreement.

## **5 STAFF AND LABOUR**



## Heath and Safety

- 5.1** Precautions shall be taken by ProjectCo to ensure the health and safety of its staff and labour. Without limitation ProjectCo shall comply with the Construction (Health and Safety Regulations) 1985, the Health and Safety at Work Act 1977, the Health and Safety at Work Act 1974 (of the Imperial Parliament) as applied to the Isle of Man by the Health and Safety at Work Order 1988 and all other applicable health and safety legislation approved codes of practice, guidance notes and technical memoranda. ProjectCo shall, in collaboration with and to the requirements of the Isle of Man Health Authority, ensure that medical staff and the ambulance services are briefed as to the Site, ProjectCo's operations and plans in the event of an emergency. ProjectCo shall ensure that first aid facilities and sick bay are available on the Site at all times, and that suitable arrangements are made for all necessary welfare and hygiene requirements and for the prevention of disease and dangerous occurrences. ProjectCo shall maintain records and make such reports concerning the health, safety and welfare of persons, and damage to property, as the Department's Representative may reasonably require.
- 5.2** ProjectCo shall appoint one or more competent persons who shall be based at the Site to assist ProjectCo to comply with the requirements and prohibitions imposed upon ProjectCo by the Applicable Laws and Health and Safety Obligations with regard to the arrangements for the maintenance of the health safety and welfare of its Staff and others affected by the conduct of its undertaking at the Site. The appointed persons shall be appropriately qualified having regard to the nature and size of the Site and the works and the number of persons reasonably expected to be on the Site at any time and shall be invested by ProjectCo with authority to issue instructions and take protective measures to prevent accidents in the name of ProjectCo.

ProjectCo shall (without prejudice to any other applicable reporting requirements) report the details of all accidents dangerous occurrences and the incidence of any industrial disease to the Department's Representative as soon as possible after its occurrence but in any event within 7 days of its occurrence or discovery (whichever is the later).

## Health and Safety Obligations

- 5.3** The Health and Safety Obligations shall apply to the Works as incorporated mutatis mutandis into the law of the Isle of Man. Without prejudice to the generality of the foregoing:-
- 5.3.1** ProjectCo shall appoint an appropriate Planning Supervisor and the Principal Contractor as defined by the Health and Safety Obligations.
- 5.3.2** the scope of the Works undertaken by ProjectCo and its subcontractors shall be deemed to include everything necessary to comply fully with the Health and Safety Obligations.

- 5.3.3** all costs incurred by ProjectCo resulting from the observance of the requirements and prohibitions imposed on it by the Health and Safety Obligations are deemed to be included in the D & B Contract Price.

- 5.4** ProjectCo agrees that it is the “Client” for the purposes of the Health and Safety Obligations and will make a declaration and will give notice to the Department in accordance with the Health and Safety Obligations to that effect before commencing any operations on the Site.

#### **ProjectCo's Superintendence**

- 5.5** ProjectCo shall procure the provision of all necessary superintendence during the design and execution of the Works, and as long thereafter as the Department's Representative may consider reasonably necessary for the proper fulfilling of ProjectCo's obligations in respect of the Works. Such superintendence shall be given by sufficient persons having adequate knowledge of the operations to be carried out (including the methods and techniques required, the hazards likely to be encountered and methods of preventing accidents) for the satisfactory and safe execution of the Works. A reasonable proportion of ProjectCo's superintending staff shall have a working knowledge of English or ProjectCo shall have sufficient interpreters available on Site during all working hours.

## **6 PLANT, MATERIALS AND WORKMANSHIP**

#### **Manner of Execution**

- 6.1** All Plant and Materials to be supplied shall be manufactured, and all work to be done shall be executed, in the manner set out in this Agreement. Where the manner of manufacture and execution is not set out in this Agreement, the Works shall be executed in a proper, workmanlike and careful manner, with properly equipped facilities and non-hazardous materials and in accordance with recognised good construction practice and Prudent Engineering and Operating Practices.

#### **Delivery to Site**

- 6.2** ProjectCo shall be responsible for procurement, transport, receiving, unloading and safe keeping of all Plant, Materials, ProjectCo's Equipment and other things required for the completion of the Works.

#### **Inspection**

- 6.3** The Department's Representative shall be entitled during manufacture, fabrication and preparation at any places where work is being carried out, on reasonable notice to inspect, examine and test the materials and workmanship, and to check the progress of manufacture, of all Plant and Materials to be supplied under this Agreement. ProjectCo

shall give the Department's Representative full opportunity on reasonable notice to inspect, examine, measure and test any such works on Site or wherever carried out.

- 6.4** ProjectCo shall give reasonable notice to the Department's Representative whenever such works are ready for inspection, before packaging, covering up or putting out of view. The Department's Representative shall then without unreasonable delay either carry out the inspection, examination, measurement or testing or notify ProjectCo that it is considered unnecessary. If ProjectCo fails to give reasonable notice pursuant to this Clause 6.4 it shall, at the request of the Department's Representative, uncover such work and thereafter reinstate and make good at its own cost.

### **Testing**

- 6.5** ProjectCo shall provide all documents and other information necessary for testing and such assistance, labour, materials, electricity, fuel, stores, apparatus and instruments as are necessary to carry out such tests efficiently. The Department shall on reasonable notice procure the delivery of Primary and Secondary Waste for testing.
- 6.6** ProjectCo shall notify, the Department's Representative, the time and place for the testing of any Plant and other parts of the Works. The Department's Representative shall give ProjectCo not less than 24 hours notice of its intention to attend any such tests. ProjectCo shall provide sufficient suitably qualified and experienced staff to carry out the tests specified in this Agreement.
- 6.7** ProjectCo may proceed with the tests notified to the Department's Representative, unless the Department's Representative instructs ProjectCo otherwise or expressly stated elsewhere in this Agreement or the Department's Requirements.
- 6.8** ProjectCo shall promptly forward to the Department's Representative duly certified reports of the tests (including for the avoidance of doubt any carried out in respect of Directly Procured Items).
- 6.9** If during testing ProjectCo notes faults or defects in the Materials or Plant supplied, which may influence the tests or subsequent testing operations, ProjectCo shall immediately give notice to the Department's Representative in writing together with an estimate of the anticipated consequences.

### **Rejection**

- 6.10** If, prior to the issue of the Taking Over Certificate as a result of inspection, examination or testing, any Plant, Materials, design or workmanship (including for the avoidance of doubt any Directly Procured Items) is defective or otherwise not in accordance with this Agreement, the Department's Representative may reject such Plant, Materials, design or workmanship and shall notify ProjectCo promptly, stating his reasons. ProjectCo shall then promptly make good the defects and ensure that the rejected item complies with this Agreement.

- 6.11** If the Department's Representative reasonably requires such Plant, Materials, design or workmanship to be retested, the tests shall be repeated under the same terms and conditions. If such rejection and retesting cause the Department to incur additional costs (over and above its normal overheads), such costs shall be recoverable from ProjectCo by the Department, and may be deducted by the Department from any monies due, or to become due, to ProjectCo.

#### **Ownership of Plant and Materials**

- 6.12** Each item of Plant and Materials shall become the property of the Department at whichever is the earlier of the following times:
- 6.12.1** when it is delivered to Site or (in the case of Directly Procured Items) the earlier of payment or delivery to the Site;
  - 6.12.2** when by virtue of Clause 7.17 of this Schedule, ProjectCo becomes entitled to payment of the value of the Plant and Materials.

#### **Wheelie Bins**

- 6.13** ProjectCo shall purchase Wheelie Bins at the request and expense of the Department prior to Take Over. The cost of such Wheelie Bins shall be treated as a Provisional Sum (save that no element of Profit shall be taken into account in calculating the Provisional Sum).

## **7 COMMENCEMENT, DELAYS AND SUSPENSION**

#### **Commencement of Works**

- 7.1** ProjectCo shall commence the design of the Facility as soon as it is reasonably possible after the Execution Date (notwithstanding the Effective Date will not by then have arisen) and shall give notice to the Department's Representative of such commencement. ProjectCo shall commence the execution of the remainder of the Works as soon as it is reasonably possible after the Effective Date. ProjectCo shall proceed with its obligations in respect of the Works with due expedition and without delay.

#### **Time for Completion**

- 7.2** ProjectCo shall ensure that the whole of the Works shall have passed the Tests on Take Over and/or shall obtain from the Department a Taking Over Certificate:
- 7.2.1** within the Time for Completion for the Works; and

- 7.2.2** without prejudice to Clause 7.2.1 before the Long Stop Date and in the event of breach of this Clause 7.2.2, Clause 22.3 of the Project Agreement shall apply.

### **Extension of Time for Completion**

- 7.3** ProjectCo shall be entitled to and may apply for an extension of the Time for Completion if it is or will be delayed either before or after the Time for Completion by any of the following causes:

- 7.3.1** a Variation (unless an adjustment to the Time for Completion is agreed under Clause 13.8 of this Schedule);
- 7.3.2** a Force Majeure event;
- 7.3.3** a Relief Event; or
- 7.3.4** any delay, impediment or prevention for which the Department is responsible under this Agreement (including without limitation in accordance with Clauses 2.1, 7.8, 7.15, 9.5 and 14.2.1 of this Schedule 2).

- 7.4** If ProjectCo intends to apply for an extension of the Time for Completion, ProjectCo shall give notice to the Department's Representative of such intention as soon as possible and in any event within 14 days of the start of the event giving rise to the delay, together with any other notice required by this Agreement and relevant to such cause. ProjectCo shall keep such contemporary records as may be necessary to substantiate any application, either on the Site or at another location acceptable to the Department's Representative, and such other records as may reasonably be requested by the Department's Representative. ProjectCo shall permit the Department's Representative to inspect all such records on reasonable notice and shall provide the Department's Representative with copies as required.

- 7.5** Within 14 days of the first occurrence of such delay (or such other period as may be agreed by the Department's Representative), ProjectCo shall submit full supporting details of its application. Except that, if ProjectCo cannot submit all relevant details within such period because the cause of delay continued for a period exceeding 7 days, ProjectCo shall submit interim details at intervals of not more than 28 days (from the first day of such delay) and full and final supporting details of its application within 21 days of the last day of delay.

- 7.6** In respect of any extension of time :

- 7.6.1** the extent of any delay caused by events referred to above which is concurrent with another delay for which ProjectCo is responsible shall not be taken into account; and

**7.6.2** ProjectCo shall use and continue to use all reasonable endeavours to remedy or mitigate any delay; and

**7.6.3** for the avoidance of doubt ProjectCo shall not in any event be entitled to an extension of time to the extent that any delay in the progress of the Works is caused or contributed to by any negligence, breach of statutory duty, omission or default or breach of this Agreement of ProjectCo or any person for whom it is responsible.

**7.7** The Department's Representative shall proceed in accordance with Clause 18.8 of the Project Agreement to agree or determine either prospectively or retrospectively such extension of the Time for Completion and Long Stop Date as may be due. The Department's Representative shall notify ProjectCo accordingly. When determining each extension of time, the Department's Representative shall review its previous determinations and may revise, but shall not decrease, the total extension of time.

#### **Delays Caused by Authorities**

**7.8** If the following conditions apply, namely:

**7.8.1** ProjectCo has diligently followed the procedures laid down by the relevant legally constituted public authorities in the Isle of Man; and

**7.8.2** such authorities delay, impede or prevent ProjectCo; and

**7.8.3** the resulting delay to the Works was not (by the Base Date) reasonably foreseeable by an experienced contractor

then such delay will be considered as a cause of delay giving an entitlement to extension of time under Clause 7.3 of this Schedule.

#### **Rate of Progress**

**7.9** If, at any time, ProjectCo's actual progress falls behind the Programme or it becomes apparent that it will so fall behind, ProjectCo shall submit to the Department's Representative a revised Programme taking into account the prevailing circumstances. ProjectCo shall, at the same time, notify the Department's Representative of the steps being taken to expedite progress, so as to achieve completion within the Time for Completion.

**7.10** If any steps taken by ProjectCo in meeting its obligations under this Clause cause the Department to incur additional costs, such costs shall be recoverable from ProjectCo by the Department, and may be deducted by the Department from any monies due, or to become due, to ProjectCo.

### **Liquidated Damages for Delay**

- 7.11** If ProjectCo fails to comply with Clause 7.2.1 of this Schedule, ProjectCo shall pay to the Department the sums indicated in Schedule 1 Clause 1.5 as liquidated damages for such default (which sum shall be the only monies due from ProjectCo for such default) for every day or part of a day which shall elapse between the relevant Time for Completion and Take Over. For the avoidance of doubt if the Department exercises its right pursuant to Clause 9.3 of this Schedule to issue a Take Over Certificate in respect of a Section which comprises a sufficient element of Works to treat the Primary Waste in accordance with this Agreement the Liquidated Damages shall be reduced in accordance with Clause 1.5.2 of Schedule 1.
- 7.12** The Department may, without prejudice to any other method of recovery, deduct the amount of such damages from any monies due, or to become due, to ProjectCo. In the event of an extension of time being granted under Clause 7.7 of this Schedule, the amount due under this Clause shall be recalculated accordingly, and any over-payment refunded. The payment or deduction of such damages shall not relieve ProjectCo from its obligation to complete the Works, or from any other of its duties, obligations or responsibilities under this Agreement.
- 7.13** At any time after the Department has become entitled to Liquidated Damages, the Department's Representative may give notice to ProjectCo, requiring ProjectCo to complete within a specified reasonable time for completion. Such action shall not prejudice the Department's entitlements to payment under this Clause and/or to terminate this Agreement in accordance with Clause 22 of this Agreement.

### **Suspension of Work**

- 7.14** The Department's Representative may at any time instruct ProjectCo to suspend progress of part or all of the Works. During suspension, ProjectCo shall protect, store and secure such part of the Works against any deterioration, loss or damage.

### **Consequences of Suspension**

- 7.15** If ProjectCo reasonably suffers delay and/or incurs Cost in following the Department's Representative's instructions under Clause 7.14 of this Schedule, and in resumption of the work, ProjectCo shall give notice to the Department's Representative, with a copy to the Department. After receipt of such notice the Department's Representative shall proceed in accordance with Clause 18.8 of this Agreement, to agree or determine:
- 7.15.1** any extension of time to which ProjectCo is entitled under Clause 7.7 of this Schedule; and
- 7.15.2** the amount of such Cost plus Profit, which shall be added to the D & B Contract Price, and shall notify ProjectCo accordingly;

provided that, ProjectCo shall not be entitled to such extension and payment of Cost plus Profit if the suspension is due to a cause attributable to ProjectCo.

- 7.16** ProjectCo shall not be entitled to extension of time for, or payment of the costs incurred in, making good any deterioration, defect or loss caused by faulty design, workmanship or materials, or by ProjectCo's failure to take the measures specified in Clause 7.14 of this Schedule.

#### **Payment for Plant and Material in Event of Suspension**

- 7.17** ProjectCo shall be entitled to payment for Plant and/or Materials which have not been delivered to Site if the work on Plant or delivery of Plant and/or on Materials has been suspended for more than 28 days. This entitlement shall be to payment of the value of such Plant and/or Materials as at the date of suspension, if:-

**7.17.1** ProjectCo has marked the Plant and/or Materials as the Department's property in accordance with the Department's Representative's instructions; and

**7.17.2** the suspension is not due to a cause attributable to ProjectCo.

The Department may then take over the responsibility for protection, storage, security and insurance of such suspended Plant and/or Materials; the risk of loss or damage to the suspended works shall then pass to the Department. If the Department does not so take over responsibility then ProjectCo shall remain responsible therefor.

#### **Prolonged Suspension**

- 7.18** If suspension under Clause 7.14 of this Schedule has continued for more than 84 days, and the suspension is not due to a cause attributable to ProjectCo, ProjectCo may by notice to the Department's Representative require permission to proceed within 28 days. If permission is not granted within that time, ProjectCo may treat the suspension as an omission under Clause 13 of this Schedule of the affected part of the Works. If such suspension affects the whole of the Works, ProjectCo may terminate its employment under Clause 22.18.1.4 of this Agreement.

#### **Resumption of Work**

- 7.19** After receipt of permission or an instruction to proceed, ProjectCo shall, after notice to the Department's Representative, and together with the Department's Representative, examine the Works and the Plant and Material affected by the suspension. ProjectCo shall make good any deterioration or defect in or loss of the Works or Plant or Materials, which has occurred during the suspension. If the Department has taken over risk and responsibility for the suspended Works under Clause 7.17 of this Schedule, risk and



responsibility shall revert to ProjectCo 14 days after receipt of the permission or instruction to proceed.

### **Programme Recovery**

**7.20** If as a result of any reason which entitles ProjectCo to an extension of time the rate of progress of the Works or part thereof is at any time in the reasonable opinion of the Department's Representative too slow to ensure completion of the Works by the prescribed time or any previously extended Time for Completion, the Department's Representative:-

**7.20.1** may, prior to granting the extension of time to which ProjectCo would be entitled, instruct ProjectCo to submit written proposals to the Department's Representative stating:-

- (i) the lump sum which ProjectCo will reasonably require to be added to the D & B Contract Price if the instructions issued by the Department's Representative under this Clause 7.20.1 are confirmed pursuant to the following provisions of this Clause, together with details showing the manner of calculation of the lump sum and proposals for the terms of payment thereof; and
- (ii) the extent to which the extension of time to which ProjectCo would be entitled can be cancelled or reduced and the date for completion which as a result would become the Time for Completion of the Works.

**7.20.2** shall, if ProjectCo sustains a reasonable objection to such instruction, either withdraw the instruction or vary the instruction to meet the objection and re-issue the varied instruction;

**7.20.3** may, following receipt of ProjectCo's written proposals and, if the Department's Representative wishes to accept such proposals, issue a further written instruction confirming the instruction issued under Clause 7.20.1 of this Schedule, and confirming in accordance with ProjectCo's proposals:-

- (i) the amount by which the D & B Contract Price is to be increased to take account of the lump sum quoted by ProjectCo; and
- (ii) the revised Time for Completion of the Works; and
- (iii) the details of the acceleration and the alteration of sequence or timing required.

The costs of preparing any proposals required under this Clause shall be borne by ProjectCo.

If ProjectCo and the Department are unable to reach agreement on the amount by which the D & B Contract Price is to be increased to accommodate such instruction of the Department's Representative, but are otherwise in agreement (on the revised Time for Completion of the Works and on the details of the acceleration and the alteration of sequence or timing required) then the Department's Representative may instruct ProjectCo to implement the acceleration and the value of such measures shall be ascertained to the provisions of Clause 18.8.

## **8 TESTS ON TAKE OVER**

### **ProjectCo's Obligations**

- 8.1** ProjectCo shall carry out the Tests on Take Over in accordance with this Clause and Clauses 6.5, 6.6, 6.7, 6.8, and 6.9 of this Schedule. ProjectCo shall give, to the Department's Representative, 21 days' notice of the date after which ProjectCo will be ready to carry out the Tests on Take Over. Unless otherwise agreed, such tests shall be carried out within 14 days after this date, on such day or days as the Department's Representative shall reasonably instruct.
- 8.2** As soon as the Works, or a Section, have passed the Tests on Take Over, ProjectCo shall provide the Department's Representative and the Department with a certified report of the results of all such tests. The Works shall not be regarded as having passed the Tests on Take Over until they are fit for beneficial use and occupation and ProjectCo is in all respects ready to commence the Services and in particular (without limitation) until the following Tests on Take Over have been satisfied:
- 8.2.1** the Works are complete except for minor defects which do not prevent the Works from being used for their intended purpose (or the rectification of which will not prejudice the convenient use of the Works for their intended purpose);
  - 8.2.2** all defects, snags and omissions in the Works which would prevent or materially disrupt the use and occupation of the Works have been rectified and completed;
  - 8.2.3** ProjectCo has produced a programme and method statement for the diligent completion and/or making good (as appropriate) (and in any event within 7 days) of all defects, snags and omissions in the Works other than those referred to in Clause 8.2.2 of this Schedule;

- 8.2.4** ProjectCo has prepared and submitted to the Department's Representative six sets of the As Built Documentation (including a comprehensive list thereof);
- 8.2.5** ProjectCo has supplied evidence of the satisfactory results of the Tests on Take Over. This shall include (without limitation) evidence that the performance capacity of the Facility is as specified in the Department's Requirements and ProjectCo's Proposals and evidence that the Facility has and is likely to be able to continue operating satisfactorily within the limitations given by the Approvals;
- 8.2.6** the Facility and Site has been properly cleaned;
- 8.2.7** all rubbish, surplus materials and temporary equipment not required for testing have been completely removed from the Site and the surrounding areas cleared;
- 8.2.8** all collateral warranties required under Clause 9 of this Agreement together with all documents necessary to ensure the Department (or other relevant beneficiary) obtains the benefit of such warranties have been provided;
- 8.2.9** four copies of all relevant health and safety material (including without limitation the Health and Safety File as defined by the Health and Safety Obligations) have been handed over and such information shall be in whatever format (hard and/or on disc) as may be reasonably required by the Department's Representative;
- 8.2.10** any other requirements for Tests on Take Over specified in this Agreement have been complied with;
- 8.2.11** evidence that the D & B Performance Bond (in the value of not less than 5% of the D&B Contract Price) has been procured in favour of the Department;
- 8.2.12** Wear Parts and Strategic Spare Parts have been provided, registered and placed at their final location in accordance with the Department's Requirements;
- 8.2.13** copies of D&B Contractor's and/or D & B Subcontractors' 2 year guarantees to ProjectCo in respect of all main components have been submitted to the Department's Representative.

#### **Delayed Tests**

- 8.3** If the Tests on Take Over are being unduly delayed by ProjectCo, the Department's Representative may by notice require ProjectCo to carry out such tests within 21 days after the receipt of such notice. ProjectCo shall carry out such tests on such day or days within that period as ProjectCo may fix and of which he shall give notice to the Department's Representative.
- 8.4** If ProjectCo fails to carry out the Tests on Take Over within 21 days, the Department's Representative may himself proceed with such tests. All such tests so carried out by the Department's Representative shall be at the risk and cost of ProjectCo. These Tests on Take Over shall then be deemed to have been carried out in the presence of ProjectCo and the results of such tests shall be accepted as accurate.

### **Retesting**

- 8.5** If the Works, or a Section, fail to pass the Tests on Take Over, Clauses 6.10 and 6.11 of this Schedule shall apply and the Department's Representative or ProjectCo may require such failed tests, and the Tests on Take Over or any related work, to be repeated under the same terms and conditions.

### **Failure to Pass Tests on Take Over**

- 8.6** If the Works or a Section (as the case may be) fail to pass the Tests on Take Over repeated under Clause 8.5 of this Schedule, the Department's Representative shall be entitled to:-
- 8.6.1** order further repetition of Tests on Take Over under Clause 8.5 of this Schedule;
  - 8.6.2** reject the Works or Section (as the case may be), in which event the Department shall have the same remedies against ProjectCo as are provided under Clause 22 of this Agreement; or
  - 8.6.3** without prejudice to Clause 9.3 of this Schedule issue a Taking Over Certificate in respect of the Works if the Department so requires. The D & B Contract Price shall then be reduced by such amount as may be agreed by the Department and ProjectCo (in full satisfaction of such failure only), and ProjectCo shall then proceed in accordance with its other obligations under this Agreement.

### **Testing Period Obligations**

- 8.7** Notwithstanding the general obligations of this Clause 8 in respect of the Tests or Taking Over, the Tests on Take Over shall include the following.

#### **Testing Period**

- 8.7.1** During the Testing Period ProjectCo shall carry out all commissioning and testing so as to demonstrate the capability of the Facility to perform and be operated in accordance with this Agreement. Such commissioning and testing shall include (without limitation) all hot and cold testing.

#### **Trial Period**

- 8.7.2** Not less than three months prior to the date shown in the Programme for Take Over, a Trial Period shall commence in which ProjectCo shall demonstrate to the Department's reasonable satisfaction that the Facility has and will continue to operate continuously and in accordance with the specification, conditions and obligations contained in this Agreement. The commencement of the Trial Period shall be conditional on the following:

- 8.7.2.1** That the Facility has been completed save for works of a minor nature and is fully operational.
- 8.7.2.2** ProjectCo has submitted the As-Built Documentation to the reasonable satisfaction of the Department's Representative.
- 8.7.2.3** ProjectCo has submitted a detailed programme for execution of the Tests on Take Over.
- 8.7.2.4** ProjectCo has submitted a completed checklist endorsed by ProjectCo and any D & B Contractor confirming that all obligations have been satisfied under this Agreement in respect of the design and construction of the Facility including (without limitation) those included in the Department's Requirements and ProjectCo's Proposal.

#### **Test Records**

- 8.7.3** Notwithstanding any other obligation to keep records ProjectCo shall keep a separate record during the Testing Period of all the tests, events, measurements, and notes of meetings and shall be updated daily by the Staff commissioning, testing and operating the Facility. All such records shall be available for inspection on reasonable notice by the Department's Representative and shall be in a suitable format for such inspection.

## **9 DEPARTMENT'S TAKING OVER**

### **Taking Over Certificate**

- 9.1** Except as stated in Clause 8.6 of this Schedule, ProjectCo shall commence the operation and maintenance of the Works in accordance with the O & M Obligations and this Agreement when the Works have been completed in accordance with this Schedule (except as described in Clause 9.2.1 below), the Tests on Take Over have been passed and a Taking Over Certificate for the Facility has been issued.
- 9.2** ProjectCo may apply by notice to the Department's Representative (subject (without limitation) to Clause 8.1 of this Schedule) for a Taking Over Certificate not earlier than 14 days before the Facility will, in ProjectCo's opinion, be complete and ready for operation. The Department's Representative shall, within 28 days after the receipt of ProjectCo's application:-
- 9.2.1** issue the Taking Over Certificate to ProjectCo, stating the date on which the Facility was completed in accordance with this Agreement (except for minor outstanding work that does not affect the use of the Facility for its intended purpose) including passing the Tests on Take Over ; or
  - 9.2.2** reject the application, giving its reasons and specifying the work required to be done by ProjectCo to enable the Taking Over Certificate to be issued. ProjectCo shall then complete such work before issuing a further notice under this Clause.

### **Use by the Department**

#### **Sectional Completion**

- 9.3** ProjectCo shall not operate any part of the Facility (save for testing in accordance with this Agreement) unless the Department's Representative has issued a Taking Over Certificate. In the event that after the expiry of the Time for Completion the results of the Tests on Completion in respect of the treatment of Primary Waste are successful and the results of the Tests on Completion in respect of the treatment of Secondary Waste are unsuccessful then the Department shall be entitled to issue a Taking Over Certificate in respect of that part of the Works comprising the Primary Waste treatment facility. The Parties' respective rights and obligations in respect of the remainder of the Works shall be unaffected and ProjectCo shall (at ProjectCo's cost) procure any necessary adjustments to its operations including so as to accommodate such sectional completion (without limitation) the management, sequence of working, security, insurance, health and safety provisions, testing, supervision of the Works and Facility, and execution of the Works.

- 9.4** For the avoidance of doubt, in the event the Department's Representative issues a Taking Over Certificate in respect of the Primary Waste treatment facility in accordance with Clause 9.3 of this Schedule, ProjectCo shall take such steps as may be necessary to carry out any outstanding Tests on Take Over, and ProjectCo shall carry out such Tests on Take Over as soon as practicable.

#### **Interference with Tests on Take Over**

- 9.5** If ProjectCo is prevented from carrying out the Tests on Take Over by a cause for which the Department (or another contractor employed by the Department) is responsible and ProjectCo incurs additional Cost as a result of this delay in carrying out the Tests on Take Over, such Cost plus Profit and any extension of time to which ProjectCo is entitled pursuant to Clause 7.7 of this Schedule shall be determined by the Department's Representative in accordance with the provisions of Clause 18.8 of this Agreement and shall be added to the D & B Contract Price.

### **10 TESTS AFTER TAKE OVER**

#### **Department's Requirements**

- 10.1** ProjectCo shall provide the necessary labour, materials, electricity, fuel and water for, and shall carry out all testing and monitoring required after Take Over including without limitation any Tests after Take Over and at the Department's Representative's request submit all records and measurements of such tests at ProjectCo's cost.
- 10.2** The Tests after Take Over shall be carried out as soon as is reasonably practicable after a request by the Department's Representative to do so and ProjectCo shall give to the Department Representative at least 21 days' notice of the date on which the Tests after Take Over will be commenced.
- 10.3** The results of the Tests after Take Over shall be compiled and evaluated by the Department's Representative and ProjectCo.

#### **Delayed Tests**

- 10.4** If the Department incurs additional costs as a result of any unreasonable delay caused by ProjectCo in carrying out the Tests after Take Over, such costs shall be determined by the Department's Representative in accordance with the provisions of Clause 18.8 of this Agreement and shall be deducted from monies due or to become due to ProjectCo.

#### **Retesting**

- 10.5** If the Works fail to pass the Tests after Take Over, the Department may require such failed tests, and the Tests after Take Over on any related work, to be repeated under the same terms and conditions. If such failure and retesting result from a default of ProjectCo and cause the Department to incur additional costs, such costs shall be

recoverable from ProjectCo by the Department, and may be deducted by the Department from any monies due, or to become due, to ProjectCo.

#### **Failure to Pass Tests after Take Over**

- 10.6** If the Facility fails to pass a Test after Take Over and ProjectCo in consequence proposes to make any adjustment or modification thereto, the Department's Representative may instruct ProjectCo that the Department does not wish such adjustment or modification to be made until a time that is convenient to the Department. In such event, ProjectCo shall remain liable to carry out the adjustment or modifications and to satisfy such tests within a reasonable time of being notified to do so by the Department's Representative.
- 10.7** Notwithstanding any other obligation in respect of the Tests after Take Over under this Agreement the following shall apply:

#### **Guarantee Period**

- 10.7.1** Upon issuing of the Taking Over Certificate, a Guarantee Period of not less than two years shall commence in which ProjectCo shall carry out further tests and monitoring to verify compliance with this Agreement and in particular (without limitation) the Approvals.

#### **Tests after Take Over**

- 10.7.2** Any Tests after Take Over instructed by the Department shall verify that the Facility operates in compliance with the Approvals. The Tests after Take Over shall be conducted, computed and verified in a report to ProjectCo and the Department. An independent institute shall be (subject to the approval of the Department) appointed jointly by ProjectCo and the Department on terms to be agreed in accordance with the Department's Requirements at the cost of ProjectCo. Such tests shall be in addition to any tests which the Department shall reasonably require at the Department's cost.
- 10.7.3** The satisfactory completion of any Tests after Take Over and the submission of all outstanding Construction Documents shall be a pre-condition for the issue of the Final Taking Over Certificate.
- 10.8** In any event the following shall be a pre-condition for the issue of the Final Taking Over Certificate:
- 10.8.0.1** the procurement of EMAS Validation;
  - 10.8.0.2** submission of evidence of compliance with all Approvals;



**10.8.0.3** submission of all documentation in accordance with Clause 4.12 of this Schedule; and

**10.8.0.4** compliance with all material terms of this Agreement.

## **11 DEFECTS LIABILITY**

### **Completion of Outstanding Work and Remedying Defects**

**11.1** In order that the Construction Documents and the Works shall be in the condition required by this Agreement at, or as soon as practicable after, the expiry of the D & B Phase, ProjectCo shall:-

**11.1.1** complete any work which is outstanding on the date stated in a Taking Over Certificate, as soon as practicable after such date; and

**11.1.2** execute all work of amendment, reconstruction, and remedying defects or damage, as may be reasonably instructed by the Department or the Department's Representative during the D & B Phase.

**11.2** If any such defect appears in or damage occurs to the Facility at any stage during the D & B Phase ProjectCo shall as soon as reasonably practicable notify the Department in writing.

### **Cost of Remedying Defects**

**11.3** All work referred to in Clause 11.1.2 of this Schedule shall be executed by ProjectCo at its own cost

### **Extension of D & B Phase**

**11.4** The D & B Phase shall be extended by a period equal to the sum of any periods, after Take Over during which the Works (including for the avoidance of doubt the Secondary Waste treatment facility in the event of sectional completion in accordance with Clause 9.3 of this Schedule) or any Section or item of Plant cannot be used, for the purposes for which they are intended, by reason of a defect or damage PROVIDED THAT:

**11.4.1** the damage arises out of a defect; or

**11.4.2** the effect of all damage to the Facility or any part prior to Final Take Over is to prevent the full operation of the Facility for a period of at least 12000 hours since Take Over; and

**11.4.3** the D&B Phase shall not exceed four years in any circumstances.

### **Failure to Remedy Defects**

- 11.5** If ProjectCo fails to remedy any defect in or damage to the Facility which occurs prior to Final Take Over within a reasonable time, the Department or the Department's Representative may fix a date on or by which to remedy the defect or damage, and give ProjectCo reasonable notice of such date.
- 11.6** If ProjectCo fails to remedy the defect or damage by such date the Department may (at its sole discretion):-
- 11.6.1** carry out the work itself or by others in a reasonable manner and at ProjectCo's risk and cost. The costs properly incurred by the Department in remedying the defect or damage shall be recoverable from ProjectCo by the Department; or
  - 11.6.2** require the Department's Representative to determine and certify a reasonable reduction in the D & B Contract Price which the Department's Representative shall do in accordance with Clause 18.8 of the Agreement.

### **Removal of Defective Work**

- 11.7** If any defect or damage is such that it cannot be remedied expeditiously on the Site, ProjectCo may, with the consent of the Department's Representative (such consent not to be unreasonably withheld or delayed), remove from the Site for the purposes of repair any part of the Works which is defective or damaged. For the avoidance of doubt this Clause 11.7 shall not affect the Department's Requirements.

### **Further Tests**

- 11.8** If the remedying of any defect or damage is such that it may affect the performance of the Facility, the Department may require any Tests on Taking Over or Tests after Taking Over, or both, be repeated to the extent reasonably necessary. The requirement shall be made by notice within 28 days after the defect or damage is remedied. Such tests shall be carried but in accordance with Clause 8 or Clause 10 of this Schedule (as the case may be).

### **Right of Access**

- 11.9** ProjectCo's rights of access and possession of the Site after Take Over shall be in accordance with and subject to the Lease and terms of this Agreement.

### **Final Taking Over Certificate**

- 11.10** The Works shall not be considered to be completed until the Final Taking Over Certificate has been issued by the Department's Representative and delivered to ProjectCo, stating the date on which ProjectCo completed the Works and tested the Works (including remedying any defects) to the Department's Representative's reasonable satisfaction. .
- 11.11** The Final Taking Over Certificate shall be issued and delivered to ProjectCo by the Department's Representative on the date on which ProjectCo completes the Works to the Department's Representative's reasonable satisfaction and has provided all the Construction Documents in accordance with this Agreement and not before the expiry of the D & B Phase.

### **Unfulfilled Obligations**

- 11.12** After the Final Taking Over Certificate has been issued, ProjectCo shall remain liable for the fulfilment of any obligation in respect of the D & B Phase which remains unperformed at that time.

### **Latent Defects**

- 11.13** Notwithstanding the issue of the Final Taking Over Certificate or any other term of and/or rights and obligations under this Agreement (whether express or implied), ProjectCo shall remain liable for making good with all possible speed any Latent Defect which appears in respect of the Plant (which for the avoidance of doubt excludes the building fabric, foundations and associated infrastructure comprised in the Facility) and remainder of the Facility at any time before the second and sixth anniversaries of the Final Take Over respectively and shall forthwith at the request of the Department remedy such Latent Defect promptly at its own cost.

## **12 D & B CONTRACT PRICE AND PAYMENT**

### **The D & B Contract Price**

- 12.1** The following provisions shall apply in respect of the D&B Contract Price:
- 12.1.1** payment for the Works shall be made on a fixed lump sum basis as amended in accordance with the terms of this Agreement (including without limitation Clause 4A of this Agreement and Clause 1.7 of Schedule 1);
  - 12.1.2** the D & B Contract Price shall not be adjusted for changes in the cost of labour, materials or other matters save as provided by Clause 1.1 of Schedule 1;
  - 12.1.3** ProjectCo shall pay all duties and taxes in consequence of its obligations under this Agreement, and the D & B Contract Price shall

not be adjusted for such costs, except as stated in Clause 12.16 of this Schedule;

- 12.1.4** payment for the Works shall be made in stage payments in accordance with Part 1 of Schedule 1;
- 12.1.5** payment for the Works shall be in the Local Currency and/or Nominated Currency in the amounts identified in Clause 1.3 of Schedule 1.

#### **Application for Interim Payment Certificate**

- 12.2** ProjectCo shall submit a statement and invoice (in a form first approved in writing by the Department) in 6 copies to the Department's Representative when the conditions for release of the payment have been satisfied at each stage payment detailed in Part 1 Schedule 1 showing:

- 12.2.1** the amounts to which ProjectCo considers itself to be entitled in respect of the Works (including without limitation sums due in respect of Savage and Chadwick's services), together with all supporting evidence required to satisfy the conditions for release of payment specified in Schedule 1 which shall include in any event the D & B Progress Report ; and
- 12.2.2** any amounts to be added and/or deducted in accordance with this Agreement (including without limitation any sums due in respect of the appointment of the Environmental Consultant and the carrying out of any Remediation Works pursuant to Clause 4A of this Agreement and Clause 1.7 of Schedule 1); and
- 12.2.3** the amounts previously certified and paid.

#### **D & B Schedule of Payments**

- 12.3** The instalments quoted in Schedule 1 of this Agreement shall be used to determine the amount to which Project Co is entitled for the purposes of Clause 12.2.1 of this Schedule.
- 12.4** The Department is not obliged to make the first payment to ProjectCo until the Department has received:-
  - 12.4.1** the D & B Performance Bond (Schedule 11); and
  - 12.4.2** the Programme (Clause 3.22 of this Schedule).

- 12.5** Provided, in the Department's Representative's opinion, the sum due pursuant to Clause 12.3 of this Schedule is no less than 95% of the relevant stage payment the Department's Representative shall, within 14 days of receiving a statement, invoice and supporting documents, deliver to the Department (with a copy to ProjectCo) an Interim Payment Certificate showing the amount which the Department's Representative considers to be due. If, in the Department's Representative's opinion, the sum due is less than 95% of the relevant stage payment the Department's Representative shall promptly notify ProjectCo accordingly, and no payment shall be due. For the avoidance of doubt if the conditions for release of payment have not been satisfied to the extent necessary to entitle ProjectCo to no less than 95% of the relevant stage payment (taking no account of any other sums which may be due under this Schedule 2) the Department shall be under no obligation to make any payment pursuant to this Clause 12.
- 12.6** For the avoidance of doubt if anything supplied or work done by ProjectCo is not in accordance with this Agreement, the cost of rectification or replacement shall be deducted by the Department's Representative from any amount otherwise due.
- 12.7** The Department's Representative may in any payment certificate take into account any correction or modification that should properly be made to any previous certificate.

### Payment

- 12.8** Unless otherwise stated in this Agreement:-
- 12.8.1** the Department shall pay the amount certified in each Interim Payment Certificate within ~~35~~<sup>21<sup>39</sup></sup> days from the date on which the Department's Representative received ProjectCo's statement, invoice and supporting documents; and
- 12.8.2** the Department shall pay the amount certified in the Final Payment Certificate within ~~35~~<sup>21<sup>40</sup></sup> days from the date of issue of the Final Payment Certificate.
- 12.8.3** Payments shall be made into a bank account, nominated by ProjectCo, in the Isle of Man (save for payments in respect of Directly Procured Items which shall be paid in accordance with Clause 1.1 of Schedule 1 of this Agreement).

<sup>39</sup> Changes as per paragraph 2.3.1 of DofV 1

<sup>40</sup> Changes as per paragraph 2.3.2 of DofV 1<sup>1</sup>

## Statement at Completion

- 12.9** Not later than 84 days after the issue of the Taking Over Certificate, ProjectCo shall submit, to the Department's Representative, 6 copies of a statement at completion with supporting documents showing in detail, in the form approved by the Department's Representative under Clause 12.2 of this Schedule:-

- 12.9.1** the final value of all work done in accordance with this Agreement up to the date stated in such Taking Over Certificate;
- 12.9.2** any further sums which ProjectCo considers to be due; and
- 12.9.3** an estimate of amounts which ProjectCo considers will become due to it under the D & B Schedule of Payments.

The estimated amounts shall be shown separately in such statement at completion. The Department's Representative shall certify payment under Clause 12.5 of this Schedule.

## Application for Final Payment

- 12.10** Not later than 56 days after the date of issue of the Final Taking Over Certificate, ProjectCo shall submit to the Department's Representative 6 copies of a draft Final Statement with supporting documents showing in detail, in a form approved by the Department's Representative:-

- 12.10.1** the value of all work done in accordance with this Agreement; and
- 12.10.2** any further sums which ProjectCo considers to be due to it under this Agreement or otherwise.

- 12.11** If the Department's Representative disagrees with or cannot verify any part of the draft Final Statement, ProjectCo shall submit such further information as the Department's Representative may reasonably require and shall make such changes in the draft as may be agreed between them. ProjectCo shall then prepare and submit to the Department's Representative the Final Statement as agreed.

- 12.12** If, following discussions between the Department's Representative and ProjectCo and any changes to the draft Final Statement which may be agreed between them, it becomes evident that a dispute exists, the Department's Representative shall deliver to the Department (with a copy to ProjectCo) an Interim Payment Certificate for those parts of the draft Final Statement which are not in dispute.

## Discharge

- 12.13** When submitting the Final Statement, ProjectCo shall submit a written discharge which confirms that the total of the Final Statement represents full and final settlement of all monies due to ProjectCo under Part 1 Schedule 1 of this Agreement. Such discharge may state that it shall become effective only after payment due under the Final Payment Certificate has been made.

#### **Issue of Final Payment Certificate**

- 12.14** The Department's Representative shall issue to the Department, with a copy to ProjectCo, the Final Payment Certificate within 14 days after receiving the Final Statement and written discharge in accordance with Clauses 12.10, 12.11, 12.12 and 12.13 of this Schedule stating:-

**12.14.1** the amount which is finally due; and

**12.14.2** after giving credit to the Department for all amounts previously paid by the Department and for all sums to which the Department is entitled other than under Clause 7.11 of this Schedule, the balance, if any, due from the Department to ProjectCo or from ProjectCo to the Department as the case may be.

- 12.15** If ProjectCo has not applied for a Final Payment Certificate in accordance with Clauses 12.10, 12.11, 12.12 and 12.13 of this Schedule, the Department's Representative shall request ProjectCo to do so. If ProjectCo fails to make such an application within a period of 28 days, the Department's Representative shall issue the Final Payment Certificate for such amount as it considers to be due.

#### **Cessation of Department's Liability**

- 12.16** The Department shall not be liable to ProjectCo for any matter or thing arising out of (or in connection with) the execution of the Works, unless ProjectCo shall have included a claim for it in its Final Statement and (except for matters or things arising after the issue of the Taking Over Certificate for the Works) in the statement at completion described in Clause 12.9 of this Schedule. For the avoidance of doubt this Clause 12.16 relates to the Department's liability for the D & B Contract Price (Schedule 1 Part 1) and shall not affect ProjectCo's right to payment for the operation and maintenance of the Facility pursuant to Clause 7 and Schedule 1 Part 2 of this Agreement.

#### **Changes in Legislation**

- 12.17** The D & B Contract Price shall be adjusted to take account of any increase or decrease in Cost resulting from a Specific Legislative Change and not (for the avoidance of doubt) in respect of any General Legislative Change.
- 12.18** If ProjectCo suffers (or will suffer) delay and/or incurs (or will incur) additional Cost resulting from such a Specific Legislative Change ProjectCo shall give notice to the

Department's Representative. After receipt of such notice the Department's Representative shall proceed in accordance with Clause 18.8 of the Project Agreement, to agree or determine:-

**12.18.1** any extension of time to which ProjectCo is entitled under Clause 7.7 of this Schedule; and

**12.18.2** the amount of such Cost, which shall be added to the D & B Contract Price, and shall notify ProjectCo accordingly.

**12.19** Any dispute as to the sums payable pursuant to this Clause 12 may be referred by either party to the disputes procedure.

**12.20** Project Co shall appoint Savage and Chadwick in accordance with and subject to (without limitation) Clause 3.12 of this Schedule and at the stages identified in part 1 Schedule 1 this Department shall pay to Project Co a sum equivalent to the fee due to Savage and Chadwick under such appointment subject to Project Co's provision of proper substantiation thereof and a maximum aggregate sum of £50,000 (exclusive of VAT) inclusive of all professional fees and expenses in any event.

## **13 VARIATIONS**

### **Right to Vary**

**13.1** Variations may be initiated by the Department's Representative at any time during the D & B Phase, either by instruction or by a request for ProjectCo to submit a proposal. If the Department's Representative requests ProjectCo to submit a proposal and subsequently elects not to proceed with the change, ProjectCo shall be reimbursed for the Cost incurred, including without limitation costs associated with any additional design services procured. A Specific Legislative Change shall be deemed to be a request for ProjectCo to submit a proposal insofar as is necessary for the design and/or execution of the Works or carrying out of the O&M Obligations in accordance with this Agreement provided ProjectCo shall submit reasonable prior notice of its intention to procure any such proposal. For the avoidance of doubt the cost of any such proposal shall not include the costs associated with the Staff whose cost would be charged as an indirect overhead expense in connection with the provision of the Works and/or Services.

**13.2** ProjectCo shall not make any alteration and/or modification of the Works, unless and until the Department's Representative instructs or approves a Variation. If the Construction Documents or Works are not in accordance with this Agreement, the rectification thereof shall not constitute a Variation. ProjectCo shall not be obliged to implement a Variation if and to the extent that it will adversely affect the safety or stability of the Works and/or would not be consistent with Prudent Engineering and Operating Practices.



### Value Engineering

- 13.3** ProjectCo may, at any time, submit to the Department's Representative a written proposal which in ProjectCo's opinion will reduce the cost of constructing, maintaining or operating the Works, or improve the efficiency or value to the Department of the completed Works, or otherwise be of benefit to the Department. Any such proposal shall be prepared at the cost of ProjectCo and shall include the items listed in Clauses 13.4 and 13.6 of this Schedule. This Clause 13.3 shall not apply to any proposal known or reasonably available to ProjectCo at the Execution Date.
- 13.4** In the event that ProjectCo considers that a cost saving may be made ProjectCo shall notify the Department in writing, giving details of:-
- 13.4.1** the potential cost saving;
  - 13.4.2** details of how the saving may be achieved;
  - 13.4.3** the proposed changes to the design and to the Construction Documents; and
  - 13.4.4** the effect, if any, on the programming of the Works.
- 13.5** The Department shall review any such information and in its absolute discretion may authorise ProjectCo to take measures to give effect to the cost savings. In the event that the saving is actually effected as a Variation the saving shall be shared equally between ProjectCo and the Department and the value to ProjectCo shall be included in the next Interim Payment Certificate following the carrying out of the affected part of the Works and the saving actually being achieved.

### Variation Procedure

- 13.6** If the Department's Representative requests a proposal, prior to instructing a Variation, ProjectCo shall submit as soon as practicable:-
- 13.6.1** a description of the proposed design and/or work to be performed and a programme for its execution;
  - 13.6.2** ProjectCo's proposal for any necessary modifications to the Programme; and
  - 13.6.3** ProjectCo's proposal for any adjustment to the D & B Contract Price (by reference to the pricing schedules for charges for design and construction management personnel and rates for construction operatives contained in ProjectCo's Proposal where appropriate), Time for Completion and/or any modifications to this Agreement.

- 13.7** The Department's Representative shall, as soon as practicable after receipt of such proposals, respond with approval, rejection or comments.
- 13.8** If the Department's Representative instructs or approves a Variation, he shall proceed in accordance with Clause 18.8 of this Agreement, to agree or determine any adjustments to the D & B Contract Price, Time for Completion and the D & B Schedule of Payments. Adjustment of the D & B Contract Price shall include ProjectCo's Profit and shall take account of ProjectCo's submissions under Clause 13.3 of this Schedule, if applicable. The amount of any adjustment to the D & B Contract Price shall be determined in accordance with the prices and/or rates in ProjectCo's Proposal and/or prices and/or rates analogous thereto so far as reasonably applicable and when not reasonably applicable any adjustment shall be such as is reasonable in all the circumstances.
- 13.9** In any event, any Variation (with any Variations already directed to be made) which requires a net adjustment to the D & B Contract Price (as calculated on the date of receipt of the proposal for a Variation) of greater than fifteen percent (15%) of the D & B Contract Price shall require the prior written consent of ProjectCo. The calculation of the adjustment for the purposes of this Clause 13.9 shall not include any adjustment to the D & B Price required as a result of a Specific Legislative Change.

#### **Provisional Sums**

- 13.10** Each Provisional Sum shall only be used, in whole or in part, in accordance with the Department's Representative's instructions. The total sum paid to ProjectCo shall include only such amounts for the work, supplies or services to which such Provisional Sums relate as the Department's Representative shall have instructed. For each Provisional Sum the Department's Representative may order:-
- 13.10.1** work to be executed (including Plant, Materials or services to be supplied) by ProjectCo and valued under Clause 13.8 of this Schedule;
- 13.10.2** Plant, Materials or services to be purchased by ProjectCo, for which payment will be made as follows:-
- (i) the actual price paid (or due to be paid) by ProjectCo; and
- (ii) Profit.
- 13.11** ProjectCo shall, when required by the Department's Representative, produce quotations, invoices, vouchers and accounts or receipts in substantiation and sums claimed.

### **Notice to Correct**

- 13.12** If ProjectCo fails to carry out any of its obligations, or if ProjectCo is not executing the Works in accordance with this Agreement, the Department's Representative may give notice to ProjectCo requiring him to make good such failure and remedy the same within a specified reasonable time.

## **14 DEFAULT OF DEPARTMENT**

### **ProjectCo's Entitlement to Suspend Work**

- 14.1** If the Department fails to make any payment in accordance with Clause 12.8 of this Schedule, ProjectCo shall be entitled to suspend performance of all (but not some) of its construction operations, provided that ProjectCo has first given to the Department at least 14 days' notice of intention to suspend performance stating the ground or grounds on which ProjectCo relies. Such right to suspend performance shall cease when the Department makes payment in full of the relevant amount due. Any period during which performance is suspended in pursuance of the right conferred by this Clause shall be disregarded in computing for the purposes of any contractual time limits the time taken by ProjectCo to complete the Works directly or indirectly affected by the exercise of such right. Suspension of the performance of ProjectCo's obligations pursuant to this Clause 14.1 shall specifically exclude the cancellation of insurance policies taken out and maintained under this Agreement for which any premiums have been or which have become due in whole or in part from ProjectCo to the insurers before the date on which ProjectCo first purports to exercise such right of suspension and any works and services required to ensure such policies remain in effect
- 14.2** If ProjectCo suffers delay and/or incurs Cost as a result of suspending work or reducing the rate of work in accordance with Clause 14.1 of this Schedule, ProjectCo shall give notice to the Department's Representative. After receipt of such notice, the Department's Representative shall proceed in accordance with Clause 18.8 of this Agreement, to agree or determine:-
- 14.2.1** any extension of time to which ProjectCo is entitled under Clause 7.3 of this Schedule; and
- 14.2.2** the amount of such Cost plus Profit, which shall be added to the D & B Contract Price, and shall notify ProjectCo accordingly.

### **Cessation of Work and Removal of ProjectCo's Equipment**

- 14.3** After termination under Clauses 22.1, 22.3 or 22.18.1 of this Agreement, ProjectCo shall (without prejudice to any other obligation under this Agreement):-
- 14.3.1** cease all further work, except for such work as may be reasonably necessary for the purpose of making safe or protecting those parts of

the Works already executed, and any work required to leave the Site in a clean and safe condition;

- 14.3.2** hand over all Construction Documents, Plant and Materials and any Directly Procured Items for which ProjectCo has received payment;
- 14.3.3** hand over those other parts of the Works executed by ProjectCo up to the date of termination; and
- 14.3.4** subject to Clause 3.26 of this Schedule remove all ProjectCo's Equipment which is on the Site and repatriate all its staff and labour from the Site.



### **Annex 1 : D&B Subcontractors**

Savage and Chadwick - Architectural services in support of the PSO Application more particularly described in the Department's Requirements;

Environmental Consultant - only if not jointly appointed

Contractors/Designers supplying and/or installing works and services relating to the following disciplines:

Remediation Works;

Steelworks;

Concrete Works;

Cladding/building envelope;

Paving, Roads surfaces;

Mechanical Works;

Electrical Works;

Primary Waste Boiler;

Turbine;

Secondary Waste Incinerator;

Primary Waste Incinerator;

Flue Gas Treatment Plant;

Air Cooled Condensor;

Weighbridges;

Cranes;

Scrap metal separator;

Encapsulation equipment;

Instrumental equipment (including emissions control measurement station); and

CMS System;

ProjectCo shall provide a list of subcontractors for approval by the Department from which the D&B Subcontractors shall be selected. A preliminary list shall be provided on the Execution Date. This list shall be finalised before the Effective Date for the following items: Primary Incinerator, Primary Boiler, Flue Gas Treatment Plant (primary and secondary), Secondary Incinerator, Turbine and Air Cooled Condenser. The list shall be finalised progressively as part of the D&B Progress Report for the other items after the Effective Date.

**SCHEDULE 3**  
**O & M OBLIGATIONS**

## **1 COMMENCEMENT OF THE SERVICE**

- 1.1** ProjectCo shall serve not less than six weeks' written notice on the Department of when the Facility shall first be Available and when ProjectCo shall be in a position to provide the Services.
- 1.2** Without prejudice to Clause 4.1 of the Project Agreement ProjectCo shall obtain the Regulator's Licence prior to Take Over and EMAS Validation prior to Final Take Over.
- 1.3** The parties shall establish appropriate quality assurance protocols to govern the weighing of Conforming Waste at and the delivery of Conforming Waste to the Facility.
- 1.4** Prior to the receipt of Conforming Waste at the Facility and subsequently during the Operating Period, ProjectCo shall provide instruction in the procedures to be followed at the Facility for the quantifying and delivery of Conforming Waste and movement and discharge of Vehicles in a safe and efficient manner in accordance with Prudent Engineering and Operating Practices to drivers of Vehicles who are notified to them as not having delivered Conforming Waste to the Facility previously.
- 1.5** ProjectCo may only accept and dispose of waste at the Facility delivered by, on behalf of, or with the written consent of the Department.

## **2 OBLIGATIONS OF PROJECTCO**

### **2.1 Availability of the Facility**

- 2.1.1** ProjectCo shall ensure that the Facility is Available from Take Over until the Expiry Date including during periods of Planned Outages and Unplanned Outages, but shall not be in breach of this obligation in the event of Force Majeure, a Relief Event or where the Facility is only unable to accept Conforming Waste for storage and disposal as a direct consequence of the act or omission of the Department or its employees agents or contractors (other than any Local Authority or ProjectCo or their employees, agents or contractors).

### **2.2 Delivery and disposal of waste**

- 2.2.1** ProjectCo shall accept and dispose of all Conforming Waste delivered to the Facility at the Delivery Points by or on behalf of the Department and shall dispose of all Residues.



- 2.2.2** ProjectCo accepts that the tonnage of Conforming Waste delivered to the Facility may vary on a daily, a calendar month or annual accounting period basis. ProjectCo accepts that the Variable Element of the Gate Fees shall reflect the variance in the tonnage of Conforming Waste that is delivered to the Facility during the Agreement Period.
- 2.2.3** With regard to the volume of Primary Waste delivered to the Facility:
- 2.2.3.1** The Department undertakes to procure the delivery of Primary Waste to the Facility so that the Net Calorific Value of the waste fed into the hopper will always be in the Net Calorific Value interval specified in the Capacity Diagram, provided that ProjectCo uses Prudent Engineering and Operating Practices when mixing the waste.
- 2.2.3.2** ProjectCo shall monitor continuously the Thermal Load of the waste fed into the hopper.
- 2.2.3.3** ProjectCo shall notify the Department's Representative within 24 hours if the Net Calorific Value of the crane fed waste falls to a level below 70% of the Net Calorific Value in the Nominal Load Point so that consumption of support fuel is required in order not to jeopardise Approvals or to damage the Facility.
- 2.2.3.4** The monthly reports to be produced by ProjectCo shall include details of the Thermal Load fed into the hopper during the previous month. The report shall specify the calculated Net Calorific Value of the waste and the monthly Thermal Load shall be calculated on the basis of tonnages of Primary Waste crane fed into the incinerator, the tonnes of steam generated in the boiler and an agreed average efficiency of the incinerator. The average efficiency shall be as specified in ProjectCo's Proposal. The report shall include a continuous monitoring of the previous quarter's and 12 months' Thermal Load and also details of consumption of support fuel oil added (if any) to lift the Net Calorific Value up above the minimum Net Calorific Value as defined in the Capacity Diagram.

- 2.2.3.5** If ProjectCo can reasonably demonstrate that there is no more volume available for storage of Primary Waste in the bunker in accordance with Approvals, the Facility shall be deemed Available if the previous 12 months' accumulated Thermal Load exceeds 97% of 6955 TJ (65,000 tonnes of 10.7 MJ/kg).
- 2.2.3.6** If ProjectCo can reasonably demonstrate that there is no more volume available for storage of Primary Waste in the bunker in accordance with Approvals, the Facility shall be deemed Available if the quarterly accumulated Thermal Load exceeds 25% of 6955 TJ.
- 2.2.3.7** If the monthly report shows that it has been necessary to add support fuel in order to achieve the minimum Net Calorific Value then the Department shall reimburse ProjectCo the costs relating thereto PROVIDED ProjectCo has notified the Department's Representative in accordance with its obligations in Clause 2.2.3.3 above.
- 2.2.3.8** Consumption of support fuel in relation to Planned or Unplanned Outages will not be reimbursed.
- 2.2.4** ProjectCo shall not refuse Conforming Waste deliveries which exceed the quantity described in Clause 2.2.3 above if the Approvals permit the acceptance and disposal of such additional Conforming Waste and the Facility has capacity to accept such additional Conforming Waste.
- 2.2.5** As between the Department and ProjectCo all Conforming Waste shall be deemed to have been accepted by and to have become the property of, and held at the entire responsibility of, ProjectCo and the Department shall have no claim over, nor any responsibility for, any such items with effect from the time they pass the relevant Delivery Point.
- 2.2.6** If between the date hereof and the Expiry Date a Consignment Note System is introduced to the Isle of Man as an Applicable Law ProjectCo shall accept waste at the Facility in accordance with and subject to the requirements of that Consignment Note System. The introduction of a Consignment Note System as an Applicable Law shall not constitute a Legislative Change.

- 2.2.7** If items are delivered to a Delivery Point which on inspection in accordance with the Department's Requirements or pursuant to the Consignment Note System are found not to be Conforming Waste, they shall remain the property and responsibility of the Department and ProjectCo shall immediately notify the Department.
- 2.2.8** On receipt of the notification referred to in Clause 2.2.7 above the Department may require ProjectCo to:
- 2.2.8.1** reload the items on the Vehicle or other container in which they were delivered; or
  - 2.2.8.2** store the items safely and securely at the Site pending collection by the Department; or
  - 2.2.8.3** promptly dispose of the items as ProjectCo sees fit in accordance with Applicable Laws

and the Department shall reimburse ProjectCo the reasonable and proper costs of complying with such instruction subject to ProjectCo identifying the deliverer of such items to the Department.

- 2.2.9** ProjectCo shall carry out random checks of Vehicles at Delivery Points as deemed necessary to monitor the waste being delivered to the Facility and ensure only Conforming Waste is received at the Facility.
- 2.2.10** ProjectCo shall ensure that only Conforming Waste is incinerated at the Facility and shall be responsible for effecting such policies and procedures which are necessary to ensure that only Conforming Waste is incinerated at the Facility.

## **2.3 Environmental Protection**

- 2.3.1** During the Agreement Period, ProjectCo shall take all necessary steps to ensure that the risk of impact upon the environment of any operations of ProjectCo in pursuance of its obligations under this Agreement is adequately and sufficiently assessed, controlled, monitored, abated, mitigated, remediated and minimised. ProjectCo shall have in place satisfactory contingency plans for dealing with abnormal situations and shall indemnify the Department against any claim for damage to the environment that may arise out of ProjectCo's acceptance and disposal of waste, including Conforming Waste save where such claim or damage arises from the acts or omissions of the

Department its employees, agents or contractors other than a Local Authority or ProjectCo or their employees, agents or contractors.

**2.3.2** Without limiting Clause 2.3.1 above, ProjectCo shall ensure that the Facility and the Site incorporate adequate nuisance and pollution control measures to comply with the Department's Requirements, and all Approvals and Applicable Laws.

**2.3.3** ProjectCo shall not cause or permit or fail to prevent Environmental Contamination at or from the Site during the Agreement Period.

## **2.4 Duty of Care**

**2.4.1** ProjectCo shall at all times comply with all the requirements of the Duty of Care. ProjectCo shall demonstrate to the full satisfaction of the Department's Representative that this Duty of Care is being fulfilled. This clause is in addition and without prejudice to any common law duty of care to which ProjectCo is subject.

## **2.5 Continuity of the Services**

**2.5.1** Both parties recognise that it is of paramount importance that there is no break in the provision of any form of waste management service. Accordingly, and without prejudice to the obligation in Clause 2.1.1 above, ProjectCo shall perform the Services in such a way as to minimise the frequency, severity and duration of Unplanned Outages.

**2.5.2** ProjectCo shall rectify any defects which appear in the Facility following Take Over at its own cost.

## **2.6 Operational Plan and Annual Maintenance Plans**

**2.6.1** ProjectCo shall in accordance with the Department's Requirements prepare and obtain the approval of the Department's Representative to satisfactory and practicable Operational Plan and Annual Maintenance Plans.

**2.6.2** ProjectCo shall keep the Operational Plan and Annual Maintenance Plans under such regular review as is appropriate in the circumstances of the case, advise the Department's Representative of any amendments to it which ProjectCo considers appropriate, necessary or desirable, and make such amendments to it as the Department's Representative shall reasonably direct or approve, so that the Operational Plan and Annual Maintenance Plans shall not be amended without the consent of the Department's Representative

(such approval not to be unreasonably withheld or delayed). All such amendments shall be formally and systematically recorded in writing.

**2.6.3** ProjectCo shall implement the Operational Plan and Annual Maintenance Plans with any such directed or approved amendments, and give the Department's Representative all information he reasonably requires to satisfy him that such implementation is to take place.

**2.6.4** ProjectCo shall submit a running and detailed maintenance plan covering a continuous period of a minimum of one year, which shall be continuously updated (at least monthly), in order to regularly maintain and repair the Facility with the objective to minimise Unplanned Outages. The Annual Maintenance Plan shall describe all Planned Outages to the Facility during the given year, including not only maintenance requiring Planned Outages, but also Facility maintenance to be carried out during operation.<sup>41</sup>

**2.6.5** ProjectCo has provided the Department with the spreadsheet "maintenance spending Model 2008-29" set out in Appendix 12 of this Agreement which shows how much ProjectCo expects to spend on Planned Maintenance in each Operating Year. Within 12 weeks after the end of each Operating Year, ProjectCo will provide a reconciliation between actual and projected spend to the Department. ProjectCo shall obtain the Department's written consent before spending any of the funds which are identified in the maintenance spending Model 2008-29 as being attributable to one item or activity, on any other item or activity. The Department's recognition of the planned expenditure shown in the maintenance spending Model 2008-2029 does not in any way affect ProjectCo's obligations under the Project Agreement with regard to ensuring that the facility is Available, in respect of Abatements, or otherwise, or either party's rights and obligations in relation to the subject matter of Clause 3 below (Change in Law).<sup>42</sup>

## **2.7 Reports and Meetings**

**2.7.1** ProjectCo shall comply with the reporting obligations in respect of the provision of the Services contained in the Department's Requirements in the manner set out in ProjectCo's Proposal.

<sup>41</sup> Clause added pursuant to clause 5.4 of DoV2

<sup>42</sup> Clause added pursuant to clause 5.4 of DoV2

- 2.7.2** ProjectCo shall comply with the obligations to arrange and attend meetings during the Operating Period Phase contained in the Department's Requirements in the manner set out in ProjectCo's Proposal.

## **2.8 Spares and Consumables**

- 2.8.1** ProjectCo shall maintain at the Facility the stocks of Strategic Spare Parts, Wear Parts and other consumables described in the Department's Requirements in good and serviceable condition and free of third party interests.

**2.8.2** <sup>43</sup>Appendix 18 of Deed of Variation No 2<sup>44</sup> sets out the maximum agreed rate of use ("Usage") of lime, carbon, ammonia, water and fuel ("Consumables") per tonne of waste received at the Facility and the price ("OpFee Price") for each of the Consumables included in the Operating Fee agreed in the price review carried out with the 2009 Quinquennial Review. It is agreed that:

(a) ProjectCo will include a monthly update of a tracking sheet as part of the monthly client report to the Department in the form and including the details set out in Appendix 19 of Deed of Variation No 2<sup>45</sup>; and

(b) Provided that ProjectCo shall have demonstrated to the Department's reasonable satisfaction that:

(i) the relevant Consumables' costs were identified in ProjectCo's Proposal,

(ii) that throughout the period since the previous Price Review Date ProjectCo used all reasonable endeavours to achieve the best prices obtainable as between arms-length parties passed on to the Department the full benefit of any bulk or other discounts and produced a report to the Department to that effect,

(iii) there is no element of double counting with any increase referable to the Relevant Indices and

(iv) any change is calculated by reference to the pricing schedules in ProjectCo's Proposal

then, on each Price Review Date, the amounts due to each Party under paragraphs (1) and (2) below will be calculated and the net balance of the respective cumulative amounts will be payable within 30 days of finalisation of

<sup>43</sup> This clause 2.8.2 was added pursuant to clause 5.2 of DoV2

<sup>44</sup> Included as Appendix 9 to this Project Agreement

<sup>45</sup> Included as Appendix 10 to this Project Agreement

the relevant Quinquennial Review to the party entitled to the largest cumulative balance:

- 1) if the actual price of any of the Consumables exceeds the OpFee Price then an additional payment will be due from the Department to ProjectCo equal to the amount of the excess multiplied by the total tonnage of Primary Waste and Secondary Waste received at the Facility multiplied by the actual amount of consumables used not exceeding the usage for that consumable;
- 2) if the actual price of any of the Consumables is lower than the OpFee Price then a rebate will be due from ProjectCo to the Department equal to the amount of the shortfall multiplied by the total tonnage of Primary Waste and Secondary Waste received at the Facility multiplied by the actual amount of consumables used not exceeding the usage for that consumable;
- 3) if the parties fail to agree on any of the matters under paragraph (B) above then the matter will be resolved by adjudication following the Adjudication Rules.

## **2.9 Fire Precautions**

- 2.9.1** ProjectCo shall take all reasonable steps and precautions to prevent and minimise the extent of loss or damage to the Facility arising from fire including, without limitation, those contained in the Department's Requirements.

## **2.10 Health and Safety**

- 2.10.1** The Services shall be performed with due regard to the protection of the health and safety of any persons affected or likely to be affected by the conduct of the Services, including (without limitation) the Department's employees and contractors and any visitors to or trespassers on the Site and/or the Facility and ProjectCo shall accordingly observe and comply with all Applicable Laws and appropriate standards and by-laws as applicable. The cost of compliance with such regulations shall be deemed to be included in the Gate Fees.
- 2.10.2** ProjectCo shall be responsible for the suitability and safety of all equipment used in the performance of the O & M Obligations. No

equipment shall be used which is unsuitable, unsafe or liable to cause damage to any person or property.

## **2.11 Utilities**

- 2.11.1** ProjectCo shall be responsible at its own risk and expense for obtaining and maintaining an appropriate supply of all necessary utility services required in connection with the provision of the Services.

## **2.12 Weighbridges**

- 2.12.1** ProjectCo shall be responsible for accurately operating and maintaining in good working order all weighbridges at the Facility and shall maintain full and accurate records in such detail and form as is required by the Department's Requirements.

## **2.13 Emergencies**

- 2.13.1** Where an Emergency exists or if ProjectCo considers that an Emergency shall exist unless appropriate action is taken ProjectCo shall immediately implement such elements of the Emergency Plan as it considers necessary to deal with the Emergency. ProjectCo shall inform the Department without delay of the nature and consequences of such Emergency and any immediate remedial steps to be taken by ProjectCo. ProjectCo shall as soon as reasonably practical thereafter, if appropriate, provide a written remedial plan to the Department for the long term remedy or future prevention of the Emergency or circumstances giving rise to it. Subject to Clauses 15.4 and 16.5 of the Project Agreement, ProjectCo shall be responsible for all costs arising in connection with Emergencies and the actions required to deal with them (except where the Facility is only unable to accept Conforming Waste for storage and disposal as a direct consequence of the act or omission of the Department or its employees agents or contractors (other than any Local Authority or ProjectCo or their employees, agents or contractors)) and shall pay to the Department the reasonable costs properly incurred or to be incurred by the Department in complying with its obligations under the Emergency Plan on demand.
- 2.13.2** The Department and ProjectCo shall comply with their respective obligations set out in the Emergency Plan and shall provide all reasonable assistance to the other to put into effect the relevant aspects of any Emergency Plan.



**2.13.3** The Department's Representative may in accordance with suitable arrangements agreed between the parties to avoid unnecessary and undue disruption of the operations of ProjectCo at any time require ProjectCo or the Approved Service Provider or any of its or their staff engaged directly or indirectly in the provision of the Services to:

**2.13.3.1** participate in training with, or give assistance and support in the training of, persons nominated by the Department so that the Department or relevant third parties may fulfil their obligations in connection with waste disposal or dealing with the risk or consequence of any emergency or disaster; and

**2.13.3.2** give such assistance as the Department's Representative may require in dealing with such risk or consequences

and the Department shall pay ProjectCo's reasonable costs necessarily incurred in complying with the Department's Representative's request in relation to this Clause 2.13.3 provided they shall have been identified and agreed in advance and they shall be supported by a duly itemised VAT invoice.

**2.13.4** ProjectCo or the Department may propose changes to the Emergency Plan during the Agreement Period and the parties shall act reasonably in considering any proposed changes. Any approved changes to the Emergency Plan shall be treated as if a Services Change in accordance with Clause 4 of this Schedule 3.

**2.13.5** To the extent Conforming Waste is stored at the Department's emergency landfill or off site storage during an Emergency the Department may charge a reasonable rental for the use of its landfill or storage which shall reflect the actual cost to the Department of providing the landfill but shall not include any profit element. This rent shall be reimbursed to ProjectCo when the Conforming Waste is removed by ProjectCo from the landfill or storage as appropriate.

**2.13.6** To the extent Secondary Waste is disposed of by ProjectCo during an Emergency other than at the Facility ProjectCo shall be entitled to payment of an Operating Fee as if such waste had been delivered to the Facility.

## **2.14 Maintenance of Records and Drawings**

**2.14.1** ProjectCo shall keep at the Facility a complete accurate and up to date set of the As Built Documents and such other data as is required for the purposes of proper performance of the O & M Obligations and/or which is required by the Department's Requirements.

**2.14.2** The Department shall have the right on reasonable prior notice and at any reasonable time to examine the records and data of ProjectCo relating to this Schedule or the Facility.

**2.15 Right of Entry to Delivery Point and Access to Information**

**2.15.1** Subject to every effort being made to minimise interference with the operation of the Facility, the Department, its employees or agents together with all appropriate vehicles and equipment, may enter the Facility forthwith in cases of emergency but otherwise at all reasonable times for any of the following purposes:

**2.15.1.1** the Department's Representative carrying out his duties under this Agreement;

**2.15.1.2** access to ProjectCo's records and weighbridge facilities for audit purposes as required by this Agreement; or

**2.15.1.3** inspecting the state and condition of any part of the Facility and ensuring that the operation of the Facility is proceeding satisfactorily and that ProjectCo has complied and is complying with all its obligations under this Agreement.

**2.16** ProjectCo shall take all reasonable steps to co-operate with the Department, the Department's Representative, and the Department's other servants or agents in exercising any right of entry and to facilitate the purpose for which the right is exercised.

**2.17** ProjectCo shall permit the Department's Representative to have access at all reasonable times to the premises, facilities and records of ProjectCo, and if so required, ensure that its officers, employees and agents give such information and other assistance to the Department's Representative as will enable him to carry out his duties under this Agreement. This shall include access for random checks on ProjectCo's performance of the Service.

**2.18 CMS System**

**2.18.1** ProjectCo shall procure that at all times the CMS System is functioning to the appropriate capacity to ensure the current and

future operation of the Facility, recording of data, generation of reports, on-line access for the Department and availability of a web site/home page on the internet in compliance with the Department's Requirements and in the manner set out in ProjectCo's Proposal.

## 2.19 Quinquennial Review<sup>4</sup>

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- 2.19.1** On or about the fifth anniversary of Take Over and every five years thereafter during the Operating Period ProjectCo and the Department shall conduct a review of the provision of the Services and operation of the Facility pursuant to this Agreement.
- 2.19.2** The Quinquennial Review shall follow the procedures set out in this clause 2.19 unless the parties agree in writing to vary such procedures.
- 2.19.3** The parties shall act in good faith, co-operate with one another and employ sufficient resources to ensure the Quinquennial Review proceeds in accordance with this Clause 2.19.
- 2.19.4** The date for the Quinquennial Review meeting shall be proposed by the Department not less than twelve months before the intended date.
- 2.19.5** The Department may during the twelve months preceding a Quinquennial Review arrange for Department employees and third party experts to visit the Facility by prior appointment with ProjectCo to inspect and examine the Facility. Such a right shall include, but not be limited to, the right to attend the Facility during periods of Planned Outage to witness any inspections carried out as part of that process. ProjectCo shall provide access to all parts of the Facility and all data relating to the Facility as may be reasonably requested by the Department or their invitees PROVIDED nothing contained in this Clause 2.19.5 shall materially inhibit or prevent ProjectCo from complying with the O & M Obligations.

<sup>46</sup> The results of the first Quinquennial Review ("QR") were recorded in the second Deed of Variation between the Parties which is attached to this Conformed Copy as Appendix 8. DofV 2 noted, amongst other things, that although the first QR departed in some respects from the requirements of the Project Agreement, future QRs would need to follow those requirements strictly in accordance with their terms. ProjectCo warranted to the Department (DofV 2, clause 5.1) for itself and as agent for any ProjectCo Group companies that all information provided by or on behalf of ProjectCo or any ProjectCo Group Companies in relation to any information provided by or on behalf of any of them to the Department or any of its advisers in connection with the preparation, negotiation, agreement and conclusion of this QR was, when provided, true, complete and accurate in all material respects, and not misleading. DofV 2, clause 9 recorded that pursuant to the agreement reached between the Parties and recorded in DofV 2 the Department has paid ProjectCo the sum of £840,623 being £243,561 in respect of ProjectCo's backward looking claim – and £597,062 in respect of ProjectCo's 1 year catch up, together, ("the QR Adjustment"). This payment was made and accepted in full and final settlement and complete satisfaction of all or any claim which either Party may have against the other arising out of or in connection with the first QR. However, without in any way limiting the Department's rights or remedies in respect of any breach of warranty the Department is entitled to reopen agreement reached on all or any matters the subject of the first QR as well as agreement on any associated matters agreed at the same time, if ProjectCo is shown to the Department's reasonable satisfaction, to be in breach of warranty as to the truth, completeness and accuracy of all information provided by ProjectCo or its advisers in connection with the first QR, which is more fully set out in DofV 2 clause 5.1.

- 2.19.6** Not less than six months prior to a Quinquennial Review ProjectCo shall provide to the Department a paper which may, without limitation, contain the following:
- 2.19.6.1** information relevant to the price review to be conducted under Clause 13.2 of this Agreement;
  - 2.19.6.2** summary of Service Changes since the last Quinquennial Review;
  - 2.19.6.3** suggestions to improve the Facility;
  - 2.19.6.4** opportunities for additional income generation and profit sharing;
  - 2.19.6.5** proposals for optimising power generation from the Facility;
  - 2.19.6.6** proposals for any increase in the fee payable under the Bottom Ash Disposal Contract;
  - 2.19.6.7** summary of changes in the costs of operating the Facility with reference to changes in the Relevant Indices since the last Quinquennial Review;
  - 2.19.6.8** summary of operational performance since the last Quinquennial Review and current position; and
  - 2.19.6.9** details of other items ProjectCo specifically wishes to raise at the Quinquennial Review.
- 2.19.7** Not less than three months prior to a Quinquennial Review the Department shall supply to ProjectCo a paper which may, without limitation, contain the following:
- 2.19.7.1** confirmation of the date and time of the Quinquennial Review meeting;
  - 2.19.7.2** an agenda for the meeting;
  - 2.19.7.3** the Department's comments on the paper provided by ProjectCo under Clause 2.19.6;

- 2.19.7.4** details of any proposed Legislative Changes or waste management initiatives or other matters which may affect the operation of the Facility during the next five years which the Department is aware of (the provision, or lack or provision, of such information to be without prejudice to the parties' positions with regard to Legislative Change established elsewhere in this Agreement);
- 2.19.7.5** details of whether the Department wishes to conduct any further inspections or investigations at the Facility; and
- 2.19.7.6** suggestions for prospective amendments to this Agreement.
- 2.19.8** The Quinquennial Review meeting will be held at the Facility and chaired by the Department. Attendees shall include the Department's Representative and ProjectCo's Representative. The purpose of the meeting shall be to agree a policy for the next five years in relation to the issues identified in the pre-meeting papers and Department inspections of the Facility. The policy will establish clear objectives and propose a methodology for achieving them.
- 2.19.9** ProjectCo shall issue draft minutes of the Quinquennial Review meeting within one month of the meeting containing the agreed policy for the next five years. The Department shall comment on the minutes within two weeks of their receipt. The parties shall use all reasonable endeavours to agree the minutes as soon as practicable and ProjectCo shall issue the final minutes to the Department within two weeks of their approval of the drafts.
- 2.19.10** The parties shall comply with their obligations under this Schedule in accordance with the policy agreed at the Quinquennial Review.

### **3 CHANGE IN LAW**

#### **3.1 Notification**

- 3.1.1** ProjectCo may give reasonable written notice to the Department of a Legislative Change. Any such notice shall include:-
- 3.1.1.1** details of the Legislative Change;

- 3.1.1.2** confirmation as to whether ProjectCo regards it to be a Specific or General Legislative Change;
  - 3.1.1.3** proposals relating to the implementation of the Legislative Change;
  - 3.1.1.4** impact on the performance of the Services anticipated by ProjectCo;
  - 3.1.1.5** the anticipated impact on any fees payable to or costs incurred by ProjectCo;
  - 3.1.1.6** ProjectCo's assessment of and the way in which the Legislative Change is likely to affect the Department; and
  - 3.1.1.7** a proposal as to by, how much and when any change to the Gate Fees should take effect in order to reflect the anticipated impact specified in Clause 3.1.1.5.
- 3.1.2** The Department may request a revised notice from ProjectCo or refer the matter to the dispute procedure set out in the Project Agreement if it reasonably considers that:
  - 3.1.2.1** there has been no, or is no, Legislative Change; or
  - 3.1.2.2** that any of the information provided to it by ProjectCo is inaccurate or inadequate to enable the Department to assess fully the costs and benefits of ProjectCo's proposal in capital and operating terms; or
  - 3.1.2.3** that the Legislative Change does or should not legitimately affect the performance of the Services and/or the fees payable to or costs incurred by ProjectCo or not to the extent proposed by ProjectCo.
- 3.1.3** For the avoidance of doubt in preparing its proposal in accordance with Clause 3.1 ProjectCo shall not make any provision for indexation of sums which will be covered by Clause 13 of the Project Agreement and the Department shall be entitled to reimbursement of any sums which it subsequently establishes to have been taken into account in this manner more than once.

## **3.2 Consequential Changes to Services**

**3.2.1** Any modifications to the Facility or to any of the Services required to comply with a Legislative Change shall constitute a Services Change, and subject to Clause 3.2.2, shall be executed or performed by ProjectCo in accordance with all relevant terms and conditions of this Agreement provided that any Legislative Change which gives effect to Applicable Laws existing at the Base Date shall be deemed not to be a Specific Legislative Change.

**3.2.2** If ProjectCo does not reasonably and diligently undertake the works and/or modifications resulting from a General Legislative Change then the Department reserves the right without any obligation to carry out or procure any work or provide any service necessitated by such General Legislative Change and recover as a debt all amounts necessarily incurred by the Department in the exercise of its rights under this Clause.

### **3.3 Variations to Payments**

**3.3.1** If ProjectCo's notice indicates that it is willing to fund the capital cost of implementing a Services Change necessitated by a Specific Legislative Change and the Department accepts ProjectCo's notice and proposals given under Clause 3.1.1, the Department shall so notify ProjectCo. Alternatively, the Department shall state that it accepts ProjectCo's notice and proposals but that it wishes to fund the capital cost of the Services Change itself and the provisions of Clause 3.4.1 shall apply.

**3.3.2** The amount payable by the Department pursuant to Clause 3.3.1 will be calculated by reference to the actual costs incurred by ProjectCo in implementing the Services Change but so that this shall not exceed the amount specified in ProjectCo's proposal submitted in accordance with Clause 3.1.1 and that the margin included in such amount shall be equivalent to ProjectCo's Profit and the provisions of Clause 21 of the Project Agreement shall apply in identifying this amount.

### **3.4 Capital Impact**

**3.4.1** In respect of any Specific Legislative Change having a Capital Impact the Department may elect to pay the capital cost arising directly from the Specific Legislative Change on receipt of a valid VAT invoice and there shall be no increase in the Gate Fees in respect of that capital cost.

**3.4.2** Where the Department chooses not to pay the capital cost arising directly from the Specific Legislative Change and informs ProjectCo of

its decision in writing, ProjectCo shall serve a notice on the Department within one month of being notified of the Department's decision stating whether it wishes and is able to obtain the necessary additional funding on reasonable commercial terms and the proposed impact on the Gate Fees.

**3.4.3** Where the Department chooses not to pay the capital cost arising directly from the Specific Legislative Change and ProjectCo has served a notice under Clause 3.4.2 that it cannot provide the requisite funding or that it can but the Department does not wish to accept, this Agreement shall terminate six months from the date on which the Department notifies ProjectCo that it will not be funding such capital cost but without prejudice to the rights of either party in respect of antecedent breaches of this Agreement.

**3.4.4** If this Agreement terminates pursuant to Clause 3.4.3 above:

**3.4.4.1** the Department shall make a payment to ProjectCo on the terms contained in Clause 15.10 of this Agreement;

**3.4.4.2** if required to do so by the Department and to the extent that it is possible to do so, ProjectCo shall comply with the Handback Obligations in accordance with Clause 35 of this Agreement.

### **3.5 Public Health (Amendment) Bill 1999**

**3.5.1** The coming into force of the Public Health (Amendment) Act shall constitute a Specific Legislative Change only to the extent it differs materially from the Public Health (Amendment) Bill 1999 available in the public domain at the Base Date and otherwise shall not constitute a Specific Legislative Change.

### **3.6 Landfill Tax**

**3.6.1** An increase in the landfill tax payable by ProjectCo to dispose of Residues in accordance with this Agreement which arises from a change in legislation in the country in which such Residues are being disposed by ProjectCo shall be treated as a Specific Legislative Change (unless the Department can establish to ProjectCo's reasonable satisfaction that it could dispose of Flue Gas Treatment Residues more cheaply elsewhere).

### **3.7 Regulator's Licence**



- 3.7.1** A Specific Legislative Change shall occur where the terms of the Regulator's Licence are more stringent than those set out in the Planning Scheme Order so that there is a material adverse effect on the cost to ProjectCo of providing the Services.

## **4 SERVICES CHANGES**

- 4.1** The Department shall be entitled to request any change in the Services (and to propose new Abatements or changes in existing Abatements in each case associated with the Services Change) whether resulting from Legislative Change or otherwise by serving a Services Change Notice whereupon the provisions of this Clause 4 shall apply. For the avoidance of doubt the remaining provisions of this Clause 4 are all subject to Clause 4.8.
- 4.2** Upon receipt by ProjectCo of a Services Change Notice, ProjectCo shall provide to the Department a Revised Design Proposal incorporating the Services Change; a written appraisal setting out in detail the Services Change Capital Cost (including without limitation any additional costs or savings associated with the change and the cost of securing any additional finance) associated therewith; confirmation whether ProjectCo wishes to fund the Service Change Capital Cost itself in the first instance and recover the cost through the Gate Fees and, if so, the proposed change in the Gate Fees. In preparing such written appraisal ProjectCo shall ensure that the Services Change Capital Cost and proposed change to the Gate Fee are costed on the basis of the most economically advantageous contract to the parties hereto reasonably obtainable by ProjectCo and that the margin applicable on such costs shall be equivalent to ProjectCo's Profit.
- 4.3** If the Department shall not agree the Services Change Capital Cost and/or any change in Gate Fees or Abatements proposed by ProjectCo then either party may refer the dispute for resolution in accordance with the provisions of the Project Agreement.
- 4.4** Notwithstanding that a dispute resolution procedure may have been initiated the Department shall subject to the provisions of Clause 4.8 hereof be entitled to serve an Action Notice which shall also identify whether the Department shall fund the capital cost of the Services Change itself or requires ProjectCo to do so where it has proposed to do so pursuant at Clause 4.2, but if no Action Notice is served then the Department shall upon demand reimburse to ProjectCo the costs reasonably incurred by ProjectCo to procure the information supplied pursuant to Clause 4.2.
- 4.5** If the Department serves an Action Notice, ProjectCo shall implement the Services Change in accordance with the Action Notice and any related Revised Design Proposal. The parties agree that the amounts payable by the Department shall be amended to reflect the Services Change Capital Cost and (if appropriate) the changes in the Gate

Fee proposed by ProjectCo (or if a dispute resolution procedure may have been initiated as so determined).

**4.6** In the event that ProjectCo is unable to produce to the Department an appropriate Revised Design Proposal in accordance with this Clause it shall so notify the Department as soon as reasonably practicable and Clause 4.7 shall apply.

**4.7** Upon receipt of a notice pursuant to Clause 4.6 or if ProjectCo fails to implement a Services Change in accordance with an Action Notice then the Department may opt to fund the procurement of the relevant Services Change and (subject to Clause 4.8) ProjectCo shall carry out or procure the carrying out of such works and services as instructed by the Department at the cost of the Department and the mutual rights and obligations of the parties shall be extended and varied so far as may be necessary to facilitate any such works and services and the effect of the subsequent beneficial use thereof by the Department.

**4.8** It is agreed and declared that ProjectCo shall not be obliged to undertake any Services Change or produce any Revised Design Proposal and the Department shall not be entitled to enforce an Action Notice under Clause 4.4 hereof in any of the following circumstances:-

**4.8.1** where an Approval will not be obtainable;

**4.8.2** where the undertaking and / or implementation of a Services Change is likely to materially affect the health and safety compliance of the Facility and / or (insofar as not expressly waived in writing by the Department) it will not comply with the Applicable Laws;

**4.8.3** where the undertaking and / or implementation of any Services Change has the effect of adversely affecting ProjectCo's risk profile or profit margins save only insofar as such risk profile / profit margins (to be proved on an open book basis) cannot reasonably be compensated by the Department pursuant to its option to fund and/or vary the Gate Fee;

**4.8.4** where the undertaking and/or the implementation of a Services Change would not be consistent with Prudent Engineering and Operating Practices.

**4.9** Changes in the Variable Element of the Gate Fee will be negotiated and agreed in relation to any Services Changes to fairly reflect increases or decreases in ProjectCo's costs resulting from:-

**4.9.0.1** changes in waste quantities beyond the maximum monthly/annual tonnages stated in the Department's

Requirements; or

**4.9.0.2** other Services Changes.

**4.10** Without limiting any of ProjectCo's other obligations in the Project Agreement, it will keep the Department informed of the arrangements which it proposes to make and does make in relation to the procurement and contractual arrangements for any Services Changes, all costs associated with them and the intended and actual programme for their implementation. For the avoidance of doubt, but not with the intention of altering the meaning or effect of any of the provisions of the Project Agreement, the Parties confirm that alterations, modifications or extensions to the Facility requested by the Department constitute Services Changes and that the terms and conditions in this clause 4 shall apply to them.<sup>47</sup>

## **5 WASTE DELIVERY**

- 5.1** Conforming Waste will be delivered to the appropriate Delivery Point in Vehicles in the case of Primary Waste and in Wheelie Bins in the case of Secondary Waste used by the Department or its contractors and/or other vehicles or containers permitted by the Department's Representative in accordance with any relevant Approvals.
- 5.2** The Department and ProjectCo shall agree a protocol for the use of the Wheelie Bins to apply to the waste producers who contribute to the Secondary Waste stream to include, inter alia, permanent markings of maximum weight loads on Wheelie Bins.
- 5.3** The Department shall meet the reasonable and proper cost of replacing Wheelie Bins which are no longer useable for reasons other than the acts or omissions of ProjectCo or its employees or fair wear and tear.

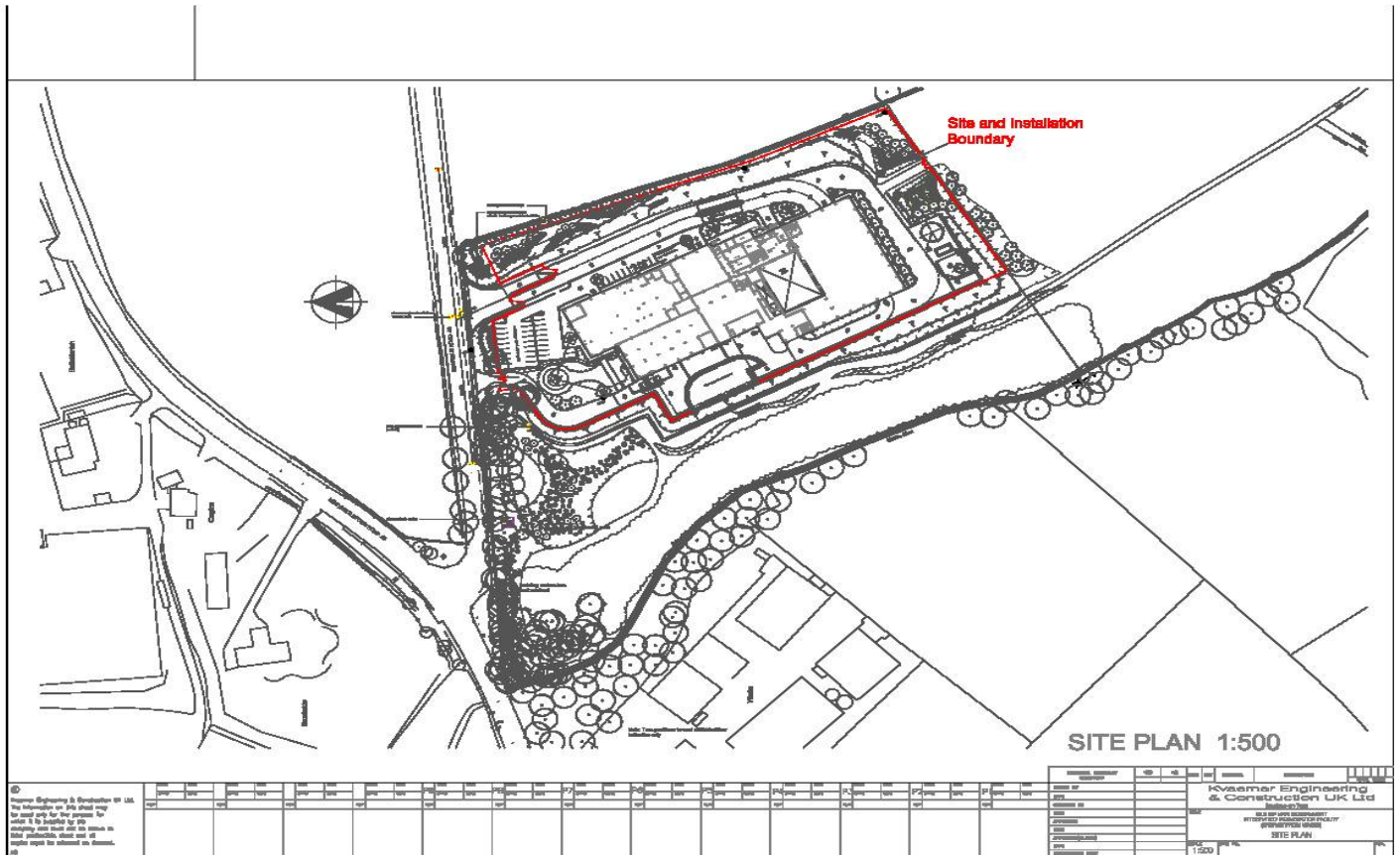
## **6 RESIDUE DISPOSAL OBLIGATIONS**

- 6.1** ProjectCo shall not store Residues at the Site (other than temporarily pending prompt disposal) but shall as part of the Services dispose of all Residues produced at the Facility except insofar as the Department has agreed to accept and dispose of those wastes as follows:
- 6.2** The Department shall provide appropriate facilities for the disposal of Bottom Ash throughout the Testing Period and shall not charge ProjectCo for the same during such period.
- 6.3** ProjectCo shall ensure that the Bottom Ash produced at the Facility complies with the specification outlined in Schedule 7 to this Agreement and is transported to the appropriate site in accordance with all Applicable Laws and Approvals.

<sup>47</sup> This clause was added by DoFV 2, clause 5.5

- 6.4** Unless ProjectCo arranges for the disposal of Bottom Ash by any alternative means in accordance with all necessary consents, licences, approvals and relevant legislation, ProjectCo and the Department shall enter into the Bottom Ash Disposal Contract on or before Take Over and shall thereafter comply with the terms and conditions of that agreement.
- 6.5** The Department shall obtain the necessary licence or permit for the disposal of Flue Gas Treatment Residues off the Isle of Man or, if it fails to obtain such a licence or permit, shall provide a site for disposal of the same as the Isle of Man.
- 6.6** ProjectCo shall ensure that the Flue Gas Treatment Residues produced at the Facility comply with the specification outlined in Schedule 7 to this Agreement and are transported and disposed of in accordance with all Applicable Laws and Approvals (which for the purpose of this Clause shall include any such relevant Applicable Laws and Approvals of the country in which the disposal shall take place).

# SCHEDULE 4 PART 1 : THE SITE



**SCHEDULE 4**  
**PART 2 : THE LEASE**

**WASTE MANAGEMENT BOARD/DEPARTMENT OF LOCAL GOVERNMENT AND THE  
ENVIRONMENT, ISLE OF MAN GOVERNMENT (1)**

**UNITED WASTE (ISLE OF MAN) LIMITED (2)**

**LEASE**

***NB If the Department or Waste Management Board has not granted an interest in the Premises to the Financier by completion of this lease, but not otherwise, Clause 6.12 shall apply and the definition of “Headlease” and Clauses 4.18 and 5.2 shall not apply.***

**THIS LEASE** made the                      day of                      **200**

**BETWEEN:**

- (1) **[WASTE MANAGEMENT BOARD / DEPARTMENT OF LOCAL GOVERNMENT AND THE ENVIRONMENT** ~~OF~~ a department of the Isle of Man Government of Murrey House, Mount Havelock, Douglas, Isle of Man, IM1 2SF<sup>48</sup> ("the Landlord")
- (2) **UNITED WASTE (ISLE OF MAN) LIMITED** being a company incorporated under the Companies Acts of the Isle of Man and having its registered office situate at 15-19 Athol Stret, Douglas, Isle of Man, IM1 1LB ("the Tenant")

**WITNESSES** as follows:

**1 DEFINITIONS**

The following expressions shall where the context so admits have the following meanings:

"Applicable Laws"                      any law, regulation, statute, rule, order, standards or delegated legislation of the Isle of Man (whether primary or subordinate legislation and specifically including regulations made thereunder), or applied to the Isle of Man by order in council or specifically by Act of the Imperial Parliament European Community Directives directly applicable to the Isle of Man and/or any other such laws, regulations, statutes, rules, orders, standards or delegated legislation or European Community Directives standards not applicable to the Isle of Man but specified in the Project Agreement or the Department's Requirements as applicable.

"Authorised Use"                      use as an integrated incinerator (energy from waste) facility to include the receipt, storage, incineration and disposal of Conforming Waste and the generation of electricity and also, if required pursuant to the Project Agreement, steam for district heating together with any other use ancillary to such uses and necessary to comply with the Tenant's obligations contained in the Project Agreement.

"Conducting Media"                      all pipes, sewers, mains, ducts, conducts, gutter, watercourses, wires, cables, channels, flues and all other conducting media including any fixing louvres cowls and any other ancillary apparatus.

"Conforming Waste"                      waste defined and having the characteristics described in Schedule 7 to the Project Agreement.

<sup>48</sup> Amendment made in executed lease dated 8 November 2004

"Contractual Demise"	the term of twenty-five years from and including the <del>date hereof</del> <a href="#">17<sup>th</sup> August 2004</a> <sup>49</sup> .
"Fixed Element"	that part of the Gate Fees payable pursuant to clause 2.1.1 of Schedule 1 to the Project Agreement.
"Gate Fees"	the fees payable by the Landlord pursuant to the Project Agreement.
<del>["Headlease"]</del>	<del>the lease under which the Landlord holds the Premises.]</del> <sup>50</sup>
"Plan"	the plan annexed.
"Planning Acts"	the Town and Country Planning Acts 1934-1999 and any amendments or additions thereto.
"Premises"	ALL THAT land and premises known as <del>[</del> <a href="#">the Energy from Waste Facility, Richmond Hill, Douglas, Isle of Man, IM4 1JH</a> <sup>51</sup> shown edged red on the Plan for the purpose of identification only together with all buildings from time to time thereon and all additions alterations and improvements to the same which may be carried out during the Term and together with all Landlord's fixtures and fittings from time to time in and about the same.
"Prescribed Rate"	means the rate of 2% above the London Inter Bank Offer Rate (L.I.B.O.R) from time to time accruing on a daily basis.
"Project Agreement"	the agreement dated <del>17<sup>th</sup></del> <a href="#">17<sup>th</sup> October 2000</a> <sup>52</sup> and made between the Landlord (1) and the Tenant (2) <a href="#">(then known as United Waste (Isle of Man) Limited)</a> <sup>53</sup> relating to the provision of an integrated incinerator (energy from waste) facility at the Premises and any agreement made supplemental to or in variation thereof from time to time.
"Public Authority"	(a) any Department of the Government of the Isle of Man whether acting through its Minister or otherwise, any subdivision or part thereof and any Department, Statutory Board, agency, authority, bureau or tribunal having or exercising authority or delegated authority over the Landlord or Tenant;
	(b) within the borough of Douglas the municipal

<sup>49</sup> [Amendment made in executed lease dated 8 November 2004](#)

<sup>50</sup> ~~Include if Department has granted superior interest in the Premises prior to completion of the Lease but not otherwise.~~

<sup>51</sup> [Amendment made in executed lease dated 8 November 2004](#)

<sup>52</sup> [Amendment made in executed lease dated 8 November 2004](#)

<sup>53</sup> [Amendment made in executed lease dated 8 November 2004](#)



corporation of such borough;

- (c) elsewhere within the Isle of Man, the commissioners of any local government district;
- (d) where the context so admits any joint board constituted by representatives of any one or more constituent authorities established or deemed to be established by order under section 7 of Local Government Act 1985 or any other enactment or any joint committee appointed by one or more local authorities under section 17 of the Local Government Act 1985 or any other enactment.

"Rent"

~~£ per annum being a sum equivalent to the amount payable as the Fixed Element of the Gate Fee payable under the Project Agreement for the month in which the relevant Rent is payable (disregarding the application of any Abatement))~~ £3,403,590.4 plus VAT per annum<sup>54</sup>

"Retained Land"

any property of the Landlord adjoining or neighbouring the Premises.

"Services Change"

has the meaning ascribed to it in the Project Agreement.

"Term"

the Contractual Demise and any period of holding over or extension whether by statute or otherwise.

"Variation"

has the meaning ascribed to it in the Project Agreement.

## 2 INTERPRETATION

- 2.1 The expression "the Landlord" shall include the person for the time being entitled to the reversion immediately expectant on the determination of the Term while the expression "the Tenant" shall include the Tenant's successors in title and assigns.
- 2.2 In this lease references to any statute or statutory provision shall be to Acts of Tynwald and shall be deemed to refer to and include any modification amendment or re-enactment thereof for the time being in force whether by statute or applied by order in council or regulation.
- 2.3 The headings are inserted for convenience only and shall be ignored in construing the terms and provisions of this lease.

<sup>54</sup> [Amendment made in executed lease dated 8 November 2004](#)

- 2.4** References in this lease to any clause schedule or paragraph of a schedule without further designation shall be construed as a reference to the clause, schedule or paragraph of the schedule to this lease so numbered.
- 2.5** Any covenant by the Tenant not to do any act or thing shall be deemed to include a covenant not to permit or suffer such act or thing and to use its best endeavours to prevent such act or thing being done by a third party and any covenant by the Tenant to do any act or thing shall be deemed to include a covenant to use its best endeavours to procure that such act or thing is done by a third party.
- 2.6** References to "consent of the Landlord" or words to a similar effect mean a consent in writing signed or on behalf of the Landlord and to "approved" and "authorised" or words to a similar effect mean (as the case may be) approved or authorised in writing on behalf of the Landlord and all such references shall be deemed to require also the consent of any mortgagee or superior landlord where necessary. Nothing in this lease obliges any such mortgagee or superior landlord not to unreasonably withhold or delay any such consent.

### **3 DEMISE AND RENT**

In consideration of the rents and covenants on the part of the Tenant reserved and contained in this lease the Landlord DEMISES to the Tenant ALL THOSE the Premises TOGETHER WITH the rights set out in the Second Schedule EXCEPTING AND RESERVING nevertheless unto the Landlord the rights and matters set out in the First Schedule TO HOLD the same to the Tenant for the Contractual Demise but determinable as provided later in this lease SUBJECT to all covenants, conditions, agreements, declarations, stipulations and provisions, rights, easements and other matters whatsoever affecting the Landlord's title to the Premises YIELDING AND PAYING to the Landlord without deduction:

**3.1** the Rent throughout the Term monthly in advance on the first day of each calendar month whether or not demanded except the first payment which shall be made on the date hereof in respect of the period from and including ~~the date hereof~~ 17<sup>th</sup> August 2004<sup>55</sup> until the end of the calendar month in which it falls.

**3.1** ~~3.2~~ by way of further rent the value added tax or any other tax replacing or supplementing the same which from time to time is or may be chargeable in respect of the Rent.

### **4 TENANT'S COVENANTS**

The Tenant covenants with the Landlord as follows:

#### **4.1 Rents**

To pay the rents reserved at the times and in the manner stipulated in Clause 3 without any deduction, set off or counterclaim.

<sup>55</sup> Amendment made in executed lease dated 8 November 2004

## **4.2 Outgoings**

- 4.2.1** To pay and discharge all rates, taxes, charges, duties, assessments, outgoings and impositions whatsoever which are now or shall at any time hereafter during the Term be charged, rated, assessed or imposed on or in respect of the whole or any part of the Premises or the owner or occupier of the same save only such as the Landlord is bound by law to pay notwithstanding any contract to the contrary.
- 4.2.2** To pay for all drainage, water, gas, electricity, telephone communications and any other services or amenities of like nature used by or available to the Premises (including all standing charges) and to observe and perform all present and future regulations and requirements of the statutory supply authorities and to keep the Landlord indemnified against non-payment breach non-observance or non-performance of the same.

## **4.3 Project Agreement**

Throughout the Term:

- 4.3.1** to observe and perform the obligations on the part of ProjectCo contained in the Project Agreement as if the same were set out in full in this lease; and
- 4.3.2** to keep the Premises and every part of the same in good order and in good and substantial repair and condition.

## **4.4 Alterations**

Unless required by the Landlord under the terms of the Project Agreement or required to comply with the Tenant's obligations under the Project Agreement:

- 4.4.1** Not to build or erect or permit or suffer to be built or erected any additional building, structure or erection on the Premises and not to make or to permit or suffer to be made any addition or alteration to the structure or exterior of the Premises or any alteration to the Conducting Media of any nature whatsoever.
- 4.4.2** Not to impose or permit or suffer to be imposed any floor loading greater than the Premises are designed to bear or so as to cause any damage to the Premises.

## **4.5 Signs**

Not to affix, place or exhibit or permit or suffer to be affixed, placed or exhibited to or upon the exterior of any part of the Premises or to or through any windows or to or upon any boundary, wall, rail or fence at the Premises any sign, placard, poster, signboard or other advertisement save as may have been previously approved in writing by the Landlord (such approval not be unreasonably withheld or delayed).

#### **4.6 User**

- 4.6.1** Not to use or permit or suffer to be used the Premises or any part of the same for any illegal or immoral purpose or for any dangerous, noxious, noisy or offensive trade or business or purpose whatsoever PROVIDED THAT the proper operation of the Premises in strict accordance with the terms of the Project Agreement shall not constitute a breach of this covenant.
- 4.6.2** Not to use or permit or suffer the Premises to be used otherwise than for the Authorised Use.

#### **4.7 Nuisance**

- 4.7.1** Not to do or permit or suffer anything in or upon the Premises or any part of the same or on any property over which the Tenant exercises rights which may be or become a nuisance or annoyance or cause damage or inconvenience to the Landlord or the tenants, owners or occupiers of any other property in the neighbourhood or to any public local or other authority PROVIDED THAT the Landlord shall not itself claim it has suffered any nuisance or annoyance, damage or inconvenience where the proper operation of the Premises is in strict accordance with the terms of the Project Agreement.
- 4.7.2** Not to form or permit or suffer to be formed any refuse dump or scrap heap on the Premises other than as required under or permitted by the Project Agreement.
- 4.7.3** To pay all costs, charges and expenses incurred by the Landlord in remedying any breach of Clause 4.7.1 or any other matter in connection with the Premises whether or not in obedience to a notice served by a Public Authority.

#### **4.8 Notices**

To transmit forthwith to the Landlord the original or a full and accurate copy of any notice concerning the Premises which is received by the Tenant or other person occupying the Premises or which shall come to the knowledge of the Tenant or other person occupying the Premises.

#### **4.9 Encumbrances on Landlord's Title**

To observe and perform the covenants, conditions, agreements, declarations, stipulations and provisions, rights, easements and other matters whatsoever affecting the Landlord's title to the Premises or any part of the same.

#### **4.10 Entry for Works**

To permit the Landlord and the agents of the Landlord and other persons authorised by them with all necessary workmen, materials and appliances at all reasonable times (or at any time in case of emergency) to enter upon and where necessary remain on the Premises to carry out work or do anything whatsoever comprised within the Landlord's obligations in this lease or to exercise its rights or perform its obligations under the Project Agreement or within such of the Tenant's obligations in this lease or the Project Agreement as the Tenant has failed to perform in accordance (if applicable) with the terms of the Project Agreement or this lease including, without limitation, conducting feasibility studies with a view to requesting any Services Change or Variation pursuant to the Project Agreement PROVIDED THAT in each case those entering upon the Premises comply with the reasonable requirements of the Tenant as to the means of access and the manner in which any works are carried out and with Applicable Laws.

#### **4.11 Alienation**

Not to assign, underlet, charge or part with the possession or share the use or occupation of the whole or any part or parts of the Premises nor enter into a binding agreement to do any of the same.

#### **4.12 Notice of Dealings**

To deliver or cause to be delivered to the Landlord or its agents for the time being a notice of every assignment of the Premises together with a certified copy of any deed or document effecting or evidencing the same within one month after the execution or signature of any such deed or document or other instrument or any order of Court by which such assignment may be effected or evidenced and to pay to the Landlord or the Landlord's agents their reasonable fees being not less than fifty pounds together with Value Added Tax for the registration of each such deed document instrument or order.

#### **4.13 Compliance with Applicable Laws**

To comply with the requirements of all Applicable Laws and the reasonable requirements of every Public Authority (including the due and proper execution of any works) in respect of the Premises, their use, occupation and any work being carried out to them (whether the requirements are imposed upon the owner, lessee or occupier) and not to do or omit anything by which the Landlord may become

liable to make any payment or do anything under any Applicable Laws or requirement of a Public Authority in respect of the Premises.

#### **4.14 To Yield Up**

To yield up the Premises with vacant possession (and to hand over all keys relating to the Premises) at the determination of the Term (whether resulting from early termination or expiry by effluxion of time) in accordance with the covenants contained in this lease having removed all tenant's or trade fixtures (making good at the expense of the Tenant nevertheless any damage to the Premises caused by such removal to the reasonable satisfaction of the Landlord) and all furniture, fittings, papers and refuse of the Tenant and every moulding, sign, writing or painting of the name or business of the Tenant or other occupiers of the Premises provided that the Landlord may treat as abandoned by the Tenant any property not removed by the Tenant prior to the expiration of the Term and may as agent of the Tenant (and the Landlord is hereby irrevocably appointed by the Tenant to act in that capacity) arrange for the removal and destruction or sale of the same.

#### **4.15 Costs**

To pay to the Landlord on demand and on an indemnity basis all costs, charges, expenses and incidental damages and losses both direct and indirect (including without prejudice to the generality of the foregoing Solicitors' costs, Advocate's, Counsel's, Architects', Surveyors' and other professional fees and commission payable to a coroner) incurred by the Landlord in connection with:

- 4.15.1** the preparation and service of a notice under Section 11 of the Conveyancing (Leases and Tenancies) Act 1954 or of proceedings under Sections 11 and 13 of that Act notwithstanding that in any such case forfeiture is avoided otherwise than by relief granted by the Court.
- 4.15.2** the enforcement of any of the covenants on the part of the Tenant and the conditions in this lease whether during or after the termination of the Term.
- 4.15.3** any steps taken in connection with the preparation and service of a schedule of dilapidations whether during or after the termination of the Term.

#### **4.16 Value Added Tax**

- 4.16.1** To pay in addition to any monies due from the Tenant under the terms and provisions of this lease on demand such Value Added Tax or tax of a like nature (at the rate for the time being in force) as shall be

chargeable in respect of the value of any supply made by the Landlord to the Tenant under the terms of or in connection with this lease.

- 4.16.2** In every case where the Tenant has agreed to reimburse the Landlord in respect of any payment made by the Landlord under the terms of or in connection with this lease the Tenant shall also reimburse any Value Added Tax paid by the Landlord on such payment.

#### **4.17 The Planning Acts**

- 4.17.1** Not to commit in relation to the Premises any breach of planning control (such term to be construed in the way in which it is used in the Planning Acts) and to comply with the provisions and requirements of the Planning Acts that affect the Premises whether as to the Authorised User or otherwise and to indemnify (both during or following the expiration of the Term) and keep the Landlord indemnified against all liability whatsoever including reasonably and properly incurred costs and expenses in respect of any contravention by the Tenant.
- 4.17.2** At the expense of the Tenant to obtain all planning permissions and to serve all such notices as may be required for the carrying out of any operations or user on the Premises in accordance with the Authorised Use provided that no such application for planning permission shall be made without the previous written consent of the Landlord.
- 4.17.3** Subject only to any statutory direction to the contrary, to pay and satisfy any charge or levy that may subsequently be imposed under the Planning Acts in respect of the carrying out or maintenance of any such operations or the commencement or continuance of any such user.

#### **4.18 Headlease**

[Not to do (or omit to do) any act or thing which could cause a breach of the covenants on the part of the tenant contained in the Headlease.]<sup>+1</sup><sub>=</sub>

### **5 LANDLORD'S COVENANT**

The Landlord covenants with the Tenant:

- 5.1** That the Tenant paying the Rent and performing and observing the covenants on the part of the Tenant contained in this lease shall and may peaceably and quietly hold and enjoy the Premises during the Term without any interruption by the Landlord or any person rightfully claiming under or in trust for the Landlord.

<sup>+1</sup><sub>=</sub> Include if Department has granted superior interest in the Premises prior to completion of the Lease but not otherwise

- 5.2 ~~[To pay the rents reserved under the Headlease and to observe and perform the covenants stipulations and conditions imposed on the tenant under the Headlease to the extent they do not fall to be performed by the Tenant hereunder.]~~<sup>56</sup> pay the Tenant a fair and reasonable proportion according to user of the cost of inspecting, cleansing, maintaining and renewing the Access Road and weighbridge as defined in paragraph 5 of the First Schedule.<sup>56</sup>

## 6 PROVISOS AGREEMENTS AND DECLARATIONS

PROVIDED ALWAYS and it is hereby expressly agreed as follows:

### 6.1 Forfeiture

If the rents hereby reserved or any part thereof shall at any time be in arrears for twenty-one days after the same shall have become due (whether formally demanded or not) or if there is any breach, non-performance or non-observance of any of the covenants and conditions on the part of the Tenant contained in this lease then and in any such case it shall be lawful for the Landlord at any time thereafter to re-enter into and upon the Premises or any part thereof in the name of the whole and to repossess and enjoy the Premises and thereupon the Term shall absolutely cease and determine but without prejudice to any rights or remedies of the Landlord in respect of any antecedent breach of any of the covenants or conditions contained in this lease.

### 6.2 Early Termination of the Contractual Demise

If the Project Agreement is terminated or determines for any reason (including without limitation expiry by effluxion of time) the Landlord may terminate this lease forthwith by service of written notice upon the Tenant served at any time within twelve months of such determination of the Project Agreement but without prejudice to any claim by the Landlord against the Tenant in respect of any antecedent breach of any covenant or condition contained in this lease.

### 6.3 Statutory Exclusion

The provisions of the First Schedule of the Tenancies (Implied Terms) Act 1954 shall not apply to these presents.

### 6.4 Statutory Compensation

Except where any Act of Tynwald prohibits or modifies the right to compensation being excluded or reduced by agreement the Tenant shall not be entitled on quitting the Premises or any part thereof to claim any compensation from the

<sup>56</sup> [Amendment made in executed lease dated 8 November 2004](#)



Landlord under any Act of Tynwald whether enacted before or after the date hereof.

## **6.5 Notices**

Notice may only be served in writing by hand delivery, recorded delivery, post or facsimile (for which there is transmission sheet followed by hand delivery or recorded delivery post despatched within 48 hours of transmission):

**6.5.1** as regards the Landlord, at the office specified at the head of this document or such address or facsimile number (if any) as the Landlord shall notify in writing to the Tenant from time to time.

**6.5.2** as regards the Tenant, at the Tenant's registered office or its trading address or facsimile number (if any) as it shall notify in writing to the Landlord from time to time.

## **6.6 Interest on unpaid rents and other moneys**

If the Rent and any value added tax (or any other tax replacing or supplementing the same from time to time) payable thereon shall not be paid to the Landlord on or before the relevant date for payment (whether or not demanded) or any other amounts payable by the Tenant to the Landlord under this lease shall not be paid within 21 days of the date of demand the Tenant shall pay to the Landlord with any such sums (but without prejudice to any other rights or remedies of the Landlord) interest thereon at the Prescribed Rate calculated on a day-to-day basis from the date on which the same became due and payable down to the date of payment by the Tenant.

## **6.7 Non-acquisition of easements**

The Tenant shall not by implication of law or otherwise be entitled to any estate or any right, privilege or easement whatsoever (except as expressly granted by this lease) nor shall the Tenant by virtue or in respect of the Premises or this lease be deemed to have acquired or to be entitled nor shall it during the Term acquire or become entitled by length of enjoyment, prescription or any other means to any such estate, right, privilege or easement.

## **6.8 Rent acceptance when breach exists**

If the Landlord shall refuse to accept the Rent or any other rents or amounts payable by the Tenant to the Landlord under this lease in order to avoid a waiver of any right which the Landlord may have to forfeit this lease or re-enter the Premises by reason of any breach of covenant by the Tenant or otherwise then notwithstanding any tender of the same by the Tenant, such sums shall bear interest to be paid by the Tenant at the Prescribed rate calculated on a day-to-day

basis from the date on which the same became due and payable down to the date upon which payment shall be accepted by the Landlord or earlier forfeiture or re-entry.

#### **6.9 Warranty Disclaimer**

The Tenant acknowledges that no representation or warranty has been given prior to the date hereof or is given or implied by this lease that the use, now or hereafter proposed by the Tenant for the Premises, is or will be or will remain a use which does not constitute a breach of the Planning Acts or will not require planning permission.

#### **6.10 Suspension of Rent**

If the Landlord exercises its rights in Clauses 15.8 or 16.6 of the Project Agreement to suspend payment of the Fixed Element of the Gate Fees the Rent payable hereunder shall be suspended until such time as the Fixed Element of the Gate Fees again becomes payable under the Project Agreement.

#### **6.11 Manx Law**

This lease shall be governed by and construed in accordance with the laws of the Isle of Man.

#### **6.12 <sup>57</sup>Superior Interest**

- 6.12.1** The Landlord may terminate this lease forthwith by service of written notice upon the Tenant served at any time during the Term where:
- (i) the Landlord has entered into an agreement with a third party either to sell its freehold interest or grant a leasehold interest in the Premises AND to take back from that third party a lease of the Premises "the Proposed Headlease"; and
  - (ii) the Tenant has reviewed the terms, covenants, stipulations, conditions and rent obligations of the Proposed Headlease and has approved the same in writing (such approval not to be unreasonably withheld or delayed).

**6.12.2** In the event that this lease is terminated pursuant to notice served by the Landlord under Clause 6.12.1 above (but not in any other circumstances including, for the avoidance of doubt, termination pursuant to a notice served under Clause 6.2 of this lease or where the lease expires by effluxion of time) the Landlord shall grant to the Tenant and the Tenant shall enter into a sublease of the Premises to be entered into forthwith following termination of this lease pursuant to Clause 6.12.1 above and the grant of the leasehold interest to the Landlord referred to in Clause 6.12.1 such sublease shall be in identical form to this lease other than:

<sup>57</sup> [Amendment made in executed lease dated 8 November 2004](#)

- 6.12.2.1** The Contractual Demise shall be expressed to be for a period terminating on the date on which this lease would expire by effluxion of time;
- 6.12.2.2** A definition of “Headlease” shall be included as follows: “the lease under which the Landlord holds the Premises”;
- 6.12.2.3** A new Clause 4.18 shall be included as follows: “not to do (or omit to do) any act or thing which could cause a breach of the covenants on the part of the tenant contained in the Headlease”;
- 6.12.2.4** A new Clause 5.2 shall be included as follows: “to pay the rents reserved under the Headlease and to observe and perform the covenants stipulations and conditions imposed on the tenant under the Headlease to the extent they do not fall to be performed by the Tenant hereunder”; and
- 6.12.2.5** This Clause 6.12 shall be deleted.
- 6.12.3** The purpose of this Clause 6.12 is not intended to have any negative impact on or increase the obligations or liabilities of the Tenant. The Landlord shall indemnify and hold harmless the Tenant, their contractors, agents and employees from and against all claims, damages, losses and expenses arising out of or resulting from the creation of the Headlease, the termination of this lease and the creation of the sublease under Clauses 6.12.1 and 6.12.2, above save and except it is hereby accepted by the Tenant that there will be no liability on the Landlord under the provisions hereof if such claim damage loss or expense would have been suffered or incurred in any event by the Tenant under the provisions of this lease.

**IN WITNESS** whereof this lease is executed as a deed and is delivered on the date stated at the beginning of this lease.

## FIRST SCHEDULE (Exceptions and Reservations)

In exercising the following rights the Landlord shall comply with Applicable Laws and the reasonable requirements of the Tenant with regard to obtaining access to the Premises

- 1 The free and uninterrupted passage and running of water, soil, gas, electricity, telephone and other supplies to and from the Retained Land in and through the conducting media which now are or may at any time hereafter during the term of this lease (having obtained the Tenant's prior written approval to the same, such approval not to be unreasonably withheld or delayed) be in upon through under or over the premises.
- 2 The right to construct and maintain in, on, through, under or over the Premises at any time during the Term at reasonable times and after reasonable prior written notice any easements or services for the benefit of the Retained Land having obtained the Tenant's prior written approval to the same (such approval not to be unreasonably withheld or delayed).
- 3 The right at any time during the Term at reasonable times and after reasonable prior written notice (except in an emergency when no notice shall be required) to enter upon the Premises to:
  - 3.1 inspect, maintain, relay, repair, replace or renew or execute any works whatever to or in connection with any of the Conducting Media, easements or services referred to in paragraphs 1 and 2 of this Schedule;
  - 3.2 exercise any of the rights granted to the Landlord by this lease or the Project Agreement;

the Landlord exercising such rights only if such works cannot reasonably be effected without such entry and causing as little inconvenience as possible and remedying any physical damage so caused.

- 4 The right at any time during the Term at reasonable times and after reasonable prior written notice (except in an emergency when no notice shall be required) to close temporarily for works of repair or any other necessary purpose any area of access roads (other than the Premises) the use of which is available to the Tenant PROVIDED THAT if such closure is to be for any material period of time the Landlord shall provide an alternative means of access to the Premises.
- 5 ~~A right of way over the Premises for the purposes of fire evacuation from the Retained Land and for general access cleaning and maintenance of the Retained Land.~~ Subject to the payment of the sum referred to in Clause 5.2 a right of way over the access road shown coloured brown on the Plan "the Access Road" for the purpose of access to and from that part of the Retained Land shown edged in blue on the Plan PROVIDED THAT the Access Road may only be used for deliveries of waste between the hours of 7am to 6pm Mon-Fri and 7am to 2pm Saturday

AND FURTHER PROVIDED THAT if at any time the number, type or condition of vehicles exercising this right in any way interrupts the Tenant's operation and use of the Premises ("an Interruption") then the Tenant and the Landlord shall meet and try to resolve the issue to the Tenant's reasonable satisfaction, however if the issue is not resolved to the Tenant's satisfaction then the Tenant acting reasonably may vary (but not remove or extinguish) the rights granted in this sub-clause so that the Interruption no longer occurs. AND FURTHER PROVIDED THAT the Tenant may on giving reasonable notice to the Landlord vary such route. The Tenant also reserves the right to turn vehicles away that fail to comply with any site rules for the Premises.<sup>58</sup>

- 6 All liberties, privileges, easements, quasi-easements, rights and advantages whatsoever now held or enjoyed with or appertaining or reputed to appertain to any other part of the Retained Land.
- 7 The right to deal in any manner whatsoever with any adjoining or neighbouring property of the Landlord and to erect, maintain, rebuild or alter or suffer to be erected, maintained, rebuilt or altered thereon any buildings whatsoever whether such buildings shall or shall not affect or diminish the light or air which may now or at any time in the future be enjoyed for or in respect of the Premises and for such purposes to tie into and build off the external walls and foundations of the Premises.
- 8 The right of support and shelter by and from the Premises for adjoining buildings (whether now in existence or erected during the Term).
- 9 The mines and minerals under the Premises.

10 <sup>59</sup>The right to use the weighbridge on the Premises.

<sup>58</sup> Amendment made in executed lease dated 8 November 2004

<sup>59</sup> Amendment made in executed lease dated 8 November 2004

## **SECOND SCHEDULE (Rights Granted)**

In exercising the following rights the Tenant shall comply with Applicable Laws and the reasonable requirements of the Landlord with regard to obtaining access to the Retained Land.

- 1** The free and uninterrupted passage and running of water to and from the Premises in and through the Conducting Media which now are or may at any time hereafter during the term of this lease be in upon through under or over the Retained Land.
- 2** The right at any time during the Term at reasonable times and after reasonable prior written notice (except in an emergency when no notice shall be required) to enter upon the Retained Land to:
  - 2.1** inspect, maintain, relay, repair, replace or renew or execute any works whatever to or in connection with any of the Conducting Media, easements or services referred to in paragraph 1 of this Schedule;
  - 2.2** exercise any of the rights granted to the Tenant by this lease or the Project Agreement;

the Tenant exercising such rights only if such works cannot reasonably be effected without such entry and causing as little inconvenience as possible and remedying any physical damage so caused.
- 3** All liberties, privileges, easements, quasi-easements, rights and advantages whatsoever now held or enjoyed with or appertaining or reputed to appertain to the Premises.
- 4** The right of support and shelter by and from the Retained Land for adjoining buildings on the Premises (whether now in existence or erected during the Term).



## SCHEDULE 5 INSURANCES<sup>60</sup>

### PART 1 - COVER

#### 1 CONSTRUCTION "ALL RISKS"

For the avoidance of doubt, all monetary maxima and minima in this paragraph 1 shall be indexed annually in accordance with Clause 17.26.

**1.1 Cover** "All Risks" of loss destruction or damage to the Property Insured from any cause not otherwise excluded

**1.2 Insured Parties**

- a) ProjectCo and its servants or agents
- b) The D & B Contractor
- c) The Department and its servants or agents
- d) All other contractors &/or sub-contractors engaged by the above (in any tier) in connection with the carrying out of the Works or Services
- e) Professional consultants manufacturers and suppliers to the above for their site activities only in connection with the carrying out of the Works
- f) The Financier ~~if required~~ and its directors.

~~For~~each for their respective rights and interests

**1.3 Property Insured** The Works and Facility

All property and interests of every description used for or intended for incorporation within the Works and Services relating to design, supply, demolition, construction, erection, testing, setting to work, commissioning operating and maintenance of the Facility (including construction of any car parking, landscaping etc.)

Plant and ProjectCo's Equipment used in connection with the Works or Services

Temporary Works

Department's equipment stored on the Site and/or used for testing/commissioning

<sup>60</sup> DofV 2 clauses 2.2 and 2.3 changed the insurance provisions by inserting this revised Schedule 5 (as well as clause 17 in the main body of this Agreement which was also replaced, see ante). The new clause 17 and Schedule 5 had effect from 22<sup>nd</sup> February, 2012.



- 1.4 Insurance Period** From the Effective Date until Final Taking-Over Certificate (as extended in accordance with the Project Agreement)
- 1.5 Territorial Limits** Anywhere in Europe in connection with the Works and Facility
- 1.6 Sum Insured**
- The Works and Facility - full replacement cost
- ProjectCo's Equipment full replacement cost
- Temporary Works market value
- 1.7 Deductibles** £15,000 each and every loss but increasing to £50,000 each and every loss in respect of DE5 and during the Testing Period and Guarantee Period
- 1.8 Principal Extensions**
- Full Terrorism Buy Back for property on the UK mainland
- Professional fees } 10% of the Sum Insured in addition to Sum Insured
- Debris removal } 10% of the Sum Insured in addition to Sum Insured
- Escalator clause - +25% uplift in Sum Insured
- Increased cost of construction - incomplete/unbuilt Works/Facility - limit £1,000,000
- Expediting expenses - limit 25% above normal cost in addition to Sum Insured £1,000,000
- Construction documents - limit £250,000

Full faulty design workmanship and material cover DE5

Full guarantee maintenance

Including testing and commissioning

Automatic reinstatement of sums insured

Inland transits and incidental "off-site" storage - limit £1,000,000

Public Authorities

72 hours clause

Unexploded munitions

Including VAT at the prevailing rate

Other interests

Joint Code of Practice Compliance

Free issue materials/Directly Procured Items

Minimisation of loss - limit £100,000

Marine 50/50 Clause

**1.9 Principal Exclusions**

War and Civil War etc

Nuclear events including radioactive contamination

The cost of making good wear and tear etc.

Unexplained shortages or disappearance at time of taking an inventory

Sonic bangs

Liquidated damages

Date recognition

Consequential losses not otherwise insured

**1.10 Special  
Endorsements**

Subrogation waiver against any Insured

Separate policy considered to apply to each Insured

Non duty of disclosure by the Department

Loss payee clause in excess of £250,000

Non contribution by other policies clause

Non vitiation

Joint and several interest with cross liabilities

30 day notice clause

**2 PUBLIC LIABILITY INSURANCE**

[For the avoidance of doubt, all monetary maxima and minima in this paragraph 2 shall be indexed annually in accordance with Clause 17.26.](#)

## **2.1-2.1 Cover**

Legal liability of the Insured to pay (including claimant's costs and expenses) as damages in respect of:

- (i) death or bodily injury, illness, death, disease contracted by any person
- (ii) loss of or damage to property
- (iii) interference to property or any easement right of air light water or way or the enjoyment or use thereof by obstruction trespass loss of amenities nuisance or any like cause

happening during the period of insurance and arising out of or in connection with the carrying out of the Works or Services

## **2.2-2.2 Insured Parties**

As under Construction "All Risks" up to and including Take Over and ~~(a), (c) and (f) under paragraph 6.2 below~~ thereafter;

- [a\) ProjectCo and its servants or agents](#)
- [b\) The Department and its servants or agents](#)
- [c\) The Financier and its directors.](#)

[each for their respective rights and interests](#)

## **2.3-2.3 Insurance Period**

Effective Date to Expiry Date

## **2.4-2.4 Indemnity Limit**

£25 million any one occurrence / unlimited in the aggregate up to and including Take Over

As from Take Over, £33 million any one occurrence/unlimited in the aggregate but limited in the aggregate during the Insurance Period for Products Liability

## **2.5-2.5 Maximum Deductible**

~~£2,500~~ [10,000](#) each and every occurrence of property damage only

## **2.6-2.6 Principal Extensions**

<sup>\*</sup> Cross liabilities

Costs and expenses in addition to indemnity limit

Contractual liability

Worldwide jurisdiction [excluding USA and Canada](#)

Health & Safety at Work defence costs

Unexploded Munitions

## ~~2.7~~ 2.7 Principal Exclusions

Penalties fines liquidated and ascertained damages

ABI Pollution exclusion

War and Civil War etc

Nuclear events including radioactive contamination

Insured's own employees

Aircraft and marine craft

Professional indemnity (but not resultant third party property damage or personal injury)

Date recognition

## ~~2.8~~ 2.8 Special Endorsements

Subrogation waiver against any Insured

Separate policy considered to apply to each Insured

Non duty of disclosure by the Department [and the Financier](#)

Non contribution by other policies clause

Non vitiation

Joint and several interest with cross liabilities

30 day notice clause

### 3 PROFESSIONAL INDEMNITY INSURANCE

For the avoidance of doubt, all monetary maxima and minima in this paragraph 3 shall be indexed annually in accordance with Clause 17.26.

£10 million by D&B Contractor in respect of each and every claim

~~3.1~~  
3.1

~~3.2~~  
3.2

£5 million by D&B Subcontractor in respect of each and every claim subject to Clause 9.1.3 of the Project Agreement

### 4 MARINE CARGO OPEN COVER

For the avoidance of doubt, all monetary maxima and minima in this paragraph 4 shall be indexed annually in accordance with Clause 17.26.

"All Risks" of loss destruction or damage to the Property Insured from any cause not otherwise excluded including war and strikes.

~~4.1~~ 4.1 Cover

~~4.2~~ 4.2 Insured

The Department and the Financier and ProjectCo and D&B Contractor and any other parties for whom the Insured may receive instructions to insure and/or have assumed responsibility to insure.

~~4.3~~ 4.3 The Property Insured

Property and interest of every description for all transits by sea or air of all goods intended for the Works or Facility where such items are carried for the account and interest of the Insured from risk attachment at factory premises to Site, including offsite storage outside the British Isles.

Open cover to accept all sendings despatched during the currency of the policy and to accept all interests at Insureds' risk.

~~4.4~~ 4.4 Period

From the commencement of appropriate transits until delivery to the Site plus deferred unpacking period.

~~4.5~~ 4.5 Sums Insured

For any one sending/any one voyage not less than the full replacement value +10%

#### ~~4.6~~ 4.6 Basis of Cover

Including but not limited to:-

##### ***Marine Transits***

Institute Cargo Clauses (A)

Institute War Clauses (Cargo)

Institute strikes Clauses (Cargo)

Institute Classification Clauses

Institute War Cancellation Clauses (Cargo)

##### ***Air Transits***

Institute Cargo Clauses (Air)

Institute War Clauses (Air Cargo)

Institute Strikes Clauses (Air Cargo)

##### ***Overland Transits***

cover required only outside British Isles only if not covered under Construction "All Risk" Insurance

Concealed Damage Clause

50/50 Clause

#### ~~4.7~~ 4.7 Principal Exclusions

As Institute clauses.

#### ~~4.8~~ 4.8 Maximum Deductibles

£2,500

## 5 STATUTORY POLICIES

### 6

Third Party Liability

#### ~~5.1~~ 5.1 Motor

#### ~~5.2~~ Employers 5.2

Limit of an amount and in a form complying with the Employers Liability Compulsory Insurance Act 1976 or subsequently enacted legislation.

**Employer's**  
**Liability**

**6 PROPERTY "ALL RISKS"**

For the avoidance of doubt, all monetary maxima and minima in this paragraph 6 shall be indexed annually in accordance with Clause 17.26.

**~~6.1~~ 6.1 Cover**

"All Risks" of loss or damage (including mechanical and electrical breakdown) to property used for or in connection with the ownership maintenance and operation of the Facility and provision of the Services

**~~6.2~~ 6.2 Insured Parties**

- a) ~~As (a), (c) and (f) of Construction "All Risks" and ProjectCo~~ and its servants or agents
  - b) The Department and its servants or agents
  - c) The Financier and its directors
  - d) the Approved Service Providers <sup>61</sup>
- each of their respective rights and interests

**6.3 Sum Insured**

Reinstatement as new cost on buildings, fixtures, fittings and contents

**6.4 Maximum  
Deductible**

£~~15,000~~ 240,000 each and every loss<sup>61</sup>

**6.5 Insurance Period**

From Take Over and annually thereafter until the Expiry Date

**6.6 Principal  
Extensions**

Day one reinstatement - +15%

Subsidence and landslip

Architects & surveyors fees

Debris removal costs

Public authorities

<sup>61</sup> This figure was increased from £15,000 pursuant to clause 6.1 of DoV2



Automatic reinstatement of sum insured

**6.7 Principal Exclusions**

War and Civil War ~~etc~~

Nuclear events including radioactive contamination

The cost of making good wear and tear etc. but not excluding consequential losses

Sonic Bangs

Consequential losses

Date recognition

Deliberate acts or omissions of the Insured

Unexplained shortages

Fidelity losses

Loss or damage to motor vehicles, aircraft or marine craft

**6.8 Special Endorsements**

Subrogation waiver against any Insured

Separate policy considered to apply to each Insured

Non duty of disclosure by the Department [and the Financier](#)

Loss payee clause

Non contribution by other policies clause

Non vitiation

Joint and several interest with cross liabilities

30 day notice clause

**1 BUSINESS INTERRUPTION INSURANCE**

For the avoidance of doubt, all monetary maxima and minima in this paragraph 7 shall be indexed annually in accordance with Clause 17.26.

- |            |                             |  |
|------------|-----------------------------|--|
| <b>1.1</b> | <b>Cover</b>                | <p>In respect of:</p> <p>(i) Loss of revenue;</p> <p>(ii) Increased working costs</p> <p>as a result of loss or damage to property by a cause not otherwise excluded under Property "All Risks"</p>  |
| <b>1.2</b> | <b>Insured Parties</b>      | <p>a) <del>As Property "All Risks"</del> <u>ProjectCo and its servants or agents</u></p> <p>b) <u>The Department and its servants or agents</u></p> <p>c) <u>The Financier and its directors.</u></p> <p><u>each for their respective rights and insured interests</u></p>                                       |
| <b>1.3</b> | <b>Indemnity Period</b>     | <del>{TBA—</del> Minimum of 12 Months <del>}</del>   |
| <b>1.4</b> | <b>Deductible</b>           | <del>{TBA—maximum</del> Maximum <del>}</del> equivalent of <del>7</del> <u>60</u> days <del>}</del>  |
| <b>1.5</b> | <b>Insurance Period</b>     | Annually renewable from date of Take Over to the Expiry Date   |
| <b>1.6</b> | <b>Extensions</b>           | <p><del>Full Terrorism Buy Back (UK Mainland Risks)</del></p> <p>Denial of Access</p> <p>Public Utilities</p> <p>Suppliers extension</p> <p>Professional Accountants Clause</p>  |
| <b>1.7</b> | <b>Special Endorsements</b> | <p>Subrogation waiver against any Insured</p> <p>Separate policy considered to apply to each Insured</p> <p>Non duty of disclosure by the Department</p> <p>Loss payee clause</p> <p>Non contribution by other policies clause</p> <p>Non vitiation</p> <p>Joint and several interest with cross liabilities</p> |

30 days' notice clause

## PART 2 - BROKER'S LETTER

To: Department of Infrastructure (being the successor to the Department of Local Government and the ~~Environment (or any successor to its statutory functions in respect of the collection and disposal of waste) ("the Department")~~. EnvironmentCc: Dols Advisors regarding the Deed

cc: ~~Attorney General~~  
~~Department's brokers~~

Dear Sirs

### ~~Integrated Incinerator (Energy from Waste) Facility (the "Project")~~

~~We have been requested by [name of client] ("ProjectCo"), to provide you with certain confirmations relating to the insurances arranged by us in relation to the Project, and in consideration of ONE POUND (receipt of which from the Department is hereby acknowledged) we provide you with the confirmations set out below.~~

~~The insurances summarised in [Appendix [ ]] attached to this letter (the "**Insurances**") are, at the date hereof, in full force and effect in respect of the risks and liabilities as set out in the insurance policies evidenced in the policies/cover notes attached as [Appendix [ ]] (the "**Policies**").~~

Agreement dated 27 October 2000 entered into between (1) United Waste (Isle of Man) Limited (now called SITA (Isle of Man) Limited ("ProjectCo") and (2) The Department of Local Government and the Environment (succeeded by the Department of Infrastructure) (the "Department") (the "Agreement")

1. We refer to the Agreement. Unless the context otherwise requires, terms defined in the Agreement shall have the same meaning in this letter.
2. We act as insurance broker to ProjectCo in respect of the insurances described in Schedule 5 to the Agreement. In that capacity we confirm that the insurances which are required to be procured pursuant to Clause 17 (Insurance) and Schedule 5 (Insurances) of the Agreement (together the "**Required Insurances**");
  - 2.1 where appropriate name the Department and such other persons as are required to be named pursuant to the Agreement for their respective interests;
  - 2.2 are, in our reasonable opinion as insurance brokers, as at today's date, in full force and effect in respect of all the matters specified in the Agreement; and that

~~We further confirm that~~2.3 have had all premiums due to date in respect of the Required Insurances ~~are paid [or not paid as the case may be] and that~~ the Required Insurances are, to the best of our knowledge and belief, placed with insurers, which, as at the time of placement, are reputable and financially sound. We do not, however, make any representations regarding such insurers<sup>2</sup> current or future solvency or ability to pay claims<sup>3</sup>; and that

~~We have arranged the Insurances on the basis of information and instructions given by ProjectCo. We have not made any particular or special enquiries regarding the Insurances beyond those that we normally make in the ordinary course of arranging the insurances on behalf of our insurance broking clients. The confirmations set out in this letter are given by reference to our state of knowledge at the date hereof.~~ 2.4 the special endorsements set out in Schedule 5 (Insurances) and the policy requirements set out in Clauses 17.7.1 and 17.9 (Insurances) of the Agreement and are as at today's date in full force and effect in respect of the Required Insurances.

3. We further confirm that the attached cover notes confirm this position.

4. Pursuant to instructions received from ProjectCo ~~in connection with the Insurances we~~ and in consideration of ONE POUND (receipt of which is hereby acknowledged), we give the confirmations set out above and hereby undertake in respect of the interests of the Department in relation to the Required Insurances:

4.1 Notification Obligations

4.1.1 (a)(i) to notify you ~~as soon as reasonably practicable and in any event no less than 30 days~~ at least twenty (20) Business Days prior to the expiry of any of the Required Insurances if we have not received instructions from ProjectCo ~~and/or any insured parties or the agents of any such party~~ to negotiate renewal; and, in the event of our receiving instructions to renew, to advise you ~~as soon as reasonably practicable after receipt~~ promptly of the details thereof; and

~~(ii) to notify you forthwith after giving or receiving notice of termination of our appointment as brokers in relation to the Insurances;~~

4.1.2 to notify you at least twenty (20) Business Days prior to ceasing to act as brokers to ProjectCo unless, due to circumstances beyond our control, we are unable to do so in which case we shall notify you as soon as practicable; and

4.1.3 (b) subject to our lien, if any, on the Policies for premiums due under the Policies to pay into the Insurance Proceeds Account; without ~~any set-off~~ or deduction of any kind; for any reason; all payments in respect of claims received by us from ~~the~~ insurers in relation to the Required Insurances (including refunds of premium) other than as may be permitted in the relevant loss payable clauses in the ~~Endorsements;~~ endorsements set out in Schedule 5 (Insurances).

4.2 Advisory Obligations

4.2.1 to notify you promptly of any default in the payment of any premium for any of the Required Insurances;

4.2.2 (c) to ~~advise you~~ notify you if any insurer cancels or gives notification of cancellation of any of the Required Insurances, at least twenty (20) Business Days before such cancellation is to take effect or as soon as reasonably practicable ~~after receiving notice of any insurer's cancellation or suspension of any of the Insurances or receiving notice of any insurer's intention to cancel or suspend any of the Insurances~~ in the event that notification of cancellation takes place less than twenty (20) Business Days before it is to take effect;

4.2.3 to notify you of any act or omission, breach or default of which we have knowledge which in our reasonable opinion may either invalidate or render unenforceable in whole or in part any of the Required Insurances or which may otherwise materially impact on the extent of cover provided under the Required Insurances;

4.2.4 (d) in accordance with our duties to our clients make ProjectCo aware of its pre-contractual duties of disclosure to the insurers by advising ProjectCo of the type

~~of information which generally needs to be disclosed to the insurers; to advise ProjectCo of its duties of disclosure to insurers and to specifically advise upon:~~

~~(e) subject to ProjectCo's consent, to hold the insurance slips or contracts, the Policies and any renewals thereof or any new or substitute policies to the extent held by us, to the order of the Department, and~~

~~(a) the facts, circumstances and beliefs that should generally be disclosed to insurers; and~~

~~(b) the obligation not to misrepresent any facts, matters or beliefs to insurers.~~

#### 4.3 Disclosure Obligations

4.3.1 to disclose to insurers all information made available to us from any source and any fact, change of circumstances or occurrence made known to us from any source which in our reasonable opinion is material to the risks insured against under the Required Insurances and which properly should be disclosed to insurers as soon as practicable after we become aware of such information, fact, change of circumstance or occurrence whether prior to inception or renewal or otherwise; and

4.3.2 (f) to treat as confidential all information in relation to the Insurances so marked as or otherwise stated to be confidential and supplied to us by or on behalf of ProjectCo or the Department and not to disclose such information, without the prior written consent of the supplier, to any third party other than those persons who, in our reasonable opinion have a need to have access to such information from time to time, and for the purpose of disclosure to the insurers or their agents in respect of the Required Insurances in discharge of our obligation set out at clause 4.3.1 of this letter. Our obligations of confidentiality shall not conflict with our duties owed to ProjectCo and shall not apply to disclosure required by an order of a court of competent jurisdiction, or pursuant to any applicable law ~~or regulation,~~ governmental or regulatory authority having the force of law or to information which is in the public domain.

~~The above undertakings are subject to our continuing appointment as insurance brokers to ProjectCo in relation to the Insurances and following termination of such appointment we shall immediately notify the Department of such termination, such notification effecting our immediate release from all our obligations set out in this letter.~~

~~Nothing in this letter shall prejudice the right that any insurers may have to cancel any of the Insurances following default in excess of 30 days in payment of premiums nor shall the exercise of such right in such circumstances amount to a breach of any obligations accepted by us pursuant to the terms of this letter. In accordance with sub-paragraph (c) above we will give you notice as soon as reasonably practicable after receiving notice of any insurers' intention to cancel any of the Insurances and where insurers wish to cancel for reasons of non-payment of premium, we will request that insurers give you a reasonable opportunity to pay amounts outstanding before issuing notice of cancellation on behalf of such insurers.~~

#### 4.4 Administrative Obligations

4.4.1 to hold copies of all documents relating to or evidencing the Required Insurances, including but without prejudice to the generality of the foregoing, insurance slips, contracts, policies, endorsements and copies of all documents evidencing renewal of the Required Insurances, payment of premiums and presentation and receipt of claims;

4.4.2 to supply to the Department and/or its insurance advisers (or the Department's or its insurance advisers' authorised representatives) promptly on written request copies of the

documents set out in clause 4.4.1 of this letter, and to the extent available, to make available to such persons promptly upon the Department's request the originals of such documents;

4.4.3 to administer the payment of premiums due pursuant to the Required Insurances such that, in so far as we hold appropriate funds, all such premiums shall be paid to insurers in accordance with the terms of the Required Insurances;

4.4.4 to administer the payment of claims from insurers in respect of the Required Insurances (the "Insurance Claims") including:

(a) negotiating settlement of Insurance Claims presented in respect of the Required Insurances;

(b) collating and presenting all information required by insurers in relation to Insurance Claims presented in respect of the Required Insurances, and

(c) insofar as it is relevant and practicable, liaising with and reporting to the Department throughout the settlement, payment and administration of such Insurance Claims.

4.4.5 to advise the Department promptly upon receipt of notice of any material changes which we are instructed to make in the terms of the Required Insurances and which, if effected, in our opinion as insurance brokers would result in any material reduction in limits or coverage or in any increase in deductibles, exclusions or exceptions;

4.4.6 to advise the Department in advance of any change to the terms of, or any lapse, non-renewal and/or cancellation of any policy maintained in respect of the Required Insurances; and

4.4.7 to use our reasonable endeavours to have endorsed on each and every policy evidencing the Required Insurances (when the same is issued) the policy requirements referred in Clauses 17.7.1 and 17.9 (Insurances) of the Agreement and the special endorsements referred to in Schedule 5 (Insurances).

## 5. NOTIFICATION DETAILS

Our obligations at Clause 4 of this letter to notify or inform you shall be discharged by providing the requisite information in hard copy to:

Head of Waste Management  
The Department of Infrastructure  
Murray House  
Douglas IM1 2SF  
Isle of Man  
IM1 2SF

IM99 1AN]

6. We shall supply further letters in this form on renewal of each of the Required Insurances and at other times as requested by the Department and shall supply copies of such letters to those parties identified to us by the Department for such purposes.

## 7. Limitation of Liability

The undertakings given and obligations set out in this letter are given subject to any liability we may incur to you arising out of or in connection with this letter whether in contract, tort (including but not limited to negligence) or otherwise being limited in aggregate to £5,000,000, save that our liability shall not be limited in the case of death or personal injury caused by our negligence or in respect of any loss caused by our fraud.

## 8. General

8.1 For the avoidance of doubt ~~all~~ the undertakings and ~~other~~ confirmations given in this letter relate solely to the Required Insurances. They do not apply to any other insurances and nothing in this letter should be taken as providing any undertakings or confirmations in relation to any insurance (other than the Required Insurances) that ought to have been placed or may at some future date be placed by ourselves or by other brokers.

## 8.2

8.3 ~~We shall supply further letters in this form on renewal of each of the Policies and at other times as requested by the Department and shall supply copies of such letters to those parties identified to us by the Department for such purposes.~~

8.4 Following termination of our appointment as broker to ProjectCo, on written notice to the Department we are released from all ongoing obligations set forth in this letter.

8.5 Nothing in this letter shall prejudice insurers' right to cancel the Required Insurances in accordance with their terms and the undertakings and confirmations set out in this letter are given subject to such right.

8.6 This letter is given ~~to~~by us on the instructions of ProjectCo and with ProjectCo's full knowledge and consent as to its terms as evidenced by ProjectCo's ~~signature below's~~ signature below. Accordingly, Project Co hereby waives any potential liability we might otherwise have had to it arising from actions taken by us to comply with the terms of this letter (including, without limitation, any particular liability relating to any conflict of interest).

8.7 This letter shall be governed by and shall be construed in accordance with the laws of the Isle of Man and any dispute as to its terms shall be submitted to the non exclusive jurisdiction of the courts of the Isle of Man.

Yours faithfully

.....  
=====

For and on behalf of [~~MARSH TRADING COMPANY~~ProjectCo's broker]

.....  
=====

For and on behalf of ProjectCo





**SCHEDULE 6  
ELECTRICITY AGREEMENT(S)**



DATED ~~2000~~ 30<sup>th</sup> April 2001<sup>62</sup>

THE MANX ELECTRICITY AUTHORITY (1)

- and -

UNITED WASTE (ISLE OF MAN) LIMITED (2)

**Agreement for the Supply of Electricity in relation to the Isle of Man  
Integrated Incinerator (Energy from Waste) Facility**<sup>63</sup>

**~~{DEED OF AGREEMENT}~~**

**~~{IN RELATION TO A WASTE MANAGEMENT STRATEGY AND  
INTEGRATED INCINERATION FACILITY  
ISLE OF MAN}~~**

■ BEVAN  
ASHFORD ■  
SOLICITORS

35 Colston Avenue, Bristol BS1 4TT  
TEL: 0117 923 0111 FAX: 0117 929 1865  
DX: 7828 Bristol

24 October 2000

<sup>62</sup> [Amendment made in executed Electricity Agreement dated 30 April 2001](#)

<sup>63</sup> [Amendment made in executed Electricity Agreement dated 30 April 2001](#)

## ELECTRICITY AGREEMENT(S)

**BETWEEN**

**IT IS HEREBY AGREED** as follows:-

For the purposes of this Agreement:

**"Affected Party"** has the meaning set out clause 7(a).

**"Affiliate"** means, in relation to a party, a subsidiary or a holding company or any company which is a subsidiary company of the holding company of a party and the expressions "holding company" and "subsidiary" shall have the meanings respectively ascribed to them by Section 1 of the Companies Act 1974 (of Tynwald).

**"D&B Contract"** means any contract for the design, construction, testing, commissioning and completion of the Plant and the remedy of any defects or any part of such works to be entered into between ProjectCo and Kvaerner Engineering and Construction UK Limited (and any replacement contractor).

"Department" means the Department of Local Government and the Environment of the Isle of Man Government.<sup>65</sup>

**"Export Supply"** has the meaning set out clause 4(a).

<sup>64</sup> Amendment made in executed Electricity Agreement dated 30 April 2001

<sup>65</sup> Amendment made in executed Electricity Agreement dated 30 April 2001

**"Export Supply Delivery Point"** means the point identified in paragraph 2 of the First Schedule.

**"Export Supply Meters"** has the meaning set out in clause 4(f)(i).

**"Force Majeure"** means any event or circumstance which is beyond the reasonable control of the Affected Party (acting and having acted as a Reasonable and Prudent Operator) resulting in or causing the failure by the Affected Party to perform any of its obligations under this Agreement (whether in whole or in part), which failure could not have been prevented or overcome by the exercise by it of the standard of a Reasonable and Prudent Operator, provided that failure or inability to make any payment shall not be capable of constituting or causing Force Majeure.

<sup>66</sup>**"Government Department"** means any department of the Government of the Isle of Man, whether acting through its Minister or otherwise, any subdivision or part thereof and any Statutory Board (being a body specified in Schedule 1 of Statutory Boards Act 1987 as amended from time to time), authority, agency, bureau, or tribunal having or exercising authority or delegated authority over the Authority or ProjectCo or their respective functions or obligations as the case may be.

<sup>67</sup>**"Indexed"** means that the relevant amount shall be adjusted in accordance with the Manx RPI Index for the period from the date of signature of this Agreement to the date on which the relevant claim is finally determined.

<sup>68</sup>**"Interface Point"** means the 11KV substation at the Plant.

<sup>69</sup>**"Meters"** means those meters provided in accordance with clause 4(f).

**"Performance Tests"** means the performance tests set out in the Fourth Schedule [**to be supplied by the MEA**] in respect of the Plant to be carried out pursuant to the D&B Contract.

**"Plant"** means the integrated incineration (energy from waste) plant to be designed, constructed, installed, tested and commissioned pursuant to the D&B Contract.

**"Project"** means the project for the design, construction, operation and maintenance of the Plant.

**"Project Agreement"** means the agreement between the Department of Local Government and the Environment and the dated ~~{●}~~ 27<sup>th</sup> October<sup>70</sup> 2000 for (amongst other things) the design, construction, operation and maintenance of the Plant.

<sup>66</sup> [Amendment made in executed Electricity Agreement dated 30 April 2001](#)

<sup>67</sup> [Amendment made in executed Electricity Agreement dated 30 April 2001](#)

<sup>68</sup> [Amendment made in executed Electricity Agreement dated 30 April 2001](#)

<sup>69</sup> [Amendment made in executed Electricity Agreement dated 30 April 2001](#)

<sup>70</sup> [Amendment made in executed Electricity Agreement dated 30 April 2001](#)

**"Reasonable and Prudent Operator"** means a person exercising that degree of skill, diligence, prudence and foresight which would reasonably and ordinarily be expected from a skilled and experienced operator complying with applicable law, engaged in the same type of undertaking as the relevant party under the same or similar circumstances or conditions.

**"Supply"** has the meaning set out in clause 3(a).

**"Supply Delivery Point"** means the point identified in paragraph 1 of the First Schedule.

**"Take Over Date"** means the date identified as the date when the Plant was completed in the Take Over Certificate (being the certificate issued or deemed to have been issued in accordance with paragraph 9.2.1 of Schedule 2 of the Project Agreement).

**"Unit"** means one kilowatt hour.

## 2 TERM

This Agreement shall take effect on the date of signature of this Agreement and shall, subject to clause 8 (Termination), continue in full force and effect until 2359 hours on the twenty-fifth anniversary of the day preceding the Take Over Date.

## 3 SUPPLY BY THE AUTHORITY

Subject to the terms and conditions contained in the First, Second and Third Schedules hereto:

- (a) the Authority shall make available and the ProjectCo shall take a supply of electricity (hereinafter called the **"Supply"**) at the ~~ProjectCo's premises specified in Paragraph 3 to the First Schedule hereto~~ Supply Delivery Point<sup>71</sup> and the characteristics of the supply shall be as set out in paragraph ~~23~~<sup>72</sup> to the First Schedule hereto **PROVIDED THAT** the Authority shall make available the Supply only in accordance with the ~~Authority's~~<sup>73</sup> General Conditions of Supply of electricity as set forth in the Second Schedule hereto and<sup>74</sup> **PROVIDED THAT** the Authority may by notice to the ProjectCo amend, vary, or modify from time to time the relevant tariff (as further described in clause 3(b)) ~~[MEA to propose side letter]~~<sup>75</sup>;
- (b) the ProjectCo shall pay the Authority for the provision of the Supply in accordance with the Authority's tariffs and charges as set forth or referred to in the Third Schedule hereto on the basis that the tariff applicable to the Supply consistent with the tariff

<sup>71</sup> Amendment made in executed Electricity Agreement dated 30 April 2001

<sup>72</sup> Amendment made in executed Electricity Agreement dated 30 April 2001

<sup>73</sup> Amendment made in executed Electricity Agreement dated 30 April 2001

<sup>74</sup> Amendment made in executed Electricity Agreement dated 30 April 2001

<sup>75</sup> Amendment made in executed Electricity Agreement dated 30 April 2001

offered by the Authority to any other industrial customer or entity<sup>76</sup> **PROVIDED THAT** the Authority may from time to time amend or vary such tariffs or charges for the supply or any part thereof and as from the date of such variation or amendment this Agreement shall have the effect in like manner as if such alterations or amendments had originally been incorporated and any necessary consequential amendments made therein provided that such amendment or variation shall be consistent with the ~~tariffs charged to~~ tariff offered by the Authority's to any other ~~customers~~ industrial customer or entity<sup>77</sup>; and

- (c) metering for the Supply shall take place in accordance with the Authority's General Conditions of Supply of electricity as set out in the Second Schedule at the Supply Delivery Point.

<sup>78</sup>The Second Schedule provides the statutory "General Conditions of Supply". Notwithstanding any other provisions of this Agreement, paragraph 3 of this Second Schedule shall not apply to this Agreement.

#### **4 EXPORT SUPPLY BY THE PROJECTCO TO THE AUTHORITY**

##### **(a) General**

The ProjectCo agrees to make available and the Authority agrees to take and pay for such electricity (the "Export Supply") as ~~is generated by the Plant after deduction of the parasitic load~~ delivered to the Export Supply Delivery Point<sup>79</sup>, in accordance with the provisions of this clause 4 and the First and Third Schedules.

##### **(b) Performance Tests**

- (i) The ~~ProjectCo shall give to the Authority reasonable notice of any Performance Tests~~ Performance Tests shall take place on a date agreed between the Authority and the ProjectCo (each party acting reasonably in agreeing such a date)<sup>80</sup>. A representative of the Authority shall be entitled to attend the Performance Tests.
- (ii) The Authority agrees to assist the ProjectCo with any Performance Tests in relation to commissioning and on-load testing of the Plant. The ProjectCo shall pay, as part of the capital costs set out in ~~Clause~~ paragraph<sup>81</sup> 2 of the Third Schedule, for the Authority's reasonable ~~expenses~~ costs<sup>82</sup> in connection with such Performance Tests.

<sup>76</sup> Amendment made in executed Electricity Agreement dated 30 April 2001

<sup>77</sup> Amendment made in executed Electricity Agreement dated 30 April 2001

<sup>78</sup> Amendment made in executed Electricity Agreement dated 30 April 2001

<sup>79</sup> Amendment made in executed Electricity Agreement dated 30 April 2001

<sup>80</sup> Amendment made in executed Electricity Agreement dated 30 April 2001

<sup>81</sup> Amendment made in executed Electricity Agreement dated 30 April 2001

<sup>82</sup> Amendment made in executed Electricity Agreement dated 30 April 2001

- (iii) On completion of the Performance Tests, the ProjectCo shall supply the results of the Performance Tests to the Authority.
- (iv) The Authority shall accept and take all electricity generated by the Plant after the deduction of the parasitic load during the Performance Tests and any other testing or commissioning procedures required under the terms of the D&B Contract in respect of the Plant and shall pay for such electricity, subject to it conforming with the quality requirements set out in paragraph 4 of the First Schedule, in accordance with the Third Schedule

(c) **Notification of Take Over Date**

For the purposes of this Agreement, the ProjectCo shall notify the Authority of the Take Over Date in writing ~~and that the Performance Tests have been completed~~<sup>83</sup>.

(d) **Sale and purchase of the Export Supply**

- (i) The ProjectCo shall sell and the Authority shall purchase from the Take Over Date such electricity as is ~~generated by the Plant~~ delivered to Export Supply Delivery point<sup>84</sup> which conforms with the quality requirements set out in paragraph 4 of the First Schedule, in accordance with the Third Schedule.
- (ii) For the avoidance of doubt, the ProjectCo shall have no obligation to make available to the Authority any minimum level of capacity or (except to the extent actually generated by the Plant and made available at the Export Supply Delivery Point) any volume of Export Supply.
- (iii) The ProjectCo shall send to the Authority within 30 days of the end of each month during the continuance of this Agreement an invoice showing for the previous month the volume of electricity made available at the Export Supply Delivery Point during that month and the price for that volume of electricity including value added tax (if any). The Authority shall pay the amount shown in the invoice within 28 days of receipt of the invoice.<sup>85</sup>

(e) **Interconnection facilities**

- (i) The ProjectCo shall, acting as a Reasonable and Prudent Operator, be responsible for the provision, operation and maintenance of all interconnection plant and apparatus on its side of the ~~Export Supply Delivery Point~~ interface<sup>86</sup> required for

<sup>83</sup> Amendment made in executed Electricity Agreement dated 30 April 2001

<sup>84</sup> Amendment made in executed Electricity Agreement dated 30 April 2001

<sup>85</sup> Amendment made in executed Electricity Agreement dated 30 April 2001

<sup>86</sup> Amendment made in executed Electricity Agreement dated 30 April 2001

compatible and safe operation of the Plant in parallel with the Authority's electricity transmission, distribution and supply system.

- (ii) The Authority shall, acting as a Reasonable and Prudent Operator, be responsible for the provision, operation and maintenance of all cable<sup>87</sup>, plant and apparatus at the Interface Point (and which forms part of the Interface Point) and<sup>88</sup> on its side of the ~~Export Supply Delivery Point~~Interface<sup>89</sup> required for compatible and safe operation of the Plant in parallel with the Authority's electricity transmission, distribution and supply system. The Authority shall be responsible for any failure of or defect in the cable, plant and apparatus located between the Interface Point and the Export Supply Delivery Point only to the extent that such failure is directly attributable to the Authority. For the avoidance of doubt, the ProjectCo shall in no circumstances be responsible for any failure of or defect in the cable, plant and apparatus located between the Interface Point and the Export Supply Delivery Point. The term "cable" as used in this clause shall mean the electrical and fibre-optic cables fit for the purposes set out in Schedules 1 and 6 including (without limitation) all necessary telecommunications equipment<sup>90</sup>
- (iii) The ProjectCo shall pay ~~by way of monthly instalments<sup>91</sup>~~ the capital contributions in the amount of the reasonable costs ~~as and when~~properly<sup>92</sup> incurred by the Authority for the interconnection plant and apparatus (including the fibre-optic link and terminals)<sup>93</sup> provided by the Authority as indicated in Schedule 6<sup>94</sup> on its side of the ~~Export Supply Delivery Point. The amount due shall be paid by the ProjectCo to the Authority within 30 days of receipt of detailed invoice from the Authority.~~Interface<sup>95</sup> Point and for the study indicated in Schedule 5. The Authority shall raise a detailed invoice in respect of this amount. The ProjectCo shall pay the amount shown in the invoice within 10 days of receipt of the relevant stage payment from the Department in accordance with the Project Agreement<sup>96</sup>. The Authority shall be responsible for any failure of or defect in the cable, plant and apparatus located between the Interface Point and the Export Supply Delivery Point only to the extent that such failure is directly attributable to the Authority. For the avoidance of doubt, the ProjectCo shall in no circumstances be responsible for any failure of or defect in the cable, plant and apparatus located between the Interface Point and the Export Supply Delivery Point. The term "cable" as used in this clause shall mean the electrical and fibre-optic cables fit for the purposes set out in

<sup>87</sup> Amendment made in executed Electricity Agreement dated 30 April 2001

<sup>88</sup> Amendment made in executed Electricity Agreement dated 30 April 2001

<sup>89</sup> Amendment made in executed Electricity Agreement dated 30 April 2001

<sup>90</sup> Amendment made in executed Electricity Agreement dated 30 April 2001

<sup>91</sup> Amendment made in executed Electricity Agreement dated 30 April 2001

<sup>92</sup> Amendment made in executed Electricity Agreement dated 30 April 2001

<sup>93</sup> Amendment made in executed Electricity Agreement dated 30 April 2001

<sup>94</sup> Amendment made in executed Electricity Agreement dated 30 April 2001

<sup>95</sup> Amendment made in executed Electricity Agreement dated 30 April 2001

<sup>96</sup> Amendment made in executed Electricity Agreement dated 30 April 2001

Schedules 1 and 6 including (without limitation) all necessary telecommunications equipment.<sup>97</sup>

- (iv) ~~Any~~The Authority shall not be liable for any loss of connection or loss of supply ~~to the Authority shall be at no risk or liability to the Authority~~ unless the loss of connection or loss of supply was due to the act or omission (in relation to an obligation of the Authority at law or under this Agreement) of the Authority, its contractors, officers, employees or agents, unless such act is otherwise permitted under this Agreement<sup>98</sup>.

(f) **Metering**

- (i) The Authority shall provide and maintain in good order and repair meters (the "**Export Supply Meters**") to measure the Export Supply at the point of connection at the ~~11kV busbars at Pulrose Power Station~~Export Supply Delivery Point<sup>99</sup> and meters (the "**Supply Meters**") to measure the Supply at the ~~Export~~<sup>100</sup> Supply Delivery Point (together the "**Meters**"), together with a fibre-optic link and terminals between the Plant and the Export Supply Delivery Point for the relay of data, information and communications and incorporating safety protection systems during the term of this Agreement.<sup>101</sup>
- (ii) The Meters shall, as to their technical standards, description, accuracy and calibration, comply fully with the applicable<sup>102</sup> requirements of Code of Practice 3 of the Electricity Pool of England and Wales
- (iii) The Meters shall be the property of the Authority and the Authority shall be responsible for the cost of their maintenance, replacement, calibration and inspections for accuracy on a scheduled basis. If a Meter is found upon inspection to be inaccurate beyond any tolerances as defined in Code of Practice 3 of the Electricity Pool of England and Wales it shall be re-calibrated immediately and the provisions of clause 4(f)(~~v~~iv)<sup>103</sup> shall apply.
- (iv) ~~The Export Supply Meters shall be sealed with a seal owned by each of the parties and shall not be opened, calibrated or tested, except in the presence of representatives of the ProjectCo and the Authority.~~<sup>104</sup>If a Meter reading is disputed and the Meter is found upon inspection to be inaccurate, the parties shall

<sup>97</sup> Amendment made in executed Electricity Agreement dated 30 April 2001

<sup>98</sup> Amendment made in executed Electricity Agreement dated 30 April 2001

<sup>99</sup> Amendment made in executed Electricity Agreement dated 30 April 2001

<sup>100</sup> Amendment made in executed Electricity Agreement dated 30 April 2001

<sup>101</sup> Amendment made in executed Electricity Agreement dated 30 April 2001

<sup>102</sup> Amendment made in executed Electricity Agreement dated 30 April 2001

<sup>103</sup> Amendment made in executed Electricity Agreement dated 30 April 2001

<sup>104</sup> Amendment made in executed Electricity Agreement dated 30 April 2001



adjust the meter reading to compensate for the inaccuracy of the meter and adjust the payments due accordingly.

- (v) If a Meter reading is disputed and the Meter is found upon inspection to be inaccurate, the parties shall adjust the meter reading to compensate for the inaccuracy of the meter and adjust the payments due accordingly.

(g) **Metering Records**

The ~~ProjectCo and the~~<sup>105</sup>Authority shall ~~each~~<sup>106</sup> compile and maintain ~~in respect of the Plant meter~~<sup>107</sup>Meter records and other records needed to reflect the electricity ~~generated and the electricity delivered~~<sup>108</sup>made available<sup>108</sup> at the Export Supply Delivery Point ~~in respect of the Plant~~<sup>109</sup>. Such records shall be subject to inspection by the other party during normal business hours upon reasonable advance written notice.

(h) **Operation of the generating sets**

The ProjectCo may operate the generating sets specified in paragraphs ~~45~~<sup>110</sup> of the First Schedule in accordance with the operating regime specified in paragraph ~~56~~<sup>111</sup> of the First Schedule.

(i) **Technical requirements**

- (i) The Plant shall comply with the Authority's technical and operational requirements set out in the Fifth Schedule ~~[MEA to provide]~~<sup>112</sup>.
- (ii) The ProjectCo shall use reasonable endeavours to ensure that the power factor of the Export Supply shall remain within the range of 0.8(lag) and 0.9 (lead).

(j) **Required standards and disconnection**

- (i) If, in the reasonable opinion of the Authority, the condition or manner of operation of the Plant or the ProjectCo's failure to meet agreed standards ~~poses~~<sup>113</sup>pose<sup>113</sup> an immediate threat of injury, material damage to any person or to the Authority's generation, distribution and supply system or would prevent the Authority meeting its statutory obligations under any legislation in force from time to time in the Isle of Man

<sup>105</sup> [Amendment made in executed Electricity Agreement dated 30 April 2001](#)

<sup>106</sup> [Amendment made in executed Electricity Agreement dated 30 April 2001](#)

<sup>107</sup> [Amendment made in executed Electricity Agreement dated 30 April 2001](#)

<sup>108</sup> [Amendment made in executed Electricity Agreement dated 30 April 2001](#)

<sup>109</sup> [Amendment made in executed Electricity Agreement dated 30 April 2001](#)

<sup>110</sup> [Amendment made in executed Electricity Agreement dated 30 April 2001](#)

<sup>111</sup> [Amendment made in executed Electricity Agreement dated 30 April 2001](#)

<sup>112</sup> [Amendment made in executed Electricity Agreement dated 30 April 2001](#)

<sup>113</sup> [Amendment made in executed Electricity Agreement dated 30 April 2001](#)

then the Authority reserves the right to disconnect the Plant from the Authority electricity transmission, distribution and supply system without prior notice.

- (ii) In any circumstances other than those set out in clause 4(j)(i) where any material problem arises from the condition or manner of operation of the Plant or the failure by the ProjectCo to meet agreed standards then the Authority shall give the ProjectCo written notice specifying in reasonable detail the nature of the problem ~~and require the~~ The ProjectCo shall remedy the problem within 28 days of receipt of such notice ~~to remedy the problem~~<sup>114</sup> or within any longer period agreed between the Authority and the ProjectCo, the agreement of the Authority not to be unreasonably withheld or delayed. In the event that the problem remains unremedied after the agreed time period, the Authority reserves the right to disconnect the Plant from the Authority electricity transmission, distribution and supply system without further notice.

## 5 ASSIGNMENT

- (a) The ProjectCo shall not assign this Agreement without the consent in writing of the Authority. Such consent shall not be unreasonably withheld or delayed by the Authority who shall be entitled to withhold its consent until the assignee<sup>115</sup> shall by an instrument approved by the Authority (such approval not to be unreasonably withheld or delayed)<sup>116</sup> have covenanted with the Authority to observe and perform the terms and conditions herein contained with such modifications (if any) as may be agreed upon.
- <sup>117</sup>(b) ~~The~~ Subject to Clause 5(c), the Authority shall ~~not only be entitled to~~ assign its interest in and/or rights and benefits or to novate or otherwise transfer all or any of its rights and/or obligations, liabilities and duties under this Agreement ~~without the~~ to any third party (subject to prior written consent of by the ProjectCo (in writing to the identity of the third party, such consent not to be unreasonably withheld or delayed) or Government Department in which (in the case of the third party or Government Department) all or some of the functions of the Authority are or are to become vested pursuant to the exercise of powers of Tynwald and/or any Government Department or by order of the Governor in Council (meaning the Governor acting on the advice and with the concurrence of the Council of Ministers appointed in accordance with the Council of Ministers Act 1990).
- <sup>118</sup>(c) In the event of any assignment, novation or transfer by the Authority in accordance with clause 5(b), the Authority shall procure that the ProjectCo shall receive evidence satisfactory to the ProjectCo (acting reasonably) that such assignment, novation or transfer is valid and lawful.

## 6 RESERVATIONS

<sup>114</sup> Amendment made in executed Electricity Agreement dated 30 April 2001

<sup>115</sup> Amendment made in executed Electricity Agreement dated 30 April 2001

<sup>116</sup> Amendment made in executed Electricity Agreement dated 30 April 2001

<sup>117</sup> Amendment made in executed Electricity Agreement dated 30 April 2001

<sup>118</sup> Amendment made in executed Electricity Agreement dated 30 April 2001

Nothing in this Agreement shall prejudice or in any way affect any of the rights or powers of the Authority under the Electricity Acts or any other enactment for the time being in force.

## 7 FORCE MAJEURE

- (a) A party (the "**Affected Party**") shall be deemed not to be in breach of its obligations under this Agreement for so long and to the extent that the performance of its obligations is prevented by events or circumstances of Force Majeure.
- (b) The Affected Party shall give notice to the other party of any event or circumstances of Force Majeure. The notice shall include details of the event or circumstances of Force Majeure including evidence of its effect on the obligations of the Affected Party and any action proposed to mitigate its effect.
- (c) The Affected Party shall give notice to the other party promptly upon becoming able to resume performance of its obligations suspended in accordance with this clause 7 and the event or circumstance of Force Majeure shall be deemed to have ended on the date of the Affected Party's notice.
- (d) Nothing in this clause 7 shall, or shall purport to, relieve the Authority from its statutory duties ~~as, including (but not limited to) those~~<sup>119</sup> set out in the Electricity Act 1996 and the Authority shall continue to be responsible for such statutory duties notwithstanding the occurrence of Force Majeure or the operation of any other provision of this Agreement.

## ~~8~~ **8** TERMINATION

### 8.1 Termination of Supply

This sub-clause 8.1 addresses the right to terminate the Supply under this Agreement.

#### (a) Termination for ProjectCo default

~~The Authority, following 14 days notice to remedy the breach, shall,~~  
After providing the ProjectCo with notice of the occurrence of one or more of the breaches set out in this sub-clause (a) and if the ProjectCo has failed to remedy ~~the~~such breach within ~~the 14 day remedy period,~~14 days of such notice, the Authority shall be entitled to discontinue the Supply by written notice to the ProjectCo ~~on the happening of any of the following:-~~ The events of breach shall be as follows<sup>120</sup>.

<sup>119</sup> Amendment made in executed Electricity Agreement dated 30 April 2001

<sup>120</sup> Amendment made in executed Electricity Agreement dated 30 April 2001

~~(i) the failure of the ProjectCo to pay any amount in excess of £[●] and which is due and payable under clause [●] hereof within 14 business days of its due date;~~

<sup>121</sup>~~(ii)~~ any act, neglect or default of the ProjectCo related to Supply materially affecting or likely to materially affect the safety or efficiency of the Authority's transmission, distribution and supply system; or

~~(iii)~~ <sup>122</sup>~~(ii)~~ any other material breach of this Agreement by the ProjectCo which evidences the inability of the ProjectCo to continue to perform its material obligations under this Agreement in relation to Supply.

#### (b) Termination for Authority default

The ProjectCo shall be entitled to terminate Supply by written notice to the Authority if there is a material breach by the Authority of its obligations under this Agreement which evidences the inability of the Authority to continue to perform its material obligations under this Agreement in relation to Supply.

### 8.2 Termination of Export Supply

This sub-clause 8.2 addresses the right to terminate the Export Supply under this Agreement.

#### (a) Termination for ProjectCo default

~~The Authority, following 14 days notice to remedy the breach, shall.~~  
After providing the ProjectCo with notice of the occurrence of one or more of the breaches set out in this sub-clause (a) and if the ProjectCo has failed to remedy ~~the~~such breach within ~~the 14 day remedy period,~~14 days of such notice, the Authority shall be entitled to discontinue the Export Supply by written notice to the ProjectCo ~~on the happening of any of the following.~~  
The events of breach shall be as follows<sup>123</sup>:-

- (i) the failure of the ProjectCo to pay the capital contribution payable under clause 4(e)(iii) hereof within 10 days of receipt of such capital contribution from the Department;
- (ii) any act, neglect or default of the ProjectCo related to Export Supply materially affecting or likely to materially affect the safety or efficiency of the Authority's transmission, distribution and supply system; or

<sup>121</sup> Amendment made in executed Electricity Agreement dated 30 April 2001

<sup>122</sup> Amendment made in executed Electricity Agreement dated 30 April 2001

<sup>123</sup> Amendment made in executed Electricity Agreement dated 30 April 2001

- (iii) any other material breach of this Agreement by the ProjectCo which evidences the inability of the ProjectCo to continue to perform its material obligations under this Agreement in relation to Export Supply.

<sup>124</sup>(iv) the Plant does not produce electricity before 1 January 2008.

#### (b) Termination for Authority default

The ProjectCo shall be entitled to terminate the Export Supply by written notice to the Authority if:

- (i) the Authority fails to pay any amount [in excess of £[●]]500,000<sup>125</sup> which is due and payable under this Agreement within 14 days of receipt of notice from the ProjectCo of such non-payment; or
- (ii) there is a material breach by the Authority of its obligations under this Agreement which evidences the inability of the Authority to continue to perform its material obligations under this Agreement in relation to Export Supply.

### 8.3 Termination of Agreement

This sub-clause 8.3 addresses the right to terminate this Agreement.

#### (a) Termination for ProjectCo default

<sup>126</sup> In the event of:

~~The Authority, following 14 days notice to remedy the breach, shall, if the ProjectCo has failed to remedy the breach within the 14 day remedy period, be entitled to terminate this Agreement by written notice to the ProjectCo on the commission by the ProjectCo of any (i) act of bankruptcy or the obtaining of a receiving order in bankruptcy against the ProjectCo~~

- (ii) or the making of an arrangement or composition with or for the benefit of the creditors of the ProjectCo or

<sup>124</sup> Amendment made in executed Electricity Agreement dated 30 April 2001

<sup>125</sup> Amendment made in executed Electricity Agreement dated 30 April 2001

<sup>126</sup> Amendment made in executed Electricity Agreement dated 30 April 2001

(iii) if the ProjectCo is a body corporate the issue of any notice calling a meeting of creditors for the making of any order for the winding up of the Company (not being with a view merely to voluntary liquidation for the purpose of reconstruction) or the appointment of a receiver of the ProjectCo's business or undertaking or any part thereof ~~and after providing the ProjectCo with notice of the occurrence of the event as set out in this sub-clause (a) and if the ProjectCo has failed to remedy such event within 14 days of such notice, the Authority shall be entitled to terminate this Agreement by written notice to the ProjectCo.~~<sup>127</sup>

**(b) Termination for Authority default**

The ProjectCo shall be entitled to terminate this Agreement by written notice to the Authority if the Authority ceases to be the relevant electricity authority for the Isle of Man.<sup>128</sup>unless the Agreement is properly assigned in accordance with clause 5 before the Authority ceases to be the relevant electricity authority for the Isle of Man.

**(c) Termination where the Project Agreement is terminated**

This Agreement will terminate automatically upon termination of the Project Agreement.

**(d) Termination of Supply and Export Supply**

This Agreement shall terminate automatically where both the Supply and Export Supply have been terminated in accordance with sub-clauses 8.1 and 8.2.

**(e) Termination to be without prejudice**

Termination of this Agreement shall be without prejudice to any right or obligation which may have accrued to either of the parties on or prior to the termination, and all provisions of this Agreement necessary for the full enjoyment and enforcement of such accrued rights and obligations shall survive termination for the period so necessary.

**(f) Authority apparatus on termination**

On the termination of this Agreement the Authority shall be entitled to enter on the premises specified in paragraph 1 to the First Schedule hereto and any

<sup>127</sup> [Amendment made in executed Electricity Agreement dated 30 April 2001](#)

<sup>128</sup> [Amendment made in executed Electricity Agreement dated 30 April 2001](#)

other land associated with the premises and owned or occupied by the ProjectCo whereon any electric lines or other apparatus which is the property of the Authority shall for the time being be installed and to remove any part of or all such electric lines and other apparatus.

(g) **Termination and reservations**

The right to discontinue the Supply/Export Supply or to terminate this Agreement in accordance with this clause 8 are without prejudice to the reservations contained in clause 6 hereof.

## 9 LIABILITY AND INDEMNITIES

### (a) ProjectCo Indemnity

- (i) The ProjectCo will indemnify and hold harmless the Authority against any and all claims for loss, damage and expense of whatever kind or nature arising out of any breach by the ProjectCo of its obligations under this Agreement, except to the extent that any such claim has arisen due to a negligent act or omission, breach of contract or breach of statutory duty on the part of the Authority, its contractors, officers, employees or agents, provided that the liability of the ProjectCo in respect of claims for such loss, damage or expense shall not exceed the sum of £~~1,000,000~~<sup>129</sup> (Indexed) per incident or series of related incidents and £~~2,000,000~~<sup>130</sup> (Indexed) in aggregate for all claims under or in connection with this Agreement.
- (ii) Neither the ProjectCo nor its officers, employees and agents shall, in any circumstances whatsoever, be liable to the Authority under or in connection with this Agreement for any loss of profit, loss of revenue, loss of use, loss of contract or loss of goodwill, any indirect, special or consequential loss or any loss resulting from any liability of the Authority to any other person, howsoever and whensoever arising.

### <sup>131</sup>(b) Authority Indemnity

The Authority will indemnify and hold harmless the ProjectCo against any and all claims for loss, damage and expense of whatever kind and nature arising out of the construction, operation and maintenance of the Authority's electricity transmission, distribution and supply system or any part of it or arising out of the breach by the Authority of its obligations under this Agreement, except to the extent that any such claim has arisen due to a negligent act or omission, breach of contract or breach of statutory duty on the part of the ProjectCo, its contractors, officers, employees or

<sup>129</sup> Amendment made in executed Electricity Agreement dated 30 April 2001

<sup>130</sup> Amendment made in executed Electricity Agreement dated 30 April 2001

<sup>131</sup> Amendment made in executed Electricity Agreement dated 30 April 2001

agents, provided that the liability of the Authority in respect of claims for such loss, damage or expense shall not exceed the sum of £[1,000,000] per incident or series of related incidents and £[2,000,000] in aggregate for all claims under or in connection with this Agreement.

<sup>132</sup>(ii) Neither the Authority nor its officers, employees and agents shall, in any circumstances whatsoever, be liable to the ProjectCo under or in connection with this Agreement for any loss of profit, loss of revenue, loss of use, loss of contract or loss of goodwill, any indirect, special or consequential loss or any loss resulting from any liability of the ProjectCo to any other person, howsoever and whensoever arising.

(c) **Conduct of claims**

If either party receives a claim from a third party in respect of which it is entitled to the benefit of an indemnity under this clause 9, it shall notify the other party within 10 days of receipt of the claim and will not settle or pay the claim without the prior approval of the other party, such approval not to be unreasonably withheld or delayed. If the party giving the indemnity wishes to contest or dispute the claim, it may conduct the proceedings in the name of the indemnified party, subject to the indemnified party being secured to its reasonable satisfaction against any costs involved.

(d) **Exclusivity of remedy**

The rights and remedies provided by this Agreement to the parties are exclusive and not cumulative and shall be in full and final satisfaction of the rights of the parties for any total or partial failure to comply with the provisions of this Agreement, howsoever caused and even where caused by negligence or a breach of duty of a party.

## 10 CONFIDENTIALITY

Each party shall treat the terms of this Agreement and information provided under or in connection with this Agreement ("**Confidential Information**") as confidential and shall not disclose Confidential Information without the prior written consent of the other party, save that consent shall not be required for disclosure:

- (a) as required by any applicable laws, pursuant to an order of any court of competent jurisdiction or the requirements of any applicable regulatory organisation;
- (b) to any Affiliate of a party provided such disclosure is necessary or reasonably required in connection with the Project and such Affiliate agrees to be bound by the confidentiality provisions of this Agreement as if it were a party hereto;

<sup>132</sup> Amendment made in executed Electricity Agreement dated 30 April 2001



- (c) to such officers, employees, professional advisers, sub-contractors, suppliers, auditors and other persons connected with a party whose duties require them to have access to Confidential Information and then only to such persons who have (prior to disclosure) been notified of the provisions of this Agreement and agreed to be bound by confidentiality obligations which are not less restrictive;
- (d) to such other persons as may be participating in or lending money in respect of the Project or giving or taking security over the assets of the Project or either of the parties (and any such person's advisers), subject to that person (and any advisers) entering into a confidentiality agreement with the parties to this Agreement in substantially similar terms to this clause 10;
- (e) to the extent required by any licence to operate the Plant or any other applicable law or binding requirement of a regulatory authority or the rules of a relevant and recognised stock exchange;
- (f) to any insurer under a policy of insurance required in relation to the Project;
- (g) to the extent that Confidential Information is, prior to the time of disclosure, in the public domain; or
- (h) to the extent that Confidential Information was, prior to disclosure hereunder, already lawfully in possession of the recipient party either without limitation on disclosure to others or which subsequently became free of such limitation.

## **11 DISPUTES**

Any dispute, difference or question arising between the parties hereto as to the construction or effect of this Agreement or the rights or obligations of either party hereunder or any matter which in default of agreement is to be determined by arbitration shall be referred to a single arbitrator agreed upon between the parties hereto or failing such agreement nominated on the application of either party by the President for the time being of the Institution of Electrical Engineers and any such reference shall be deemed a submission to arbitration within the Arbitration Acts of 1976 or any statutory modification or re-enactment thereof for the time being in force. The seat of the arbitration shall be Douglas.

## 12 NOTICES

Any notice given to the Authority shall be deemed to be duly given if delivered or sent by pre-paid registered letter post, by the system known as recorded delivery or by facsimile to the Secretary for the time being of the Authority at the principal office or facsimile number for the time being of the Authority and any notice to be given or delivered to the ProjectCo shall be deemed to be duly given or delivered if delivered or sent by pre-paid registered letter post, by the system known as recorded delivery or by facsimile to the ProjectCo at the address or facsimile number herein stated or at the address or facsimile number of the ProjectCo last known to the Authority. Any such notice so sent by pre-paid registered letter post or the system known as recorded delivery shall unless returned through the post office undelivered be deemed to have been given or delivered on the day and at the time which such notice would be delivered in the ordinary course of the post. Any such notice sent by facsimile where a valid transmission report confirming good receipt is generated shall be deemed to have been given or delivered on the day of transmission if transmitted before 1800 hours on a working day or otherwise on the first working day after transmission.

## 13 GOVERNING LAW

This agreement is governed by and shall be construed in accordance with the laws of the Isle of Man.

~~IN WITNESS WHEREOF the parties hereto have hereunto subscribed their names this day month and year first before written~~

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<sup>133</sup> [Amendment made in executed Electricity Agreement dated 30 April 2001](#)

## FIRST SCHEDULE

- 1 The description and address of the Supply Delivery Point at the premises of the ProjectCo at which the connection with the Authority's system is required is:-

Address: Richmond Hill, Braddan

Business Description: Waste-to-energy plant

Timescale envisaged for provision/use of the required supply: 25 years

Permanent telephone number to be advised before "setting to work" of the generator.

Supply Delivery Point: ~~Waste-to-energy plant 11kV substation~~<sup>134</sup>[Point of connection at the 11kV busbars at Pulrose Power Station](#)

- 2 The description and address of the Export Supply Delivery Point at which the connection with the Authority's system is required is:-

Address: Richmond Hill, Braddan

Business Description: Waste-to-energy plant

Timescale envisaged for provision/use of the required supply: 25 years

Permanent telephone number to be advised before "setting to work" of the generator.

Export Supply Delivery Point: ~~Waste-to-energy plant 11kV substation~~<sup>135</sup>[Point of connection at the 11kV busbars at Pulrose Power Station](#)

- 3 The characteristics of the Supply shall be:

type	-	alternating current
nominal voltage	-	11 kV <sup>136</sup>
normal frequency	-	50 Hertz
agreed capacity	-	<del>1.2</del> <a href="#">1.5</a> MVA <sup>137</sup>
no. of phases	-	three

- 4 The characteristics of the Export Supply shall be:

type	-	alternating current
nominal voltage	-	11kV
normal frequency	-	50 Hertz

<sup>134</sup> [Amendment made in executed Electricity Agreement dated 30 April 2001](#)

<sup>135</sup> [Amendment made in executed Electricity Agreement dated 30 April 2001](#)

<sup>136</sup> [Amendment made in executed Electricity Agreement dated 30 April 2001](#)

<sup>137</sup> [Amendment made in executed Electricity Agreement dated 30 April 2001](#)

agreed capacity - ~~7.59.0~~ MVA<sup>138</sup>

5 Generating Set - Initial details to include the information below.

No	Type*	Manufacturer	Voltage Capacity (kVA)
<sup>139</sup> <u>One</u>	<u>Synchronous</u>	<u>TBA</u>	<u>11</u>
Power Factor		Sub-Transient	Additional Equipment
<sup>140</sup> <u>0.85</u>		Reactance	Transformers, Reactors
		<sup>141</sup> <u>Saturated/Insaturated</u>	etc.(if any) installed
		<u>Typically X"d</u>	with the generator
		<u>(+ 15%/19.1%</u>	
* A = Asynchronous:	S = Synchronous		<sup>142</sup> <u>[not applicable]</u>

[NB ~~During investigation further information will be required to~~<sup>143</sup>The Study referenced in Schedule 5 will verify compliance with the required protection and other technical features.]

5 Operating Regime

Island mode - when selected<sup>144</sup>

Parallel mode - normal mode<sup>145</sup>

Manual stand-by - running off grid supply until synchronised<sup>146</sup>

<sup>138</sup> Amendment made in executed Electricity Agreement dated 30 April 2001

<sup>139</sup> Amendment made in executed Electricity Agreement dated 30 April 2001

<sup>140</sup> Amendment made in executed Electricity Agreement dated 30 April 2001

<sup>141</sup> Amendment made in executed Electricity Agreement dated 30 April 2001

<sup>142</sup> Amendment made in executed Electricity Agreement dated 30 April 2001

<sup>143</sup> Amendment made in executed Electricity Agreement dated 30 April 2001

<sup>144</sup> Amendment made in executed Electricity Agreement dated 30 April 2001

<sup>145</sup> Amendment made in executed Electricity Agreement dated 30 April 2001

<sup>146</sup> Amendment made in executed Electricity Agreement dated 30 April 2001

**SECOND SCHEDULE**  
**GENERAL CONDITIONS OF SUPPLY BY THE AUTHORITY TO PROJECTCO**

- 1 The Supply will be given in accordance with the Electricity Act 1996 as amended and the Electricity Supply Regulations 1991 as amended and the Electricity (Amendment) Regulations 1998 as amended.
- 2 Unless the ProjectCo is otherwise notified, the Supply at the ProjectCo's terminals will be alternating current 50 Hertz 11 kV in 3 phases.
- 3 Service lines from the main to the ProjectCo's terminals are laid or erected by, and remain the property of the Authority. The point of entry and position of meter and service lines is determined by the Authority's authorised officials. The ProjectCo shall permit the Authority to take without charge a branch service from its premises, if required for the purpose of providing a supply of electricity to other premises.
- 4 The ProjectCo shall obtain and retain all facilities required by the Authority for the installation of the service line, including the necessary free wayleaves over its own property which the Authority may require.
- 5 No-one other than the authorised officials of the Authority shall be permitted to connect to, unseal, remove or otherwise interfere with the Authority's apparatus.
- 6 The ProjectCo shall submit to the Authority a completed Connection Form and Test Certificate in respect of all new supplies, additional loads, circuit additions, rewires and connection of additional apparatus to the ProjectCo's existing installation.
- 7 The ProjectCo shall be responsible to the Authority for the total loss or damage, other than fair wear and tear, to meters, switches, fuses, service cables etc. on its premises.
- 8 The ProjectCo shall, at all reasonable times, permit authorised officers of the Authority to have access to its premises for the purpose of inspecting, removing, replacing, altering and testing any service line, meter or other apparatus, and also for the testing of conductors and fittings. The Authority's officers will produce their official identify card on request by the ProjectCo.
- 9 The Authority shall not be responsible for damage or injury, consequential or otherwise, caused by interruptions in the supply of electricity owing to accident, fire, flood, lightning, tempest, breakdown of machinery, or any other unavoidable cause, but it shall use all reasonable diligence in recommencing the Supply. The Supply may from time to time be temporarily

discontinued for the purpose of maintaining the efficient working of the Authority's system of supply.

- 10 Accounts accrue from day to day and are payable on demand. In default the Authority may, at its discretion, forthwith and without further notice, disconnect the Supply, and such Supply will not be reconnected until the account to date, with the cost of disconnection and reconnection, has been paid in full.
- 11 The Authority reserves the right to render an account based on an estimate of consumption if a normal meter reading is not obtained. Should the meter be disputed and, on test, prove to be inaccurate, the Authority shall make due reduction or addition for the current account, and on that account only. Should the meter cease to register, or otherwise become unavailable for measuring the Supply, the ProjectCo shall pay for a reasonable amount of energy, based on former or subsequent records over a corresponding period.
- 12 Special meter readings can be arranged at the ProjectCo's premises by giving three full working days' notice to the Authority. This will provide an official record of Units consumed from the last normal meter reading date. A charge will be payable by the ProjectCo for special meter readings.
- 13 In all cases where the Supply has been disconnected from the ProjectCo's premises at the request of the Customer or in consequence of any default or breach of the Conditions set out in this Second Schedule by the ProjectCo, the ProjectCo (or, in the case of a transfer of the supply, the new applicant) shall pay to the Authority a reconnection fee.

### THIRD SCHEDULE TARIFFS APPLICABLE TO PRIVATE GENERATORS OR SUPPLIERS

#### 1 Private Generation Charges

This Tariff is effective from 1 April 2000 or, in the case of a customer already taking a supply, from the first normal meter reading on or after 1 April 2000.

This tariff is available for the Supply provided by the Authority where private generation is installed to cater for part of the electricity requirements of the premises.

Accounts will be rendered monthly.

#### 2 Capital Costs

Any costs incurred by the Authority for the provision of additional metering, protection, or for the supply and/or export of electricity, as a result of the private generation installation will be payable by the ProjectCo as a capital sum.

#### 3 Charges for the Supply to the ProjectCo

##### 3.1 Standing Charge

	<b>High Voltage</b>
For each month	£90.00

##### 3.2 Availability Charge

An Availability Charge, payable each month, irrespective of the amount of electricity used by the ProjectCo, will be determined by the Chargeable Capacity of the Supply.

£1.25 per month for each kVA of Chargeable Capacity, subject to a minimum of 20kVA.

##### 3.3 Demand Charge

A Demand Charge, payable each month, for each kVA of maximum demand recorded in that month

£1.15 April/Oct

£3.00 Nov/Mar

##### 3.4 Unit Charge

~~For~~<sup>147</sup>The Unit charge payable for each Unit supplied to the ProjectCo by the Authority  
~~–7.24~~shall be 6.5p

### 3.5 Fuel Cost Adjustment

The Unit charge for each month is subject to a fuel cost adjustment.

### 3.6 Direct Debit Discount

A discount equivalent to £6.60 + VAT a year will be allowed to customers paying their electricity account by monthly instalments using Direct Debit and a discount equivalent to £3.60 + VAT a year to customers paying their account bi-monthly by Direct Debit.

### 3.7 Government Rebate

A rebate is available to all customers automatically for the time being and amounts to 11.51p per day for each day the supply is connected.

### 3.8 VAT

Value Added Tax will be added at the rate(s) prevailing from time to time.

## 4 Charges by the Authority

These charges are applicable to each point at which the ProjectCo wishes to sell electricity to the Authority, and cover the Authority's costs in making available the system to accept the exports from the ProjectCo together with other related costs.

### 4.1 Fixed Charge

A Fixed charge, payable each month, in addition to the appropriate Standing Charge for Electricity Supplies (see 3.1).in the amount of<sup>148</sup>

**High  
Voltage**

<sup>147</sup> Amendment made in executed Electricity Agreement dated 30 April 2001

<sup>148</sup> Amendment made in executed Electricity Agreement dated 30 April 2001



For each month £50.00

#### 4.2 Export Capacity Charge

A charge, payable each month, for each kVA of Export Supply in excess of the level of Chargeable Capacity, if any, currently applying at the ProjectCo's premises (see 3.2).

For each kVA the charge per month is £1.25

#### 5 Prompt Settlement Discounts

All the above charges are subject to a prompt settlement discount provided the total amount due is paid on or before the discount date shown on the account form.

#### 6 Payments for Electricity

Where the Authority purchases electricity from the ProjectCo the following payments will be made for the Units supplied.

##### 6.1 Unit Charge

For each Unit supplied by ProjectCo to the Authority, the Authority shall pay the base Unit generating cost ~~["generating cost" to be defined by the MEA]~~<sup>149</sup>, reviewed annually and determined from the previous financial year's audited accounts and applied for the duration of the following financial year but such Unit generating cost shall be no less than 0.285p per Unit. Value Added Tax to be applied at the appropriate rate(s) prevailing from time to time.

<sup>149</sup> [Deletion of ""generating cost" to be defined by the MEA" is an amendment made in executed Electricity Agreement dated 30 April 2001](#)

<sup>150</sup>For the purposes of this paragraph, the Unit "generating cost" shall be the marginal generating costs or marginal Unit cost, which is the 'base Unit generating cost' of producing one Unit of electricity. Its components are the cost of fuel, lube oil and engine running expenses incurred in the generation of one Unit of electricity.

<sup>151</sup>The definition of the "base Unit generating cost" incorporates the import of electricity via the submarine interconnector cable as well as the electricity generated from diesel engines. The definition will change further with the inception of generation by gas and other generation options that may come along. The calculation of the 'base Unit generating cost' is done by the following equation.

$$\text{MEA Marginal Unit Cost} = \frac{\text{£x} + \text{£y}}{\text{Z}}$$

Where:

£x = the total annual Unit generated production for IOM use (excluding exported energy)

£y = the overall annual cost of procurement of imported supplies from other sources

Z = the annual overall number of Units generated and procured by MEA for IOM use (excluding Units generated for export).

<sup>150</sup> Amendment made in executed Electricity Agreement dated 30 April 2001

<sup>151</sup> Amendment made in executed Electricity Agreement dated 30 April 2001

#### FOURTH SCHEDULE PERFORMANCE TESTS

<sup>152</sup>The parties agree to develop the Performance Tests by mutual agreement by reference to the results of the study referred to in the Fifth Schedule by the date six months before the Time for Completion, as defined by the Project Agreement.

<sup>153</sup>

~~*[To be provided by the MEA]*~~

<sup>152</sup> Amendment made in executed Electricity Agreement dated 30 April 2001

<sup>153</sup> Deletion of the words "To be provided by the MEA" is an amendment made in executed Electricity Agreement dated 30 April 2001

## FIFTH SCHEDULE TECHNICAL STANDARDS

<sup>154</sup>The Authority has appointed Mott MacDonald to commission a study of the specific technical construction standards required to ensure that the Plant functions safely and efficiently within the context of the Authority's electricity transmission, distribution and supply system. The study is derived from the engineering recommendations of the Electricity Association published under reference numbers G59/1, G75 and G77 and any relevant ancillary documents. The reasonable requirements of that study are deemed to be incorporated into this Schedule 5. The Study is entitled IOM Incinerator Connection Studies – second issue – 18<sup>th</sup> April 2001.

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~~[To be provided by the MEA]~~

<sup>154</sup> Amendment made in executed Electricity Agreement dated 30 April 2001

<sup>155</sup> Deletion of the words "to be provided by the MEA" is an amendment made in executed Electricity Agreement dated 30 April 2001

<sup>156</sup>**SIXTH SCHEDULE**  
**SINGLE LINE DRAWING**

1. [Kvaerner \(48567-00-EL00-ED001, Rev P4 : Proposals for 11kV cable, metering & protection – provisional outline of ownership, operation and maintenance responsibilities.](#)
2. [Kvaerner C48567-00-EL00-ED002, Rev P1 : Proposals for 11kV cable, metering & protection – provisional outline of installation responsibilities.](#)

<sup>156</sup> [Amendment made in executed Electricity Agreement dated 30 April 2001](#)

<sup>157</sup>IN WITNESS WHEREOF the parties hereto have hereunto subscribed their names this day month and year first before written

**EXECUTED** and **DELIVERED** by the

Authority in the presence of:

Date:

**EXECUTED** and **DELIVERED** by

ProjectCo in the presence of:

Date:

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<sup>157</sup> Amendment made in executed Electricity Agreement dated 30 April 2001

**SCHEDULE 7**  
**THE DEPARTMENT'S REQUIREMENTS**

***The Department's Requirements are contained in a separate schedule (comprising two volumes) to this Agreement identified as such by the hand of the signatories hereto.***

## SCHEDULE 8 PROJECTCO'S PROPOSAL

*ProjectCo's Proposal is contained in a separate schedule (comprising ~~six volumes~~ to this Agreement identified as such by the hand of the signatories hereto: ~~five~~<sup>158</sup> volumes) to this Agreement identified as such by the hand of the signatories hereto.*

Changes made to ProjectCo's Proposal by the DoFV 2 are as follows:

### VARIATION ORDER NO. 15 – Determination of Site Boundaries<sup>159</sup>

#### 1 Landscaping

1.1 ProjectCO shall amend the landscaping proposals in Schedule 8 to the Project Agreement to reflect the site boundary as determined.

#### 2 Areas of Responsibility

For the avoidance of doubt, the Parties have clarified the following areas of responsibility around the Site:

##### 2.1 Western Boundary

- (i) The area inside the permanent western fence is ProjectCo's responsibility;
- (ii) The area outside the permanent western fence is the Department's responsibility, subject to the remaining provisions of Clause 2.1 below;
- (iii) ProjectCo is responsible for completion of the embankment according to specifications (including but not limited to top soiling and excluding soft landscaping);
- (iv) ProjectCo is responsible for external connections, for example to the river; and
- (v) At the emergency entrance where the fence has stopped, the boundary shall be the western kerb of the entrance up to where this meets the DOT A6 road, from which point the boundary becomes the northern boundary.

<sup>158</sup> Manuscript amendment in executed PA

<sup>159</sup> This variation is made by Variation Order 15 of DoFV 2, Appendix 12. Compensation shall be made to the Department in respect of this variation (see footnote for Stage Payment 11 in Schedule 1, clause 1.3.). This variation has effect from 11 August 2004. The Availability Fee, Operating Costs, Programme described in clauses 3.22-3.24 of the Project Agreement and the reference in the D&B Performance Bond to the D&B Contract Price shall not be affected by this Variation.



**2.2 Northern Boundary**

- (i) All areas (including those outside the permanent fence) up to the boundary (which is at the kerb of the road) are the responsibility of ProjectCo.

**2.3 Southern Boundary**

- (i) The permanent fence runs along the boundary line and is the southern limit of ProjectCo's responsibility.

**2.4 Eastern Boundary**

- (i) All areas (including those outside the permanent fence) up to the eastern boundary of the Site are the responsibility of ProjectCo.

**VARIATION ORDER NO.11 – Sewage Screenings added as Primary Waste**

- 1.** The Parties agree to add to paragraph 1.2.2.1 ('Feedstream Composition') of Annex 1 to Schedule 8 of this Agreement, under 'Primary Stream Waste':<sup>160</sup>

**"(iii) Sewage Sludge Screenings**

Sewage sludge screening will be delivered to the facility in colour coded wheelie bins with a unique bar code.

The volume of screenings will be 1.15m<sup>3</sup>/ day on average, with a maximum of 5.75m<sup>3</sup>/day during storms. The screening will be 40% w/w solids.

<u>Carbon</u>	<u>25% w/w</u>
<u>Hydrogen</u>	<u>4% w/w</u>
<u>Oxygen</u>	<u>22% w/w</u>
<u>Nitrogen</u>	<u>0.3% w/w</u>
<u>Cl</u>	<u>0.5% w/w</u>
<u>Ash</u>	<u>6.0% w/w</u>
<u>Water</u>	<u>60% w/w</u>
<u>CV</u>	<u>10.0 MJ/kg" "</u>

**VARIATION ORDER NUMBER 12 – Dioxin Monitoring**

<sup>160</sup> DofV 2, Appendix 9

- 1 The proposal for a Dioxin Monitoring System pursuant to Variation Order 12 (Appendix 10 of DofV2) shall be considered as an addendum to ProjectCo's Proposal.

**VARIATION ORDER NUMBER 13 – Waste Oil Recovery**<sup>161</sup>

- 1 Section 2 ('Descriptions') of Memorandum No. 2.2.2 of Document 4 of Annex 4 is amended as follows<sup>162</sup>.

In the fourth paragraph:

Delete from "Mineral oil" to "2250 litres" and substitute the following:

"Mineral oil will be received in containers as described in SITA's email 'SITA.KV346.email' of 16 September 2002 or of materially identical specification."; and

In the third sentence, replace "waste oil" in the first occurrence with "mineral oil".

After the fourth paragraph insert the following:

"Delivery of vegetable oil will take place in Wheelie Bins with the vegetable oil mixed with animal waste."

**VARIATION ORDER NO.8 Escalation of Manning Rates**

1. The project manning rates (as listed in Annex 4 of ProjectCo's Proposals) ("Manning Rates") shall be escalated in the following manner<sup>163</sup>.
- 1.1 Manning Rates valid for the calendar year 2001 shall be those in Annex 4 adjusted to follow the development of the DETR Labour Index (as defined in the Project Agreement) from June 2000 to December 2000.
- 1.2 Manning Rates for each calendar year from 2002 onwards shall be those in Annex 4 to ProjectCo's Proposals adjusted to follow the development of the DETR Labour Index (as defined in this Agreement) for the calendar year 2001.
- 1.3 This Variation shall take effect from and including 3 December 2001.

<sup>161</sup> This variation is set out in Appendix 11, clause 1 of the Deed of Variation No. 2 dated 1 October 2014. It has effect from and including 30 September 2013. The D&B Contract price, Availability Fee, Operating Costs or the Programme described in clauses 3.22-3.24 of the Project Agreement shall not be affected by this variation.

<sup>162</sup> DofV 2, Appendix 11. This variation has effect from and including 30 September 2003

<sup>163</sup> DofV 2, Appendix 7

**SCHEDULE 9**  
**COLLATERAL WARRANTIES**  
**PART 1 - D & B CONTRACTOR'S WARRANTY**



**DATED 2000**

**KVAERNER ENGINEERING &  
CONSTRUCTION UK LIMITED (1)**

**164 DEPARTMENT ~~FUND/PURCHASER/OPERATOR~~ OF LOCAL GOVERNMENT  
AND THE ENVIRONMENT (2)**

**- and -**

**UNITED WASTE (ISLE OF MAN) LIMITED (3)**

**D & B CONTRACTOR'S WARRANTY**  
**FOR THE ISLE OF MAN INTEGRATED INCINERATION FACILITY**

**BEVAN  
ASHFORD  
SOLICITORS**

**35 Colston Avenue, Bristol BS1 4TT  
TEL: 0117 923 0111 FAX: 0117 929 1865  
DX: 7828 Bristol**

**24 October 2000**

<sup>164</sup> [Amendment made in executed Collateral Warranty dated 27 October 2000](#)

THIS DEED AGREEMENT is made the  
2000

<sup>165</sup>27th day of October

**BETWEEN:-**

- (1) **KVAERNER ENGINEERING & CONSTRUCTION UK LIMITED** (Registered number 70860) whose registered office is situated at Ashmore House, Stockton on Tees, TS18 3RE ("the Contractor")
- (2) **DEPARTMENT OF LOCAL GOVERNMENT AND THE ENVIRONMENT** a Department of the Isle of Man Government of ~~[<sup>166</sup>(the "Department") [~~"the Fund"~~] [~~"the Purchaser"~~] [~~"the Operator"~~]]]~~
- (3) **UNITED WASTE (ISLE OF MAN) LIMITED** being a company incorporated under the Companies Act of the Isle of Man and having its registered office situate at 15-19 Athol Street, Douglas, Isle of Man, IM1 1LB ("the Employer")

**WHEREAS:-**

~~(A)~~ ~~(A)~~ <sup>167</sup>The ~~Department has appointed the Employer to undertake design, construction, commissioning, operation, maintenance and handback~~ Employer has appointed the Contractor as the contractor to undertake the design manufacture delivery erection testing and completion of <sup>168</sup>an integrated incineration facility at Richmond Hill, Braddan, Isle of Man (~~"the Facility"~~) pursuant to an agreement dated <sup>169</sup>27th October 2000 ("the Contract") ~~pursuant to a Project Agreement dated [ ]~~

~~(B)~~ ~~The Employer has appointed the Contractor as the contractor to undertake the design manufacture delivery erection testing and completion of the Facility pursuant to an agreement dated [ ] ("the Contract")~~

~~(C)~~ ~~[<sup>170</sup>"The Fund is providing" is the person who may hereafter provide finance for the Facility] [~~The Department has agreed to sell its interest in the Facility to the Purchaser~~] [~~the Operator has agreed to operate [part of] the Facility~~]~~

~~(C)~~ ~~(D)~~ The Contractor has agreed with the Employer to enter into this Agreement

<sup>165</sup> Amendment made in executed Collateral Warranty dated 27 October 2000

<sup>166</sup> Amendment made in executed Collateral Warranty dated 27 October 2000

<sup>167</sup> Amendment made in executed Collateral Warranty dated 27 October 2000

<sup>168</sup> Amendment made in executed Collateral Warranty dated 27 October 2000

<sup>169</sup> Amendment made in executed Collateral Warranty dated 27 October 2000

<sup>170</sup> Amendment made in executed Collateral Warranty dated 27 October 2000

**NOW THIS DEED WITNESSETH** as follows:-

## **1 WARRANTY - BUILDING CONTRACT**

The Contractor on behalf of itself and its subcontractors :-

- 1.1 expressly grants to the <sup>[171]</sup>~~Department/Fund/Purchaser/Operator~~ the same warranties (whether express or implied) and the benefit of the same contractual terms which it owes or may owe either now or (but so that the Contractor's liability to the <sup>[172]</sup>~~Department/Fund/Purchaser/Operator~~ shall not be lessened by any variation or waiver to the Contract) in the future to the Employer contained in the Contract as if the <sup>[173]</sup>~~Department/Fund/Purchaser/Operator~~ was a signatory thereto in place of the Employer; (but for the avoidance of doubt without the <sup>[174]</sup>~~Department/Fund/Purchaser/Operator~~ being liable in any respect to the Contractor); and
- 1.2 (without limiting the generality of Clause 1.1 above) covenants with the <sup>[175]</sup>~~Department/Fund/Purchaser/Operator~~ that it has exercised and will continue to exercise all the reasonable skill and care to be expected of a contractor experienced in work of similar size and complexity to that comprised in the Facility and all reasonable skill and care in the performance of its duties under the Contract and that it shall owe a duty of care to the <sup>[176]</sup>~~Department/Fund/Purchaser/Operator~~ in respect of the performance of such duties; and
- 1.3 covenants with the <sup>[177]</sup>~~Department/Fund/Purchaser/Operator~~ that it will carry out and complete the Facility in a good and workmanlike manner using suitable goods, plant and materials and in accordance with the Contract and duly observe and perform all its duties and obligations thereunder and that the Facility will be fit for purpose within the limits described in the Contract provided always that the Contractor's liabilities to the <sup>[178]</sup>~~Department/Fund/Purchaser/Operator~~ shall not be lessened by any variation or waiver to the Contract.

## **2 WARRANTY - DESIGN**

Without derogating from the generality of Clause 1 the Contractor covenants with the <sup>[179]</sup>~~Department/Fund/Purchaser/Operator~~ on behalf of itself and its subcontractors that it has exercised and will exercise all proper skill and care in:-

<sup>171</sup> [Amendment made in executed Collateral Warranty dated 27 October 2000](#)  
<sup>172</sup> [Amendment made in executed Collateral Warranty dated 27 October 2000](#)  
<sup>173</sup> [Amendment made in executed Collateral Warranty dated 27 October 2000](#)  
<sup>174</sup> [Amendment made in executed Collateral Warranty dated 27 October 2000](#)  
<sup>175</sup> [Amendment made in executed Collateral Warranty dated 27 October 2000](#)  
<sup>176</sup> [Amendment made in executed Collateral Warranty dated 27 October 2000](#)  
<sup>177</sup> [Amendment made in executed Collateral Warranty dated 27 October 2000](#)  
<sup>178</sup> [Amendment made in executed Collateral Warranty dated 27 October 2000](#)  
<sup>179</sup> [Amendment made in executed Collateral Warranty dated 27 October 2000](#)

- 2.1 the design of the Facility (or any part) insofar as the Facility (or any part) has been or will be designed by the Contractor or its subcontractors; and
- 2.2 the selection of materials and goods for the Facility insofar as such materials and goods have been and/or will be selected by the Contractor or its subcontractors; and
- 2.3 the satisfaction of any performance specification or requirement insofar as such performance specification or requirement is included as a Contract document or in any instruction or variation under the Contract.

### 3 STEP IN RIGHTS IN FAVOUR OF THE DEPARTMENT/FUND

- 3.1 The Contractor will not exercise or seek to exercise any right of determination which may be or becomes available to it as a result of any default by the Employer under the terms of the Contract without first giving to the <sup>180</sup>~~Department/Fund~~ not less than 21 days prior written notice of the Contractor's intention to so determine specifying its grounds for the proposed determination and notwithstanding any provision of the Contract (unless determined by the Employer) the Contract shall not otherwise determine.
- 3.2 If within the said period of 21 days from the service of such notice (exclusive of the date of service) <sup>181</sup>~~Department/Fund~~ or any receiver appointed by the <sup>182</sup>~~Department/Fund~~ shall give written notice to the Contractor requiring the Contractor to continue its obligations under the Contract or otherwise in connection with the Facility the Contract shall continue in full force and effect as if no right of termination on the part of the Contractor had arisen.
- 3.3 As between the <sup>183</sup>~~Department/Fund~~ and the Contractor the <sup>184</sup>~~Department/Fund~~ or any receiver appointed by <sup>185</sup>~~Department/the Fund~~ shall be entitled at any time by written notice to the Contractor to be treated by the Contractor as the employing party under the Contract whereupon all rights and obligations of the Employer under the relevant Contract shall thereafter be exercisable and performed by the <sup>186</sup>~~Department/Fund~~ (or its receiver as applicable) to the exclusion of all others. The Employer acknowledges that the Contractor shall be entitled to rely on a notice given to the Contractor by the <sup>187</sup>~~Department/Fund~~ or its receiver under this Clause as conclusive evidence for the purposes of this Deed of the <sup>188</sup>~~Department/Fund's~~ or its receiver's entitlement to take over the Employer's said rights and obligations.
- 3.4 The rights granted by Clauses 3.2 and 3.3 hereof shall be of no effect if at the time written notice pursuant to either Clause is given to the Contractor the Contractor is

<sup>180</sup> [Amendment made in executed Collateral Warranty dated 27 October 2000](#)

<sup>181</sup> [Amendment made in executed Collateral Warranty dated 27 October 2000](#)

<sup>182</sup> [Amendment made in executed Collateral Warranty dated 27 October 2000](#)

<sup>183</sup> [Amendment made in executed Collateral Warranty dated 27 October 2000](#)

<sup>184</sup> [Amendment made in executed Collateral Warranty dated 27 October 2000](#)

<sup>185</sup> [Amendment made in executed Collateral Warranty dated 27 October 2000](#)

<sup>186</sup> [Amendment made in executed Collateral Warranty dated 27 October 2000](#)

<sup>187</sup> [Amendment made in executed Collateral Warranty dated 27 October 2000](#)

<sup>188</sup> [Amendment made in executed Collateral Warranty dated 27 October 2000](#)

already the recipient of a valid notice in writing from another party entitled to the benefit of a step-in right relating to the Contract. If two or more valid notices are received simultaneously the deemed order or priority shall be Fund before ~~[<sup>189</sup>Department]~~. Only the notice deemed to have first priority shall take effect and no other relevant notice will bind the Contractor.

**3.5** Following the issue of either of such written notices specified in Clauses 3.2 or 3.3 hereof by the ~~[<sup>190</sup>Department/Fund]~~ or any such receiver (but not otherwise):

**3.5.1** all sums outstanding and also which thereafter become due to the Contractor under the Contract and not discharged by the Employer shall be paid by the ~~[<sup>191</sup>Department/Fund]~~; and

**3.5.2** the Contractor (to the exclusion of the Employer) shall thereafter only accept the instructions of the ~~[<sup>192</sup>Department/Fund]~~ or its receiver as if the Fund had been originally named in the Contract as a party thereto in place of the Employer.

## **4 DELETERIOUS MATERIALS**

The Contractor hereby warrants that it will not specify or use and will use all skill care and diligence to ensure that others do not specify or use in the construction of the Works materials which are generally known at the time of use to be deleterious to health and safety or to durability in the particular circumstances in which they are used.

## **5 DOCUMENTS**

The Contractor will provide to the ~~[<sup>193</sup>Department/Fund/Purchaser/Operator]~~ on reasonable demand without payment copies of any plans drawings specifications calculations valuations and any other documents including computer software prepared by the Contractor in connection with the Facility.

## **6 COPYRIGHT**

To the extent that copyright in all plans drawings specifications and any other drawings including computer software prepared by the Contractor in connection with the Facility remains vested in the Contractor the Contractor acknowledges and agrees that it hereby grants to the ~~[<sup>194</sup>Department/Fund/Purchaser/Operator]~~ an irrevocable non-exclusive royalty-free licence (which shall be assignable) to use such documents (whether in existence or to be made) for all purposes relating to the Facility.

<sup>189</sup> [Amendment made in executed Collateral Warranty dated 27 October 2000](#)

<sup>190</sup> [Amendment made in executed Collateral Warranty dated 27 October 2000](#)

<sup>191</sup> [Amendment made in executed Collateral Warranty dated 27 October 2000](#)

<sup>192</sup> [Amendment made in executed Collateral Warranty dated 27 October 2000](#)

<sup>193</sup> [Amendment made in executed Collateral Warranty dated 27 October 2000](#)

<sup>194</sup> [Amendment made in executed Collateral Warranty dated 27 October 2000](#)

## 7 INSURANCE

- 7.1 The Contractor shall maintain professional indemnity insurance extending to his obligations under this Deed for a minimum cover of £10,000,000 ~~—in respect of each and every claim<sup>195</sup>~~in the aggregate annually and in the aggregate annually and such cover shall be maintained during the Contract and for a period of 12 years from the issue of the Final Payment Certificate as defined under the Contract so long as such insurance cover remains available at commercially reasonable rates.
- 7.2 The Contractor shall immediately upon execution of this Deed and at each renewal date produce upon request for inspection by the ~~[<sup>196</sup>Department/Fund/Purchaser/Operator]~~ evidence that the said policy is in force and of the extent of its cover together with a receipt for the last premium paid for the renewal of such policy and showing that such policy is in force. If the Contractor at any time fails to provide such evidence the ~~[<sup>197</sup>Department/Fund/Purchaser/Operator]~~ may insure as the Contractor's agent and the Contractor shall forthwith pay to the ~~[<sup>198</sup>Department/Fund/Purchaser/Operator]~~ sums expended in this way.
- 7.3 The Contractor shall inform the ~~[<sup>199</sup>Department/Fund/Purchaser/Operator]~~ or its assignees in writing immediately if such professional indemnity insurance ceases to be made available at commercially reasonable rates.
- 7.4 Any increased or additional premiums required by insurers by reason of the Contractor's own claims records or other acts or omissions particular to the Contractor shall be deemed to be within commercially reasonable rates.

## 8 OTHER REMEDIES

The provisions of this Deed shall be without prejudice to any other rights and remedies which the ~~[<sup>200</sup>Department/Fund/Purchaser/Operator]~~ may have against the Contractor whether in tort or otherwise and shall not be deemed or construed so as to exclude or limit any such rights and remedies.

## 9 ASSIGNMENT

The ~~[<sup>201</sup>Department/Fund/Purchaser/Operator]~~ will (at any time whether now or in the future) be entitled to assign the benefit of this Deed and the rights and remedies available to it to any third party in whom all or some of the functions of the Department relating to the collection and disposal of Conforming Waste are or are to become vested pursuant to the exercise of powers of Tynwald and/or any Government Department to any person acquiring an interest in

<sup>195</sup> [Amendment made in executed Collateral Warranty dated 27 October 2000](#)

<sup>196</sup> [Amendment made in executed Collateral Warranty dated 27 October 2000](#)

<sup>197</sup> [Amendment made in executed Collateral Warranty dated 27 October 2000](#)

<sup>198</sup> [Amendment made in executed Collateral Warranty dated 27 October 2000](#)

<sup>199</sup> [Amendment made in executed Collateral Warranty dated 27 October 2000](#)

<sup>200</sup> [Amendment made in executed Collateral Warranty dated 27 October 2000](#)

<sup>201</sup> [Amendment made in executed Collateral Warranty dated 27 October 2000](#)



the Facility and the Contractor shall do all such things as may be necessary to effect such an assignment.

## 10 SUCCESSORS

Reference to the <sup>202</sup>~~Department/Fund/Purchaser/Operator~~ shall include the person or persons for the time being entitled to the benefit of this Deed and shall include the parties' successors in title.

## 11 JURISDICTION

The laws applicable to this Deed shall be Isle of Man Law and the Isle of Man Court shall have non-exclusive jurisdiction with regard to all matters arising in connection with or under this Deed.

## 12 INDEPENDENT ENQUIRY

The liability of the Contractor under this Deed shall not be modified released, diminished or in any way affected by any independent inspection investigation or enquiry into any relevant matter which may be made or carried out by or for the <sup>2</sup>~~Department/Fund/Purchaser/Operator~~ nor by any failure or omission to carry out any such inspection, investigation or enquiry nor by the appointment by the <sup>2</sup>~~Department/Fund/Purchaser/Operator~~ of any independent firm, company, or party whatsoever to review the progress of or otherwise report to the <sup>2</sup>~~Department/Fund/Purchaser/Operator~~ in respect of the Works nor by any action or omission of any such firm, company or party whether or not such action or omission might give rise to any independent liability of such firm, company or party to the <sup>2</sup>~~Department/Fund/Purchaser/Operator~~ provided always that nothing in this Clause shall modify or affect any rights which the Contractor might have but for the existence of this Clause to claim contribution from any third party whether under statute or at common law.

## 13 WORKS OBLIGATIONS

Notwithstanding the issue of the Final Taking Over Certificate (as defined in the Contract) and without prejudice to the rights and obligations under this Deed (whether express or implied) the Contractor shall remain liable for making good with all possible speed any latent defects which appear in respect of the Plant (to the extent that the Contractor has such an obligation under the Contract and as defined in the Contract) (which for the avoidance of doubt excludes the building fabric, foundations and associated infrastructure comprised in the Facility, (as defined in the Contract) and remainder of the Facility) at any time before the second and sixth anniversaries of Final Take Over (as defined in the Contract) respectively and shall forthwith

<sup>202</sup> [Amendment made in executed Collateral Warranty dated 27 October 2000](#)

<sup>203</sup> [Amendment made in executed Collateral Warranty dated 27 October 2000](#)

<sup>204</sup> [Amendment made in executed Collateral Warranty dated 27 October 2000](#)

<sup>205</sup> [Amendment made in executed Collateral Warranty dated 27 October 2000](#)

<sup>206</sup> [Amendment made in executed Collateral Warranty dated 27 October 2000](#)

at the request of the <sup>[207]</sup>~~Department/Fund/Purchaser/Operator~~ remedy such latent defect promptly at its own cost.

## 14 LIMITATION

The Contractor's liability to the <sup>[208]</sup>~~Department/Fund/Purchaser/Operator~~ under this Deed shall be no greater nor longer lasting than the liability which the Contractor would have had under the Contract if the <sup>[209]</sup>~~Department/Fund/Purchaser/Operator~~ had been named as the "Employer" in the Contract in place of the Employer.

## 15 DEFINED TERMS

Words defined in the Project Agreement shall have the same meaning where used as defined terms in this Deed except where expressly stated otherwise.

<sup>207</sup> [Amendment made in executed Collateral Warranty dated 27 October 2000](#)

<sup>208</sup> [Amendment made in executed Collateral Warranty dated 27 October 2000](#)

<sup>209</sup> [Amendment made in executed Collateral Warranty dated 27 October 2000](#)

**EXECUTED** as a Deed by the Contractor, the Employer and the Department the day and year first before written.

**EXECUTED** as a Deed by the Contractor, acting by:

Director

---

Director/Secretary

---

**EXECUTED** as a Deed by the Employer, acting by:

Director

---

Director/Secretary

---

**EXECUTED** by the Department under the hand  
of the Minister for the Department of  
Local Government and the Environment  
in the presence of:

Witness

Name

Address

**SCHEDULE 9**  
**COLLATERAL WARRANTIES**  
**PART 2 - D & B SUBCONTRACTOR'S WARRANTY**



**DATED**

**2000**

**KVAERNER ENGINEERING & CONSTRUCTION**  
**UK LIMITED (1)**

**[D & B SUBCONTRACTOR] (2)**

**[THE FUND/DEPARTMENT/THE OPERATOR/THE PURCHASER] (3)**

**- and -**

**UNITED WASTE (ISLE OF MAN) LIMITED (4)**

**SUBCONTRACTOR'S WARRANTY**  
**FOR THE ISLE OF MAN INTEGRATED INCINERATION FACILITY**

**BEVAN**  
**ASHFORD**  
**SOLICITORS**

**35 Colston Avenue, Bristol BS1 4TT**  
**TEL: 0117 923 0111 FAX: 0117 929 1865**  
**DX: 7828 Bristol**

**24 October 2000**

THIS DEED is made the 14 day of 2000 November 2001<sup>2</sup>

<sup>10</sup>

# **BETWEEN:-**

- (1) **KVAERNER ENGINEERING & CONSTRUCTION LIMITED** (Registered in England and Wales number 70860) whose registered office is at Ashmore House, Stockton on Tees, TS18 3RE ("the Contractor")
- (2) ~~ID & B SUBCONTRACTOR (INCLUDES PROFESSIONAL TEAM)~~<sup>2</sup>  
<sup>11</sup>TECHTROL LIMITED (Registered in England and Wales No ~~[ ]~~ of ~~[ ]~~  
<sup>212</sup>1950671 of <sup>213</sup>Gregson  
Road, Stockport, Cheshire, England, SK5 7SS ("the Subcontractor")
- (3) **DEPARTMENT OF LOCAL GOVERNMENT AND THE ENVIRONMENT** a Department of the Isle of Man Government of ["Department"] ["the Fund"] ["the Purchaser"] ["the Operator"] ("the Department")
- (4) **UNITED WASTE (ISLE OF MAN) LIMITED** being a company incorporated under the Companies Acts of the Isle of Man and having its registered office situate at 15-19 Athol Street, Douglas, Isle of Man, IM1 1LB ("the Employer")

# **WHEREAS:-**

- (A) By an agreement dated ~~[ ]~~ <sup>214</sup>27<sup>th</sup> October 2000 ("the Project Agreement") the Department has appointed the Employer to undertake design, construction, commissioning, operation, maintenance and handback of an integrated incineration facility at Richmond Hill, Braddan, Isle of Man ("the Facility")
- (B) The Employer has appointed the Contractor to undertake the design, manufacture, delivery, erection, testing and completion of the Facility.
- (C) The Contractor has appointed the Subcontractor to undertake certain works and/or design services ("the <sup>215</sup>Sub-Contract Works") pursuant to a <sup>216</sup>sub-contract <sup>217</sup>reference P001/C48567 dated ~~[ ]~~ ~~(<sup>218</sup>6<sup>th</sup> September 2001~~ ("the <sup>219</sup>Sub-Contract") ~~brief details of which include [ ]~~

<sup>210</sup> Amendment made in executed sub-contractor Collateral Warranty dated 14 November 2001.

<sup>211</sup> Amendment made in executed sub-contractor Collateral Warranty dated 14 November 2001

<sup>212</sup> Amendment made in executed sub-contractor Collateral Warranty dated 14 November 2001

<sup>213</sup> Amendment made in executed sub-contractor Collateral Warranty dated 14 November 2001

<sup>214</sup> Amendment made in executed sub-contractor Collateral Warranty dated 14 November 2001

<sup>215</sup> Amendment made in executed sub-contractor Collateral Warranty dated 14 November 2001

<sup>216</sup> Amendment made in executed sub-contractor Collateral Warranty dated 14 November 2001

<sup>217</sup> Amendment made in executed sub-contractor Collateral Warranty dated 14 November 2001

<sup>218</sup> Amendment made in executed sub-contractor Collateral Warranty dated 14 November 2001

<sup>219</sup> Amendment made in executed sub-contractor Collateral Warranty dated 14 November 2001

(D) ~~[The Fund is providing finance for the Facility] [The Department has agreed to transfer its interest in the Facility to the Purchaser] [The Operator has agreed to operate [part of] the Facility].~~

220

NOW THIS DEED WITNESSETH as follows:-

## 1 WARRANTY - BUILDING SUBCONTRACT

The Subcontractor on behalf of itself and its subcontractors:-

- 1.1 expressly extends to the ~~[<sup>221</sup>Department/Fund/Operator/Purchaser]~~ (which expression throughout shall extend to any receiver appointed and persons acquiring an interest in the Facility) the benefit of all conditions and warranties (whether express or implied) on its part which it owes or may owe either now or in the future to the Contractor contained in the <sup>222</sup>Sub-Contract as if the ~~[<sup>223</sup>Department/Fund/Operator/Purchaser]~~ was a signatory thereto in place of the Contractor; and
- 1.2 (without limiting the generality of Clause 1.1 above) covenants with the ~~[<sup>2</sup><sup>24</sup>Department/Fund/Operator/Purchaser]~~ that it has exercised and will continue to exercise all reasonable and proper skill and care to be expected of a <sup>225</sup>Sub-contractor experienced in work of similar size and complexity to that comprised in the <sup>226</sup>Sub-Contract Works and all proper and reasonable skill and care in the performance of its duties under the <sup>227</sup>Sub-Contract and that it shall owe a duty of care to the ~~[<sup>2</sup><sup>28</sup>Department/Fund/Operator/Purchaser]~~ in respect of the performance of such duties; and
- 1.3 covenants with the ~~[<sup>229</sup>Department/Fund/Operator/Purchaser]~~ that it will carry out and complete the <sup>230</sup>Sub-Contract Works in a ~~good~~<sup>231</sup>professional and workmanlike manner using suitable goods plant and materials and in accordance with the <sup>232</sup>Sub-Contract and duly observe and perform all its duties and obligations thereunder and that the Works will when complete be fit for purpose within the limits described in the <sup>233</sup>Sub-Contract.

## 2 WARRANTY - DESIGN

- <sup>220</sup> Amendment made in executed sub-contractor Collateral Warranty dated 14 November 2001
- <sup>221</sup> Amendment made in executed sub-contractor Collateral Warranty dated 14 November 2001
- <sup>222</sup> Amendment made in executed sub-contractor Collateral Warranty dated 14 November 2001
- <sup>223</sup> Amendment made in executed sub-contractor Collateral Warranty dated 14 November 2001
- <sup>224</sup> Amendment made in executed sub-contractor Collateral Warranty dated 14 November 2001
- <sup>225</sup> Amendment made in executed sub-contractor Collateral Warranty dated 14 November 2001
- <sup>226</sup> Amendment made in executed sub-contractor Collateral Warranty dated 14 November 2001
- <sup>227</sup> Amendment made in executed sub-contractor Collateral Warranty dated 14 November 2001
- <sup>228</sup> Amendment made in executed sub-contractor Collateral Warranty dated 14 November 2001
- <sup>229</sup> Amendment made in executed sub-contractor Collateral Warranty dated 14 November 2001
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- <sup>231</sup> Amendment made in executed sub-contractor Collateral Warranty dated 14 November 2001
- <sup>232</sup> Amendment made in executed sub-contractor Collateral Warranty dated 14 November 2001
- <sup>233</sup> Amendment made in executed sub-contractor Collateral Warranty dated 14 November 2001

Without derogating from the generality of Clause 1 the Subcontractor covenants with the ~~[Department/Fund/Operator/Purchaser]~~<sup>234</sup> that he has exercised and will exercise all proper skill and care in:

- 2.1 the design of the Works insofar as the Works have been or will be designed by the Subcontractor or its <sup>235</sup>sub-subcontractors; and
- 2.2 the selection of materials and goods for the <sup>236</sup>Sub-Contract Works insofar as such materials and goods have been and will be selected by the Subcontractor or its <sup>2</sup>sub-subcontractors; and
- 2.3 the satisfaction of any performance specification or requirement insofar as such performance specification or requirement is included as a <sup>238</sup>Sub-Contract document or in any instruction or variation under the <sup>239</sup>Sub-Contract; and
- 2.4 the construction of the <sup>240</sup>Sub-Contract Works timeously and in accordance with the time constraints set out in the <sup>241</sup>Sub-Contract.

### 3 DELETERIOUS MATERIALS

The Subcontractor hereby warrants that it will not specify or use and will use all skill care and diligence to ensure that others <sup>242</sup>who are acting on behalf of the Sub-Contractor do not specify or use in the construction of the Works materials which are generally known at the time of use to be deleterious to health and safety or to durability in the particular circumstances in which they are used.

### 4 COPYRIGHT

- 4.1 The Subcontractor hereby grants to the ~~[<sup>243</sup>Department/Fund/Operator/Purchaser]~~ a non-exclusive irrevocable royalty-free licence to use and reproduce without payment of any fee the plans drawings specifications computer software and calculations prepared by the Subcontractor relating to the Facility <sup>244</sup>(this licence shall not extend to any information or details which the Sub-Contractor considers to form part of its intellectual property rights provided that such information or details are not necessary to enable the completion, maintenance, repair or operation of the Facility) and all amendments and additions thereto (whether in existence or to be made) but only for the purposes relating to the Facility including but without limitation the foregoing the completion repair renewal advertisement promotion letting or sale of the Facility.

<sup>234</sup> Amendment made in executed sub-contractor Collateral Warranty dated 14 November 2001

<sup>235</sup> Amendment made in executed sub-contractor Collateral Warranty dated 14 November 2001

<sup>236</sup> Amendment made in executed sub-contractor Collateral Warranty dated 14 November 2001

<sup>237</sup> Amendment made in executed sub-contractor Collateral Warranty dated 14 November 2001

<sup>238</sup> Amendment made in executed sub-contractor Collateral Warranty dated 14 November 2001

<sup>239</sup> Amendment made in executed sub-contractor Collateral Warranty dated 14 November 2001

<sup>240</sup> Amendment made in executed sub-contractor Collateral Warranty dated 14 November 2001

<sup>241</sup> Amendment made in executed sub-contractor Collateral Warranty dated 14 November 2001

<sup>242</sup> Amendment made in executed sub-contractor Collateral Warranty dated 14 November 2001

<sup>243</sup> Amendment made in executed sub-contractor Collateral Warranty dated 14 November 2001

<sup>244</sup> Amendment made in executed sub-contractor Collateral Warranty dated 14 November 2001

- 4.2 The Subcontractor agrees that upon request it will allow the ~~£<sup>2</sup>~~  
<sup>45</sup>Department/~~Fund/Operator/Purchaser~~ access to all such plans drawings  
specifications computer software and calculations and will supply the ~~£<sup>2</sup>~~  
<sup>46</sup>Department/~~Fund/Operator/Purchaser~~ with copies thereof upon payment of  
reasonable copying charges.

## 5 INSURANCE

- 5.1 The Subcontractor confirms to the ~~£<sup>247</sup>Department/~~Fund/Operator/Purchaser~~~~ that it  
has professional indemnity insurance cover with a limit of not less than  
~~£5,000,000~~<sup>248</sup>1,000,000 for each and every claim <sup>249</sup>and in aggregate annually and that  
it will use best endeavours to maintain such insurance for a period of <sup>250</sup>twelve (12)  
years after practical completion or handover of the Facility.
- 5.2 The ~~Subcontractor~~Sub-Contractor shall immediately upon execution of this Agreement  
and at each renewal date produce for inspection by the ~~£<sup>2</sup>~~  
<sup>51</sup>Department/~~Fund/Operator/Purchaser~~ evidence that the said policy is in force and  
of the extent of its cover together with a receipt for the last premium paid for the  
renewal of such policy and showing that such policy is in force.
- 5.3 The ~~Subcontractor~~Sub-Contractor shall inform the ~~£<sup>2</sup>~~  
<sup>52</sup>Department/~~Fund/Operator/Purchaser~~ or its assignees in writing immediately if  
such professional indemnity insurance cover ceases to be made available at  
commercially reasonable rates.
- 5.4 Any increased or additional premiums required by insurers by reason of the  
Subcontractor's own claims records or other acts or omissions particular to the  
~~Subcontractor~~Sub-Contractor shall be deemed to be within commercially reasonable  
rates.

## 6 ASSIGNMENT

The ~~£<sup>253</sup>Department/~~Fund/Operator/Purchaser~~~~ will (at any time whether now or in the future)  
be entitled to assign the benefit of this Deed and the rights and remedies available to it <sup>254</sup>but  
subject to the obligations under this deed to a third party with the consent of the  
Sub-contractor (such consent of the be unreasonably withheld or delayed) and the Contractor

<sup>245</sup> Amendment made in executed sub-contractor Collateral Warranty dated 14 November 2001

<sup>246</sup> Amendment made in executed sub-contractor Collateral Warranty dated 14 November 2001

<sup>247</sup> Amendment made in executed sub-contractor Collateral Warranty dated 14 November 2001

<sup>248</sup> Amendment made in executed sub-contractor Collateral Warranty dated 14 November 2001

<sup>249</sup> Amendment made in executed sub-contractor Collateral Warranty dated 14 November 2001

<sup>250</sup> Amendment made in executed sub-contractor Collateral Warranty dated 14 November 2001

<sup>251</sup> Amendment made in executed sub-contractor Collateral Warranty dated 14 November 2001

<sup>252</sup> Amendment made in executed sub-contractor Collateral Warranty dated 14 November 2001

<sup>253</sup> Amendment made in executed sub-contractor Collateral Warranty dated 14 November 2001

<sup>254</sup> Amendment made in executed sub-contractor Collateral Warranty dated 14 November 2001



and/or the ~~Subcontractor~~Sub-Contractor shall do all such things as may reasonably be necessary to any third party including (without limitation) any third party in whom all or some of the functions of the Department relating to the collection and disposal of Conforming Waste are or are to become vested pursuant to the exercise of powers of Tynwald and/or any Government Department to effect such assignment.

## 7 LIABILITY

Nothing in the ~~Subcontractor~~Sub-contractor's quotations the Contract or any other document or oral statement shall in any way limit to exclude the ~~Subcontractor~~Sub-contractor's liability under this Deed. The provisions of this Agreement shall be without prejudice to any other rights and remedies which the <sup>[255]</sup>~~Department/Fund/Operator/Purchaser~~ may have against the ~~Subcontractor~~Sub-contractor whether in tort or otherwise and shall not be deemed or construed so as to exclude or limit any such rights and remedies.

<sup>256</sup>The Sub-Contractors liability to the Department under this Deed shall neither be greater nor longer lasting than the liability which the Sub-Contractor would have had under the Sub-Contract if the Department had been named as the "Contractor" in the Sub-Contract in place of the Contractor.

## 8 SUCCESSORS

Reference to the <sup>[257]</sup>~~Department/Fund/Operator/Purchaser~~ shall include the person or persons for the time being entitled to the benefit of this Deed and shall include the parties' successors in title.

## 9 STEP IN RIGHTS IN FAVOUR OF DEPARTMENT/~~FUND~~<sup>258</sup>

- 9.1 The ~~Subcontractor~~Sub-Contractor will not exercise or seek to exercise any right of determination which may be or become available to it as a result of any default by the Contractor under the terms of the <sup>259</sup>Sub-Contract without first giving to the Department/~~Fund~~<sup>260</sup> not less than <sup>261</sup>twenty-one (21) days prior written notice of the Subcontractor's intention specifying the ground for the proposed determination and notwithstanding any provision of the <sup>262</sup>Sub-Contract (unless determined by the Contractor) the <sup>263</sup>Sub-Contract shall not otherwise determine.

<sup>255</sup> Amendment made in executed sub-contractor Collateral Warranty dated 14 November 2001

<sup>256</sup> Amendment made in executed sub-contractor Collateral Warranty dated 14 November 2001

<sup>257</sup> Amendment made in executed sub-contractor Collateral Warranty dated 14 November 2001

<sup>258</sup> Amendment made in executed sub-contractor Collateral Warranty dated 14 November 2001

<sup>259</sup> Amendment made in executed sub-contractor Collateral Warranty dated 14 November 2001

<sup>260</sup> Amendment made in executed sub-contractor Collateral Warranty dated 14 November 2001

<sup>261</sup> Amendment made in executed sub-contractor Collateral Warranty dated 14 November 2001

<sup>262</sup> Amendment made in executed sub-contractor Collateral Warranty dated 14 November 2001

<sup>263</sup> Amendment made in executed sub-contractor Collateral Warranty dated 14 November 2001

**9.2** If within the said period of <sup>264</sup>twenty-one (21) days from the service of such notice (exclusive of the date of service) the Department/~~Fund~~<sup>265</sup> or any receiver appointed by the Department/~~Fund~~<sup>266</sup> shall give written notice to the Subcontractor requiring the Subcontractor to continue its obligations under the <sup>267</sup>Sub-Contract or otherwise in connection with the Facility the <sup>268</sup>Sub-Contract shall continue in full force and effect as if no right of termination on the part of the Subcontractor had arisen.

**9.3** As between the Department/~~Fund~~<sup>269</sup> and the Subcontractor the Department/~~Fund~~<sup>270</sup> or any receiver appointed by the Department/~~Fund~~<sup>271</sup> shall be entitled at any time by written notice to the Subcontractor to be treated by the Subcontractor as the employing party under the <sup>272</sup>Sub-Contract whereupon all rights and obligations of the Contractor under the relevant <sup>273</sup>Sub-Contract shall thereafter be exercisable and performed by the Department/~~Fund~~<sup>274</sup> to the exclusion of all others The Contractor acknowledges that the ~~Subcontractor~~Sub-Contractor shall be entitled to rely on a notice given to the Subcontractor by the Department/~~Fund~~<sup>275</sup> under this Clause as conclusive evidence for the purposes of this Deed of the Department/~~Fund~~'s<sup>276</sup> entitlement to take over the Contractor's said rights and obligations.

**9.4** Following the issue of either of such ~~written~~<sup>277</sup>Written notices specified in <sup>278</sup>Sub-Clauses 9.2 or 9.3 hereof by the Department/~~Fund~~<sup>279</sup> or any such receiver (but not otherwise):

**9.4.1** all sums which thereafter become due to the Subcontractor under the <sup>280</sup>Sub-Contract and not discharged by the Contractor shall be paid by the Department/~~Fund~~<sup>281</sup>; and

**9.4.2** the Subcontractor (to the exclusion of the Contractor) shall thereafter only accept the instructions of the Department/~~Fund~~<sup>282</sup> or its receiver as if the Department/~~Fund~~<sup>283</sup> had been originally named in the <sup>284</sup>Sub-Contract as a party thereto in place of the Contractor.

<sup>264</sup> Amendment made in executed sub-contractor Collateral Warranty dated 14 November 2001

<sup>265</sup> Amendment made in executed sub-contractor Collateral Warranty dated 14 November 2001

<sup>266</sup> Amendment made in executed sub-contractor Collateral Warranty dated 14 November 2001

<sup>267</sup> Amendment made in executed sub-contractor Collateral Warranty dated 14 November 2001

<sup>268</sup> Amendment made in executed sub-contractor Collateral Warranty dated 14 November 2001

<sup>269</sup> Amendment made in executed sub-contractor Collateral Warranty dated 14 November 2001

<sup>270</sup> Amendment made in executed sub-contractor Collateral Warranty dated 14 November 2001

<sup>271</sup> Amendment made in executed sub-contractor Collateral Warranty dated 14 November 2001

<sup>272</sup> Amendment made in executed sub-contractor Collateral Warranty dated 14 November 2001

<sup>273</sup> Amendment made in executed sub-contractor Collateral Warranty dated 14 November 2001

<sup>274</sup> Amendment made in executed sub-contractor Collateral Warranty dated 14 November 2001

<sup>275</sup> Amendment made in executed sub-contractor Collateral Warranty dated 14 November 2001

<sup>276</sup> Amendment made in executed sub-contractor Collateral Warranty dated 14 November 2001

<sup>277</sup> Amendment made in executed sub-contractor Collateral Warranty dated 14 November 2001

<sup>278</sup> Amendment made in executed sub-contractor Collateral Warranty dated 14 November 2001

<sup>279</sup> Amendment made in executed sub-contractor Collateral Warranty dated 14 November 2001

<sup>280</sup> Amendment made in executed sub-contractor Collateral Warranty dated 14 November 2001

<sup>281</sup> Amendment made in executed sub-contractor Collateral Warranty dated 14 November 2001

<sup>282</sup> Amendment made in executed sub-contractor Collateral Warranty dated 14 November 2001

<sup>283</sup> Amendment made in executed sub-contractor Collateral Warranty dated 14 November 2001

<sup>284</sup> Amendment made in executed sub-contractor Collateral Warranty dated 14 November 2001

## 10 COLLATERAL WARRANTIES

The Subcontractor undertakes that it will execute as a deed and deliver to the <sup>285</sup>~~Department/Fund/Operator/Purchaser~~ a warranty in the same form as this Agreement mutatis mutandis in favour of a tenant or purchaser or Operator of the whole or any part of the Facility within <sup>286</sup>fourteen (14) days of the <sup>287</sup>~~Department/Fund/Operator/Purchaser~~ written request.

## 11 JURISDICTION

The laws applicable to this Deed shall be Isle of Man Law and the Isle of Man Courts shall have non-exclusive jurisdiction with regard to all matters arising in connection with or under this Deed.

## 12 INDEPENDENT ENQUIRY

The liability of the Subcontractor under this Deed shall not be modified released, diminished or in any way affected by any independent inspection investigation or enquiry into any relevant matter which may be made or carried out by or for the <sup>288</sup>~~Department/Fund/Purchaser/Operator~~ nor by any failure or omission to carry out any such inspection, investigation or enquiry nor by the appointment by the <sup>289</sup>~~Department/Fund/Purchaser/Operator~~ of any independent firm, company, or party whatsoever to review the progress of or otherwise report to the <sup>290</sup>~~Department/Fund/Purchaser/Operator~~ in respect of the Works nor by any action or omission of any such firm, company or party whether or not such action or omission might give rise to any independent liability of such firm, company or party to the <sup>291</sup>~~Department/Fund/Purchaser/Operator~~ provided always that nothing in this Clause shall modify or affect any rights which the Subcontractor might have but for the existence of this Clause to claim contribution from any third party whether under statute or at common law.

## 13 DEFINED TERMS

Words defined in the Project Agreement shall have the same meaning where used as defined terms in this Deed except where expressly stated otherwise.

**EXECUTED** as a Deed by the Employer the Contractor the Subcontractor and the <sup>292</sup>~~Department/Fund/Purchaser/Operator~~ the day and year first before written.

<sup>285</sup> [Amendment made in executed sub-contractor Collateral Warranty dated 14 November 2001](#)

<sup>286</sup> [Amendment made in executed sub-contractor Collateral Warranty dated 14 November 2001](#)

<sup>287</sup> [Amendment made in executed sub-contractor Collateral Warranty dated 14 November 2001](#)

<sup>288</sup> [Amendment made in executed sub-contractor Collateral Warranty dated 14 November 2001](#)

<sup>289</sup> [Amendment made in executed sub-contractor Collateral Warranty dated 14 November 2001](#)

<sup>290</sup> [Amendment made in executed sub-contractor Collateral Warranty dated 14 November 2001](#)

<sup>291</sup> [Amendment made in executed sub-contractor Collateral Warranty dated 14 November 2001](#)

<sup>292</sup> [Amendment made in executed sub-contractor Collateral Warranty dated 14 November 2001](#)

**EXECUTED** as a Deed by the Contractor, acting by:

Director

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Director/Secretary

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**EXECUTED** as a Deed by the Employer, acting by:

Director

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Director/Secretary

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**EXECUTED** as a Deed by the Subcontractor, acting by:

Director

---

Director/Secretary

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**EXECUTED** by the Department under the hand  
of the Minister for the Department of  
Local Government and the Environment  
in the presence of:

Witness

Name

Address

[EXECUTED by the [Fund/Purchaser/Operator]

acting by:

Director

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Director/Secretary]

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**SCHEDULE 9  
COLLATERAL WARRANTIES  
PART 3 – PROJECTCO'S WARRANTY**



**DATED**

**2000**

**UNITED WASTE (ISLE OF MAN) LIMITED(1)**

**- and -**

**[WASTE MANAGEMENT BOARD/FUND] (2)**

**PROJECTCO'S WARRANTY  
FOR THE ISLE OF MAN INTEGRATED INCINERATION FACILITY**

**■ BEVAN  
ASHFORD  
SOLICITORS ■**

**35 Colston Avenue, Bristol BS1 4TT  
TEL: 0117 923 0111 FAX: 0117 929 1865  
DX: 7828 Bristol**

**24 October 2000**

**THIS DEED AGREEMENT** is made the \_\_\_\_\_ day of \_\_\_\_\_ 2000

**BETWEEN:-**

- (1) **UNITED WASTE (ISLE OF MAN) LIMITED** being a company incorporated under the Companies Acts of the Isle of Man and having its registered office situate at 15-19 Athol Street, Douglas, Isle of Man, IM1 1LB ("ProjectCo")
- (2) [ ] whose registered office is situate at ["Waste Management Board"] ["the Fund"]

**WHEREAS:-**

- (A) ProjectCo has been appointed by the Department of Local Government and the Environment ("the Employer") to undertake design construction, commissioning, operation, maintenance and handback of an Integrated Incineration Facility brief details of which are set out in the Schedule hereto at the property known as ("the Facility") pursuant to an agreement dated [ ] ("the Project Agreement")
- (B) [The Fund is providing finance for the Facility] [The Waste Management Board is the successor to the Employer assuming the same or similar statutory functions in respect of waste management and disposal].

**NOW THIS DEED WITNESSETH** as follows:-

**1 ~~1~~ WARRANTY - PROJECT AGREEMENT**

The ProjectCo on behalf of itself and its subcontractors :-

- 1.1** expressly grants to the [Fund/Waste Management Board] the same warranties (whether express or implied) and the benefit of the same contractual terms which it owes or may owe either now or (but so that ProjectCo's liability to the [Fund/Waste Management Board] shall not be lessened by any variation or waiver to the Project Agreement) in the future to the Employer contained in the Project Agreement as if the [Fund/Waste Management Board] was a signatory thereto in place of ProjectCo; (but for the avoidance of doubt without the [Fund/Waste Management Board] being liable in any respect to ProjectCo) and
- 1.2** (without limiting the generality of Clause 1.1 above) covenants with the [Fund/Waste Management Board] that it has exercised and will continue to exercise all the reasonable skill and care to be expected of a contractor experienced in work of similar size and complexity to that comprised in the Facility and all reasonable skill and care in

the performance of its duties under the Project Agreement and that it shall owe a duty of care to the [Fund/Waste Management Board] in respect of the performance of such duties; and

- 1.3** covenants with the [Fund/Waste Management Board] that it will carry out and complete the Facility in a good and workmanlike manner using suitable goods plant and materials and in accordance with the Project Agreement and duly observe and perform all its duties and obligations thereunder and that the Facility will be fit for purpose within the limits described in the Project Agreement provided always that ProjectCo's liabilities to the [Waste Management Board/Fund] shall not be lessened by any variation or waiver to the Project Agreement.

## **2 WARRANTY - DESIGN**

Without derogating from the generality of Clause 1 ProjectCo covenants with the [Fund/Waste Management Board] on behalf of itself and its subcontractors that it has exercised and will exercise all proper skill and care in:-

- 2.1** the design of the Facility (or any part) insofar as the Facility (or any part) has been or will be designed by ProjectCo or its subcontractors; and
- 2.2** the selection of materials and goods for the Facility insofar as such materials and goods have been and/or will be selected by ProjectCo or its subcontractors; and
- 2.3** the satisfaction of any performance specification or requirement insofar as such performance specification or requirement is included as a contract document or in any instruction or variation under the Project Agreement.

## **3 STEP IN RIGHTS IN FAVOUR OF THE FUND**

- 3.1** ProjectCo will not exercise or seek to exercise any right of determination which may be or becomes available to it as a result of any default by the Employer under the terms of the Project Agreement without first giving to the Fund not less than 21 days prior written notice of ProjectCo's intention to so determine specifying its grounds for the proposed determination and notwithstanding any provision of the Project Agreement (unless determined by the Employer) the Project Agreement shall not otherwise determine.
- 3.2** If within the said period of 21 days from the service of such notice (exclusive of the date of service) Fund or any receiver appointed by the Fund shall give written notice to ProjectCo requiring ProjectCo to continue its obligations under the Project Agreement or otherwise in connection with the Facility the Project Agreement shall continue in full force and effect as if no right of termination on the part of ProjectCo had arisen.
- 3.3** As between the Fund and ProjectCo the Fund or any receiver appointed by Fund shall be entitled at any time by written notice to ProjectCo to be treated by ProjectCo as the employing party under the Project Agreement whereupon all rights and obligations of



the Employer under the Project Agreement shall thereafter be exercisable and performed by the Fund (or its receiver as applicable) to the exclusion of all others the Employer acknowledges that ProjectCo shall be entitled to rely on a notice given to ProjectCo by the Fund or its receiver under this Clause as conclusive evidence for the purposes of this Agreement of the Fund or its receiver's entitlement to take over the Employer's said rights and obligations.

**3.4** The rights granted by Clauses 3.2 and 3.3 hereof shall be of no effect if at the time written notice pursuant to either sub Clause is given to ProjectCo is already the recipient of a valid notice in writing from another party entitled to the benefit of a step-in right relating to the Project Agreement. If two or more valid notices are received simultaneously the deemed order or priority shall be Fund before any other interest. Only the notice deemed to have first priority shall take effect and no other relevant notice will bind ProjectCo.

**3.5** Following the issue of either of such written notices specified in Clauses 3.2 or 3.3 hereof by the Fund or any such receiver (but not otherwise):

**3.5.1** all sums outstanding and also which thereafter become due to ProjectCo under the Project Agreement and not discharged by ProjectCo shall be paid by the Fund or the Fund in receivership; and

**3.5.2** ProjectCo (to the exclusion of the Employer) shall thereafter only accept the instructions of the Fund or its receiver as if the Fund had been originally named in the Project Agreement as a party thereto in place of the Employer.

## **4 DELETERIOUS MATERIALS**

ProjectCo hereby warrants that it will not specify or use and will use all skill care and diligence to ensure that others do not specify or use in the construction of the Facility materials which are generally known at the time of use to be deleterious to health and safety or to durability in the particular circumstances in which they are used.

## **5 DOCUMENTS**

ProjectCo will provide to the *[Fund/Waste Management Board]* on reasonable demand without payment copies of any plans drawings specifications calculations valuations and any other documents including computer software prepared by ProjectCo in connection with the Facility.

## **6 COPYRIGHT**

To the extent that copyright in all plans drawings specifications and any other drawings including computer software prepared by ProjectCo in connection with the Facility remains vested in ProjectCo. ProjectCo acknowledges and agrees that it hereby grants to the

[Fund/Waste Management Board] an irrevocable non-exclusive royalty-free licence (which shall be assignable) to use such documents (whether in existence or to be made) for all purposes relating to the Facility.

## **7 INSURANCE**

- 7.1** ProjectCo shall maintain professional indemnity insurance extending to his obligations under this Agreement for a minimum cover of £10,000,000 in respect of each and every claim and such cover shall be maintained during the Project Agreement and for a period of 12 years from the issue of the Final Payment Certificate as defined under the Project Agreement so long as such insurance cover remains available at commercially reasonable rates.
- 7.2** ProjectCo shall immediately upon execution of this Deed and at each renewal date produce upon request for inspection by the [Fund/Waste Management Board] evidence that the said policy is in force and of the extent of its cover together with a receipt for the last premium paid for the renewal of such policy and showing that such policy is in force. If ProjectCo at any time fails to provide such evidence the [Fund/Waste Management Board] may insure as ProjectCo's agent and ProjectCo shall forthwith pay to the [Fund/Waste Management Board] sums expended in this way.
- 7.3** ProjectCo shall inform the [Fund/Waste Management Board] or its assignees in writing immediately if such professional indemnity insurance ceases to be made available at commercially reasonable rates.
- 7.4** Any increased or additional premiums required by insurers by reason of ProjectCo's own claims records or other acts or omissions particular to ProjectCo shall be deemed to be within commercially reasonable rates.

## **8 OTHER REMEDIES**

The provisions of this Deed shall be without prejudice to any other rights and remedies which the [Fund/Waste Management Board] may have against ProjectCo whether in tort or otherwise and shall not be deemed or construed so as to exclude or limit any such rights and remedies.

## **9 ASSIGNMENT**

The [Fund/Waste Management Board] will (at any time whether now or in the future) be entitled to assign the benefit of this Deed and the rights and remedies available to it to any person acquiring an interest in the Facility and ProjectCo shall do all such things as may be necessary to effect such an assignment.

## **10 SUCCESSORS**

Reference to the [Fund/Waste Management Board] shall include the person or persons for the time being entitled to the benefit of this Deed and the remedies hereunder.

## **11 JURISDICTION**

The laws applicable to this Deed shall be Isle of Man Law and the Isle of Man Court shall have non-exclusive jurisdiction with regard to all matters arising in connection with or under this Deed.

## **12 INDEPENDENT ENQUIRY**

The liability of ProjectCo under this Deed shall not be modified released, diminished or in any way affected by any independent inspection investigation or enquiry into any relevant matter which may be made or carried out by or for the [Fund/Waste Management Board] nor by any failure or omission to carry out any such inspection, investigation or enquiry nor by the appointment by the [Fund/Waste Management Board] of any independent firm, company, or party whatsoever to review the progress of or otherwise report to the [Fund/Waste Management Board] in respect of the Facility nor by any action or omission of any such firm, company or party whether or not such action or omission might give rise to any independent liability of such firm, company or party to the [Fund/Waste Management Board] provided always that nothing in this Clause shall modify or affect any rights which ProjectCo might have but for the existence of this Clause to claim contribution from any third party whether under statute or at common law.

## **13 WORKS OBLIGATIONS**

Notwithstanding the issue of the Final Taking Over Certificate (as defined in the Project Agreement) and without prejudice to the rights and obligations under this Deed (whether express or implied) to the extent that ProjectCo has such an obligation under the Project Agreement ProjectCo shall remain liable for making good with all possible speed any latent defects which appear in respect of the Plant (which for the avoidance of doubt excludes the building fabric, foundations and associated infrastructure comprised in the Facility, (as defined in the Project Agreement)) and remainder of the Facility at any time before the second and sixth anniversary respectively of the Final Take Over (as defined in the Project Agreement) and shall forthwith of the request of the [Department/Fund/Purchaser/Operator] remedy such latent defect promptly at its own cost.

## **14 LIMITATION**

ProjectCo's liability to the [Fund/Waste Management Board] under this Deed shall be no greater nor longer lasting than the liability which ProjectCo would have had under the Project Agreement if the [Fund/Waste Management Board] had been named as the "Employer" in the Project Agreement in place of the Employer.

## **15 DEFINED TERMS**

Words defined in the Project Agreement shall have the same meaning where used as defined terms in this Deed except where expressly stated otherwise.

**EXECUTED** as a Deed by ProjectCo and the Fund the day and year first before written.

**EXECUTED** as a Deed by ProjectCo acting by:

Director

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Director/Secretary

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**EXECUTED** as a Deed by the Fund, acting by:

Director

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Director/Secretary

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((t))

**SCHEDULE 10  
PARENT COMPANY GUARANTEE  
PART 1**



**DATED** \_\_\_\_\_ **2000**

**GROUPE FABRICOM <sup>293</sup>[S.A](#) (1)**

**- and -**

**THE DEPARTMENT OF LOCAL GOVERNMENT AND THE ENVIRONMENT (2)**

**PARENT COMPANY GUARANTEE  
FOR THE ISLE OF MAN INTEGRATED INCINERATION FACILITY**

**BEVAN  
ASHFORD  
SOLICITORS**

**35 Colston Avenue, Bristol BS1 4TT  
TEL: 0117 923 0111 FAX: 0117 929 1865  
DX: 7828 Bristol**

**24 October 2000**

<sup>293</sup> [Amendment made in executed Parent Company Guarantee 27 October 2000](#)

**THIS DEED OF GUARANTEE**<sup>294</sup> is made the      day of      2000

**BETWEEN**

- (1) **[GROUPE FABRICOM S.A.]** of  
 (“the Guarantor”), and
- (2) **[THE DEPARTMENT OF LOCAL GOVERNMENT AND THE ENVIRONMENT]**, a department  
 of the Isle of Man Government of Murray House, Mount Havelock, Douglas, Isle of Man, IM1  
 2SF (“the Department”)

**NOW THIS DEED WITNESSES** as follows:

## 1 DEFINITIONS AND INTERPRETATIONS

**1.1** In this Guarantee:

- 1.1.1** “Contract” shall mean the agreement dated [ ] made between (1) the Department, and (2) United Waste (Isle of Man) Limited being a company incorporated under the Companies Acts of the Isle of Man and having its registered office situate at 15-19 Athol Street, Douglas, Isle of Man, IM1 1LB (“ProjectCo”) for inter alia the design, construction, operation, maintenance and handback of an integrated incinerator (energy from waste) facility on the Isle of Man; and
- 1.1.2** “Obligations” shall mean each and every of the terms, provisions, conditions, obligations, undertakings and agreements on the part of ProjectCo to be performed observed or carried out by ProjectCo as contained or referred to in the Contract as such Contract may from time to time be amended.

- 1.2** The Guarantor and the Department shall include the parties' successors in title and assigns.
- 1.3** The headings in this Guarantee are inserted for convenience only and shall be ignored in construing the terms and provisions hereof.
- 1.4** Where there are two or more persons included in the expression "Guarantor" then the term Guarantor shall include the plural number and any and all obligations expressed to be made by or with such party hereunder or pursuant hereto shall be deemed to be made and undertaken by such persons jointly and severally.

<sup>294</sup> Note that a Deed of Release in respect of this Guarantee was executed on 11 July 2012. A replacement parent company guarantee was entered into by SITA Holdings UK (Limited) (the Guarantor, subsequently "Suez Recycling and Recovery UK Ltd") and the Department of Infrastructure in or around February 2013.

## **2 GUARANTEE**

- 2.1** The Guarantor hereby irrevocably covenants and guarantees to the Department the full, faithful and punctual performance, observance and compliance by ProjectCo of the Obligations.
- 2.2** The Guarantor's liability to the Department under this Guarantee shall be no greater nor longer lasting than if the Guarantor had been named as "ProjectCo" in the Contract in place of ProjectCo and in any event in respect of claims arising after Final Take Over (as defined in the Contract) shall not exceed SIX MILLION POUNDS (£6,000,000) adjusted by a percentage equivalent to the percentage increase (if any) shown by the Relevant Indices (as defined in the Contract) for the period from the Execution Date to the date on which any claim is determined together with any amounts payable by the Department in respect of registration tax or other local taxes or charges incurred in enforcing its rights under this guarantee in the Guarantor's country of origin.

## **3 LIABILITY**

- 3.1** The Guarantor shall not be discharged or released from this Guarantee nor shall its liability be affected by:
- 3.1.1** any arrangement made between ProjectCo and the Department without the consent of the Guarantor; or
  - 3.1.2** any amendment, alteration, modification, waiver, consent or variation, express or implied, to the scope of the works or services the subject of the Contract or to the obligations undertaken by ProjectCo or to the Contract or any related documentation; or
  - 3.1.3** the granting to ProjectCo of any extensions of time or forbearance, forgiveness or indulgences whether in relation to payment, time, performance or otherwise; or
  - 3.1.4** the enforcement, absence of enforcement or release of the Contract or of any security, right of action or other guarantee or indemnity; or
  - 3.1.5** the dissolution, amalgamation, reconstruction, reorganisation incapacity, limitation, disability, discharge by operation of law or any change in the constitution of ProjectCo or of any other person; or
  - 3.1.6** any indulgence or additional or advanced payment, forbearance, payment or concession to ProjectCo; or
  - 3.1.7** any compromise of any dispute with ProjectCo; or
  - 3.1.8** any assignment of the benefit of the Contract; or
  - 3.1.9** any failure of supervision to detect or prevent any fault of ProjectCo .

## **4 ASSIGNMENT**

- 4.1** This Guarantee and the benefit conferred by it may be assigned by the Department to any party to whom it assigns its interest under the Contract at any time.
- 4.2** Save for the provision of Clause 4.1 above, this Guarantee and the benefit conferred by it may not be assigned by either party.

## **5 JURISDICTION**

The Laws applicable to this Guarantee shall be Isle of Man Law and the Isle of Man Courts shall have non-exclusive jurisdiction with regard to all matters arising in connection with or under this Guarantee.

**IN WITNESS** whereof this Guarantee has been duly executed and delivered as a deed on the date first above written.



**SCHEDULE 10**  
**PARENT COMPANY GUARANTEE**  
**PART 2**



**DATED**

**2000**

**KVAERNER ENGINEERING & CONSTRUCTION**  
**UK LIMITED (1)**

**295 THE DEPARTMENT OF LOCAL GOVERNMENT AND THE ENVIRONMENT (2)**

**- and -**

**UNITED WASTE (ISLE OF MAN) LIMITED (3)**

**PARENT COMPANY GUARANTEE**  
**FOR THE ISLE OF MAN INTEGRATED INCINERATION FACILITY**

**BEVAN**  
**ASHFORD**  
**SOLICITORS**

**35 Colston Avenue, Bristol BS1 4TT**  
**TEL: 0117 923 0111 FAX: 0117 929 1865**  
**DX: 7828 Bristol**

**24 October 2000**

<sup>295</sup> [Amendment made in executed Parent Company Guarantee 27 October 2000](#)

THIS DEED OF GUARANTEE is made the <sup>296</sup>27<sup>th</sup> day of October 2000

## BETWEEN

- (1) <sup>297</sup>~~[KVAERNER E & C PLC]~~ ~~of 20 Eastbourne Terrace, London, W2 6LE~~ <sup>298</sup> (“the Guarantor”), and
- (2) <sup>299</sup>~~THE DEPARTMENT OF LOCAL GOVERNMENT AND THE ENVIRONMENT, a department of the Isle of Man Government of Murray House, Mount Havelock, Douglas, Isle of Man, IM1 2SF~~ <sup>300</sup> (“the Department”)
- (3) **UNITED WASTE (ISLE OF MAN) LIMITED** ~~being a company incorporated under the Companies Acts of the Isle of Man and having its registered office situate at 15-19 Athol Street, Douglas, Isle of Man, IM1 1LB~~ <sup>301</sup> (“ProjectCo”)

NOW THIS DEED WITNESSES as follows:

## 1 DEFINITIONS AND INTERPRETATIONS

### 1.1 In this Guarantee:

- 1.1.1 “Contract” shall mean the agreement dated ~~[ ]~~ <sup>302</sup>27<sup>th</sup> October 2000 made between ~~(1)~~ <sup>303</sup>ProjectCo and ~~(2)~~ <sup>304</sup>Kvaerner Engineering & Construction UK Limited ~~of Ashmore House, Stockton on Tees, TS18 3RE~~ <sup>305</sup> (“the D & B Contractor”) for the provision of the Facility as defined in the Project Agreement; and
- 1.1.2 “Obligations” shall mean each and every of the terms, provisions, conditions, obligations, undertakings and agreements on the part of D & B Contractor to be performed observed or carried out by D & B Contractor as contained or referred to in the Contract as such Contract may from time to time be amended; and
- 1.1.3 “Project Agreement” shall mean a project agreement dated ~~[ ]~~ <sup>306</sup>27<sup>th</sup> October 2000 between the Department ~~(1)~~ <sup>307</sup> and ProjectCo-

<sup>296</sup> Amendment made in executed Parent Company Guarantee dated 27 October 2000

<sup>297</sup> Amendment made in executed Parent Company Guarantee dated 27 October 2000

<sup>298</sup> Amendment made in executed Parent Company Guarantee dated 27 October 2000

<sup>299</sup> Amendment made in executed Parent Company Guarantee dated 27 October 2000

<sup>300</sup> Amendment made in executed Parent Company Guarantee dated 27 October 2000

<sup>301</sup> Amendment made in executed Parent Company Guarantee dated 27 October 2000

<sup>302</sup> Amendment made in executed Parent Company Guarantee dated 27 October 2000

<sup>303</sup> Amendment made in executed Parent Company Guarantee dated 27 October 2000

<sup>304</sup> Amendment made in executed Parent Company Guarantee dated 27 October 2000

<sup>305</sup> Amendment made in executed Parent Company Guarantee dated 27 October 2000

<sup>306</sup> Amendment made in executed Parent Company Guarantee dated 27 October 2000

<sup>307</sup> Amendment made in executed Parent Company Guarantee dated 27 October 2000

~~(2)~~ for the design, execution, testing, commissioning, completion, operation, maintenance and handback by ProjectCo of an <sup>308</sup> integrated ~~incinerator (energy from waste) facility~~Incinerator (Energy from Waste) Facility on the Isle of Man.

- 1.2** The Guarantor and the Department and ProjectCo shall include the parties' successors in title and assigns.
- 1.3** The headings in this Guarantee are inserted for convenience only and shall be ignored in construing the terms and provisions hereof.
- 1.4** Where there are two or more persons included in the expression "Guarantor" then the term Guarantor shall include the plural number and any and all obligations expressed to be made by or with such party hereunder or pursuant hereto shall be deemed to be made and undertaken by such persons jointly and severally.

## **2 GUARANTEE**

- 2.1** The Guarantor hereby irrevocably covenants and guarantees to ProjectCo and the Department the full, faithful and punctual performance, observance and compliance by the D & B Contractor of the Obligations.
- 2.2** The Guarantor's liability to ProjectCo and the Department under this Guarantee shall be no greater nor longer lasting than if the Guarantor had been named as ~~"D & B"~~<sup>309</sup> "the Contractor" in the Contract<sup>310</sup> or the "D&B Contractor" in the Project Agreement in place of the D & B Contractor nor shall such liability together with the liability of the D & B Contractor exceed the liability of the D & B Contractor alone under the Contract.

## **3 LIABILITY**

- 3.1** The Guarantor shall not be discharged or released from this Guarantee nor shall its liability be affected by:
- 3.1.1** any arrangement made between the Contractor, ProjectCo and/or the Department without the consent of the Guarantor; or
- 3.1.2** any amendment, alteration, modification, waiver, consent or variation, express or implied, to the scope of the works or services the subject of the Contract or to the obligations undertaken by ProjectCo or to the Contract or any related documentation; or

<sup>308</sup> [Amendment made in executed Parent Company Guarantee dated 27 October 2000](#)

<sup>309</sup> [Amendment made in executed Parent Company Guarantee dated 27 October 2000](#)

<sup>310</sup> [Amendment made in executed Parent Company Guarantee dated 27 October 2000](#)

- 3.1.3** the granting to ProjectCo and/or the D&B Contractor of any extensions of time or forbearance, forgiveness or indulgences whether in relation to payment, time, performance or otherwise; or
- 3.1.4** the enforcement, absence of enforcement or release of the Contract or of any security, right of action or other guarantee or indemnity; or
- 3.1.5** the dissolution, amalgamation, reconstruction, reorganisation incapacity, limitation, disability, discharge by operation of law or any change in the constitution of ProjectCo and/or the D & B Contractor or of any other person; or
- 3.1.6** any indulgence or additional or advanced payment, forbearance, payment or concession to ProjectCo and/or the D & B Contractor; or
- 3.1.7** any compromise of any dispute with ProjectCo and/or the D & B Contractor; or
- 3.1.8** any assignment of the benefit of the Contract; or
- 3.1.9** any failure of supervision to detect or prevent any fault of ProjectCo and/or the D & B Contractor.

#### **4 PRIORITY**

- 4.1** The Department shall not be entitled to enforce any right or claim or obligation against the Guarantor under this Deed unless and until the Project Agreement has been terminated.

#### **5 ASSIGNMENT**

- 5.1** ProjectCo may assign its benefits under this Guarantee to any party to whom it lawfully assigns its interest under the Project Agreement but not otherwise.
- 5.2** The Department may assign its benefits under this Guarantee to any party to whom it lawfully assigns its interest under the Project Agreement but not otherwise.

#### **6 JURISDICTION**

The Laws applicable to this Guarantee shall be Isle of Man Law and the Isle of Man Courts shall have non-exclusive jurisdiction with regard to all matters arising in connection with or under this Guarantee.

**IN WITNESS** whereof this Guarantee has been duly executed and delivered as a deed on the date first above written.

**SCHEDULE 11**  
**D & B PERFORMANCE BOND**  
**PART 1 : GUARANTEE BOND**

**KNOW ALL MEN BY THESE PRESENTS** that **UNITED WASTE (ISLE OF MAN) LIMITED** being a company incorporated under the Companies Acts of the Isle of Man and having its registered office situate at 15-19 Athol Street, Douglas, Isle of Man, IM1 1LB (hereinafter called "ProjectCo") and {

<sup>311</sup> **NEW HAMPSHIRE INSURANCE COMPANY** (hereinafter called "the Surety") are held and firmly bound to **THE DEPARTMENT OF LOCAL GOVERNMENT AND ENVIRONMENT** a department of the Isle of Man Government of Murray House, Mount Havelock, Douglas, Isle of Man, IM2 2SF (hereinafter called "the Employer") in the sum of 10% of the D&B Contract Price (as defined in the Project Agreement) from the Execution Date to Take Over (as defined in the Project Agreement) **THREE MILLION SEVEN HUNDRED AND THIRTY SEVEN THOUSAND FOUR HUNDRED AND FIFTY FIVE POUNDS (£3,737,455 )** <sup>312</sup> (the "Bond Amount") for the payment of which sum ProjectCo and the Surety bind themselves their successors and assigns jointly and severally by these presents.

Sealed with our respective seals and dated this                      day of                      2000

**WHEREAS** ProjectCo by an agreement made between the Employer of the one part and ProjectCo of the other part has entered into a Project Agreement which Project Agreement with all its covenants and conditions shall be regarded as being incorporated herein (herein called "the Project Agreement") for the design, construction, testing, commissioning, completion, operation and maintenance of certain Works (as defined in the Project Agreement) in connection with the provision of the Facility (as defined in the Project Agreement).

D & B Contract Price: **THIRTY SEVEN MILLION THREE HUNDRED AND SEVENTY FOUR THOUSAND FIVE HUNDRED AND FIFTY ONE POUNDS (£37,375,551).**

**NOW THE CONDITION** of the above written Bond is such that if ProjectCo shall duly perform and observe all the terms, provisions, conditions and stipulations of the Project Agreement on ProjectCo's part to be performed and observed according to the true purport, intent and meaning thereof or if on default by ProjectCo the Surety shall satisfy and discharge the established and ascertained damages sustained by the Employer thereby as shall be in accordance with and pursuant to the provisions of the Project Agreement up to the amount of the above-written Bond Amount - then this obligation shall be null and void but otherwise shall be and remain in full force and effect but no alteration in terms of the Project Agreement made by agreement between the Employer and ProjectCo or in the extent or nature of the Works (as defined in the Project Agreement) to be designed, tested, commissioned, constructed, completed and maintained thereunder and no allowance of time by the Employer or the Department's Representative (as defined in the Project Agreement) under the Project Agreement nor any forbearance or forgiveness in or in respect of any matter or thing concerning the Project Agreement on the part of the Employer or the Department's Representative (as defined in the Project Agreement) shall in any way release the Surety from any liability under the above written Bond.

<sup>311</sup> [Amendment made in undated Performance Bond no. PB30024993](#)


<sup>312</sup> [Bracket removed in undated Performance Bond no. PB30024993](#)

The Employer shall be entitled to assign its interest in this Bond to any third party in whom all or some of the functions of the Employer relating to the collection and disposal of Conforming Waste (as defined in the Project Agreement) are or are to become vested pursuant to the exercise of powers of Tynwald and/or any Government Department.

Without prejudice to the above the Employer shall be entitled to assign this Bond and the benefits thereof and remedies hereunder provided that the Surety and ProjectCo shall be entitled to receive notice of such assignment in writing within a reasonable period of the assignment taking place.

The obligations of the Surety under this Bond shall be released and discharged absolutely ~~upon~~ ~~[31 months from Execution Date]~~<sup>313</sup> [27<sup>th</sup> May 2003] 30 April 2004 save in respect of a ~~demand~~<sup>314</sup> claim made in accordance with this Bond prior to such date.

This Bond shall be governed by and construed in accordance with the laws of the Isle of Man and the Isle of Man Courts shall have non-exclusive jurisdiction with regard to all matters arising in connection with or under this Bond.

THE COMMON SEAL of ~~[PROJECTCO]~~  


<sup>315</sup> United Waste (Isle of Man) Limited

was hereunto affixed in the presence of:

Director

\_\_\_\_\_

Director

\_\_\_\_\_

THE COMMON SEAL of ~~[SURETY]~~



<sup>316</sup> New Hampshire Insurance Company

was hereunto affixed in the presence of:

~~Authorised Signatory~~

[Signature – Helen Clarke(?)]

\_\_\_\_\_

~~Authorised Signatory~~

Attorney in fact

\_\_\_\_\_

<sup>313</sup> Date in brackets inserted by undated Performance Bond no. PB30024993

<sup>314</sup> Date inserted by Rider to Bond no. PB30024993 dated 16 July 2003

<sup>315</sup> Amendment made in undated Performance Bond no. PB30024993

<sup>316</sup> Amendment made in undated Performance Bond no. PB30024993



## APPLICATION FORM FOR GUARANTEE BOND

Please provide a Contract Guarantee bond for the under mentioned Contract:

- |                            |   |
|----------------------------|---|
| <del>7</del><br><u>1</u>   | Name and Address of Employer:<br>to be inserted in Bond:          |
| <del>8</del><br><u>2</u>   | Name and Address of Contractor:                                   |
| <del>9</del><br><u>3</u>   | Name of work to be done:  |
| <del>10</del><br><u>4</u>  | Location of work:   |
| <del>11</del><br><u>4</u>  | Contract price:   |
| <del>12</del><br><u>5</u>  | Commencement Date:  |
| <del>13</del><br><u>6</u>  | Contract Period:  |
| <del>14</del><br><u>7</u>  | Maintenance Period:   |
| <del>15</del><br><u>8</u>  | Method of Payment of Contract: ie<br>fortnightly, monthly etc     |
| <del>16</del><br><u>9</u>  | Percentage of Retention:  |
| <del>17</del><br><u>10</u> | Amount of Liquidation Damages:                                    |
| <del>18</del><br><u>11</u> | a) Is price variation allowed for or<br>b) Is contract firm price |
| <del>19</del><br><u>12</u> | Brief details of work to be sub-contracted:                       |
| <del>20</del><br><u>13</u> | Form of Contract to be used:                                      |
| <del>21</del><br><u>14</u> | Name & Address of Architect/Engineer:                             |
| <del>22</del><br><u>15</u> | Other Tender Prices:  |
| <del>23</del><br><u>16</u> | Amount of Bond required:  |

I/We hereby declare that the statements and particulars given herein are true and that we have not concealed any material fact or circumstances that ought to be communicated to ~~Fortis-Bank~~New Hampshire Insurance Company.

Signed: \_\_\_\_\_ Position Held: \_\_\_\_\_

For: \_\_\_\_\_ Date: \_\_\_\_\_



**SCHEDULE 11**  
**D & B PERFORMANCE BOND**  
**PART 2 – ON DEMAND PERFORMANCE BOND**



**DATED 2000**

**SURETY (1)**

**UNITED WASTE (ISLE OF MAN) LIMITED (2)**

**- and -**

**[THE DEPARTMENT] (3)**

**ON DEMAND PERFORMANCE BOND**  
**FOR THE ISLE OF MAN INTEGRATED INCINERATION FACILITY**

**BEVAN  
ASHFORD  
SOLICITORS**

**35 Colston Avenue, Bristol BS1 4TT**  
**TEL: 0117 923 0111 FAX: 0117 929 1865**  
**DX: 7828 Bristol**

**24 October 2000**

**DEED OF BOND** made the                      day of                      2000

**BETWEEN:**

- (1) [ **LIMITED**] (Registered in England and Wales number ) whose registered office is at [ ] (“**the Surety**”)
- (2) **UNITED WASTE (ISLE OF MAN) LIMITED** being a company incorporated under the Companies Acts of the Isle of Man and having its registered office situate at 15-19 Athol Street, Douglas, Isle of Man, IM1 1LB (“**ProjectCo**”)

## 1 DEFINITIONS AND INTERPRETATIONS

In this Deed unless the context otherwise requires:

**1.1** the following expressions shall have the following meanings:

“Bond Amount”	5% of the D&B Contract Price from Take Over until Expiry
“Department”	<b>DEPARTMENT OF LOCAL GOVERNMENT AND THE ENVIRONMENT</b> , a Department of the Isle of Man Government.
“Expiry”	the date of issue of the Final Taking-Over Certificate under the Project Agreement which shall be conclusive for the purpose of this Bond.
“Facility”	the integrated incineration (energy from waste) plant and associated works and services to be designed, constructed, installed, tested, commissioned and completed by ProjectCo more particularly described in the Department’s Requirements and ProjectCo’s Proposal.
“Project Agreement”	a Project Agreement dated [     ] [to be entered into] between the Department (1) and ProjectCo (2) for the design, execution, testing, commissioning, completion, operation, maintenance and handback by ProjectCo of the Works at the Property.
“Works”	the design construction, testing, commissioning and completion of the Facility and remedying of any defects therein (excluding Temporary Works) on the terms and subject to the conditions of the Project Agreement.

## **1.2 Successors in Title**

Reference to the “Surety”, the “Department” and the “ProjectCo” shall include both parties’ successors in title and assigns.

## **1.3 Joint Liability**

Where there are two or more persons included in the expression “Surety”, “Department” or “ProjectCo” then the terms Surety, Department or ProjectCo shall include the plural numbers and any obligation expressed to be made by or with such party hereunder or pursuant hereto shall be deemed to be made and undertaken by such persons jointly and severally.

## **1.4 Headings**

The headings in this Bond are inserted for convenience only and shall be ignored in construing the terms and provisions hereof.

# **2 BOND**

The Surety guarantees and undertakes to pay to the Department the Bond Amount on receipt of the first written demand from the Department to the Surety accompanied by a signed statement from the Department stating the manner in which ProjectCo has failed to fulfil its obligations under the Project Agreement and attaching written evidence that the Department has given ProjectCo not less than 28 days’ notice of the Department’s intention to make such a call except where:

**2.1** ProjectCo has ceased trading; and / or

**2.2** any of the following events have occurred:

**2.2.1** an order being made for the administration of ProjectCo; or

**2.2.2** a petition being presented or a meeting being convened to consider the passing of a resolution or any other action being taken for or with a view to the winding up of ProjectCo in any case other than frivolously or vexatiously and ProjectCo failing within 14 days of the date of presentation of such petition or prior to the date of such meeting to take appropriate steps to challenge the relevant procedure; or

**2.2.3** ProjectCo entering into liquidation whether compulsorily or voluntarily (except for the purposes of amalgamation or reconstruction of a solvent company); or

**2.2.4** ProjectCo ceasing trading; or

- 2.2.5** ProjectCo suffering any process of execution to be levied on its assets and the same not having been lifted within 14 days; or
- 2.2.6** an administrative receiver or a receiver being appointed of all or any material part of the undertaking, property or assets of ProjectCo; or
- 2.2.7** ProjectCo stopping its payments to creditors generally; or
- 2.2.8** ProjectCo convening a meeting of its creditors or any class or group of its creditors with a view to proposing or making any assignment arrangement or composition with, or for the benefit of, its creditors or any class or group thereof except for the purpose of an amalgamation or reconstruction and ProjectCo then being solvent.

Such demand shall be conclusive evidence for the Surety's purposes as to its liability under this Bond and shall certify the circumstances giving rise to a right for the Department to terminate the Project Agreement in accordance with its terms.

### **3 AUTHORITY TO VARY PRINCIPAL CONTRACT**

No alteration of the Project Agreement or any alteration in the nature or extent of the Works and/or Services to be carried out under the Project Agreement; no allowance of time to ProjectCo; no indulgence or additional or advance payment, forbearance, payment or concession to ProjectCo; no compromise of any dispute with ProjectCo; no failure of supervision to detect or prevent any fault of ProjectCo nor the assignment of the benefit of the Project Agreement shall in any way discharge or release the Surety from any liability under this Bond.

### **4 DURATION OF BOND**

The obligations of the Surety under this Bond shall be released and discharged absolutely upon Expiry save in respect of a demand made in accordance with this Bond by the Department prior to the Expiry.

### **5 ASSIGNMENT**

- 5.1** The Department shall be entitled to assign its interest in this Bond to any third party in whom all or some of the functions of the Department relating to the collection and disposal of Confirming Waste are or are to become vested pursuant to the exercise of powers of Tynwald and/or any Government Department.
- 5.2** Without prejudice to Clause 5.1 the Department shall be ~~entitled~~<sup>317</sup> to assign this Bond and the benefits thereof and remedies hereunder provided that the Surety and

<sup>317</sup> [Borges Salmon amendment to correct typographical error \("shall be entitle"\)](#)

Contractor shall be entitled to receive notice of such assignment in writing within a reasonable period of the assignment taking place.

## 6 JURISDICTION

This Bond shall be governed by and construed in accordance with the laws of the Isle of Man and the Isle of Man Courts shall have non-exclusive jurisdiction with regard to all matters arising in connection with or under this Bond.

**IN WITNESS** whereof this Bond has been duly executed and delivered on the date first above written

**EXECUTED** as a Deed by the Surety acting by:

Director

---

Director/Secretary

---

**EXECUTED** as a Deed by ProjectCo, acting by:

Director

---

Director/Secretary

---

**SCHEDULE 12**  
**O & M DIRECT AGREEMENT**

**THIS DEED** is made the \_\_\_\_\_ day of \_\_\_\_\_ 199\_\_\_\_\_

**BETWEEN:**

- (1) **[APPROVED SERVICE PROVIDER]** [(Company number [    ])] whose registered office is at [    ] ("the Sub-contractor") and any successors or assignees;
- (2) **DEPARTMENT OF LOCAL GOVERNMENT AND THE ENVIRONMENT**, a Department of the Isle of Man Government of Murray House, Mount Havelock, Douglas, Isle of Man, IM1 1LB ("the Department")
- (3) **UNITED WASTE (ISLE OF MAN) LIMITED** being a company incorporated under the Companies Acts of the Isle of Man and having its registered office situate at 15-19 Athol Street, Douglas, Isle of Man, IM1 1LB ("ProjectCo")

## RECITALS

- (1) The Department has entered into a Project Agreement with ProjectCo to design construct operate and maintain the Facility
- (2) ProjectCo has entered into a contract with the Sub-contractor to provide the Services as defined in the Project Agreement

**NOW THIS DEED WITNESSES AS FOLLOWS:**

## 1 DEFINITIONS

- 1.1** Save where specified below words and definitions used in the Project Agreement shall have the same meaning in this Deed.
- 1.2** In this Deed the following words terms and expressions (wherever the context so admits) shall have the meanings given to them alongside

“Contract” the agreement between (1) ProjectCo and (2) the Sub-contractor to provide the Services.

“Deed” this document and any Schedules.

“Project Agreement” a Project Agreement dated [ ] [to be entered into] between the Department (1) and ProjectCo (2) for the design, execution,

testing, commissioning, completion, operation, maintenance and handing back by ProjectCo of the Works and the Services at the Facility.

## **2 INTERPRETATION**

- 2.1** Obligations undertaken or to be undertaken pursuant to this Deed by more than a single person shall be made and undertaken jointly and severally.
- 2.2** Words importing any gender include any other gender and words in the singular include the plural and words in the plural include the singular.
- 2.3** References to any statute or statutory provision shall be deemed to refer to any modification or re-enactment thereof for the time being in force whether by statute or by directive or regulation which is intended to have direct application within the United Kingdom and has been adopted by the Council of the European Communities.
- 2.4** The headings and index are inserted for convenience only and shall be ignored in interpreting the terms and provisions of the Project Agreement.

## **3 WARRANTY**

In consideration of the sum of £1 (receipt of which the Sub-contractor hereby acknowledges) the Sub-contractor warrants to and covenants with the Department whilst the Contract subsists to:

- 3.1** observe and perform the obligations of ProjectCo contained in the Project Agreement so far as they relate to the Services; and
- 3.2** exercise all reasonable skill and care expected of a competent and properly qualified contractor experienced in carrying out services of a similar size scope and degree of complexity to the Services.

## **4 STEP-IN RIGHTS**

- 4.1** The Sub-contractor will not exercise or seek to exercise any right which may be or become available to it to terminate or treat as terminated the Contract or discontinue or suspend the performance of any Services and obligations thereunder without first giving to the Department not less than 28 days' prior written notice specifying the Sub-contractor's grounds for terminating or treating as terminated the Contract or discontinuing or suspending its performance thereof.
- 4.2** Within 28 days of such notice the Department may give written notice to the Sub-contractor that the Department shall thenceforth become the employer under the Contract to the exclusion of ProjectCo and thereupon the Sub-contractor shall admit

that the Department shall be such employer and the Contract shall be and remain in full force and effect notwithstanding any of the said grounds.

- 4.3** If the Department shall have given such notice the Department shall as soon as practicable thereafter remedy any outstanding breach by ProjectCo which has been included in the Sub-~~Contractor~~contractor's specified grounds and which is capable of remedy by the Department.
- 4.4** As between the Department and the Sub-contractor, the Department shall in any event be entitled at any time by written notice to the Sub-contractor to be treated by the Sub-contractor as employer under the Contract to the exclusion of ProjectCo whereupon all rights and obligations of the employer under the Contract shall thereafter be exercisable and performed by the Department.
- 4.5** The Department shall from the service of any notice under Clause 4.2 or Clause 4.4 become responsible for the fees or costs properly payable to the Sub-contractor for the professional services rendered by the Sub-contractor provided that notwithstanding anything contained in this Deed and notwithstanding any payments which may be made by the Department to the Sub-contractor, the Department shall not be under any obligation to the Sub-contractor unless the Department shall have given written notice to the Sub-contractor pursuant to Clauses 4.2 or 4.4 of this Deed.
- 4.6** ProjectCo hereby agrees that it will not take any steps which would prevent or hinder the Department from exercising its rights under this Deed and confirms that the rights of the Department in Clauses 4.2 and 4.4 override any obligations of the Sub-contractor to ProjectCo under the Contract.

## **5 PARTNERSHIP**

Where the Sub-contractor is a partnership, references in this Deed to the Sub-contractor shall include each and every present and future partner of such partnership and the liability of each and every such partner under this Deed shall be joint and several.

## **6 NON-EXCLUSIVITY**

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

## **7 DISPUTE RESOLUTION**

- 7.1** Any dispute or difference arising under this Deed shall be resolved using the procedures set out in Clause 19 of and Schedule 13 to the Project Agreement.
- 7.2** No approval or inspection by the Department or its agents of any works or services undertaken or performed by the Sub-contractor including their design or specification or



testing and no omission to inspect or test shall negate or diminish any duty, liability or obligation under this Deed.

- 7.3** If any provision of this Deed shall be deemed invalid, unenforceable or illegal by the courts of any jurisdiction to which it is subject, such invalidity, unenforceability or illegality shall not prejudice or affect the validity, enforceability and legality of the remaining provisions.

## **8 PROJECT CO**

Project Co has agreed to be a party to this Deed for the purposes of acknowledging that the Sub-contractor shall not be in breach of the Contract by complying with the obligations imposed on it.

## **9 NOTICES**

- 9.1** Any notice shall be deemed to have been duly served:

- 9.1.1** if delivered by hand when left at the address for service provided at the start of this Deed
- 9.1.2** if given or made by prepaid first class post 48 hours after being posted (excluding Saturdays, Sundays and public holidays)
- 9.1.3** if given or made by facsimile at the time of transmission following receipt of the appropriate transmission sheet

provided that where in the case of delivery by hand or transmission by facsimile such delivery or transmission occurs either after 4.00 p.m. on a business day (being a day other than Saturday, Sunday or a public holiday) or on a day other than a business day service shall be deemed to occur at 10.00 am on the next following business day.

- 9.2** Any deemed notice or communication shall be made in writing or by facsimile addressed to the recipient at its registered office or its address stated in this Deed (or such other address or facsimile number as may be notified in writing from time to time by any party to the others).

## **10 SUCCESSORS**

This Deed shall be binding upon and shall inure to the benefit of the successors of the parties and the permitted assigns of the Department save that any assignment of this Deed shall be freely assignable to parties to whom the Department assigns or novates its interest in the Project Agreement but otherwise is subject to the consent of the Sub-contractor such consent not to be unreasonably withheld or delayed.

**11 MANX LAW**

The formation, construction, performance, validity and all aspect whatsoever of this deed shall be governed by Manx Law and the parties hereby agree to submit to the non-exclusive jurisdiction of the Isle of Man Courts.

**IN WITNESS** whereof the parties hereto have executed this agreement as a Deed the day and year first above written

**EXECUTED** as a Deed by the Subcontractor, acting by:

Director

---

Director/Secretary

---

**EXECUTED** as a Deed by ProjectCo

acting by:

Director

---

Director/Secretary

---

Executed by the Department under the hand of the  
Minister for the Department of Local Government  
and the Environment in the presence of:

Witness

Name

Address

## **SCHEDULE 13**

### **ADJUDICATION RULES**

#### **1 DEFINITIONS**

In these Rules the following terms shall have the following meanings:

"Contract"	this Agreement
"Party"	any party to the Contract
"President"	the President for the time being of the Institution of Civil Engineers of 1 Great George Street, Westminster, London, SW1P 3AA, United Kingdom or such other officer thereof as is authorised to deputise for him.

#### **2 COMMENCEMENT**

- 2.1** These Rules shall apply upon any Party giving written notice to any other Party requiring adjudication (the "Adjudication"), and identifying in general terms the dispute in respect of which adjudication is required.
- 2.2** Such notice may be given at any time and notwithstanding that arbitration or litigation has been commenced in respect of such dispute.
- 2.3** More than one such notice may be given arising out of the same contract.

#### **3 APPOINTMENT**

- 3.1** Where the Parties have agreed upon the identity of an adjudicator who confirms his readiness and willingness to embark upon the Adjudication within 7 days of referral to him, then that person shall be the "Adjudicator".
- 3.2** Where the Parties have not so agreed upon an adjudicator, or where such person has not so confirmed his willingness to act, then any Party may apply to the President for a nomination. The following procedures shall apply:
- 3.2.1** The application shall be in writing, accompanied by a copy of the Contract or other evidence of the agreement of the Parties that these Rules should apply, a copy of the written notice requiring adjudication, and the President's appointment fee (if any).

**3.2.2** The President shall endeavour to secure the appointment of an Adjudicator and the referral to him of the dispute within 7 days from the notice requiring adjudication.

**3.2.3** Any person so appointed, and not any person named in the Contract whose readiness or willingness is in question, shall be the Adjudicator.

**3.3** The President shall have the power by written notice to the Parties to replace the Adjudicator with another nominated person if and when it appears necessary to him to do so. The President shall consider whether to exercise such power if any Party shall represent to him that the Adjudicator is not acting impartially, or that the Adjudicator is physically or mentally incapable of conducting the Adjudication, or that the Adjudicator is failing with necessary dispatch to proceed with the Adjudication or make his decision. In the event of a replacement under this Rule, directions and decisions of the previous Adjudicator shall remain in effect unless reviewed and replaced by the new Adjudicator, and all timescales shall be recalculated from the date of the replacement.

**3.4** Where an adjudicator has already been appointed in relation to another dispute arising out of the Contract, the President may appoint either the same or a different person as Adjudicator.

## **4 AGREEMENT**

An agreement to adjudicate in accordance with these Rules shall be treated as an offer made by each of the parties to the Institution of Civil Engineers aforementioned and to any Adjudicator to abide by these Rules, which offer may be accepted by conduct by appointing an Adjudicator or embarking upon the Adjudication respectively.

## **5 SCOPE OF ADJUDICATION**

**5.1** The scope of the Adjudication shall be the matters identified in the notice requiring adjudication, together with:

**5.1.1** Any further matters which all Parties agree should be within the scope of the Adjudication and

**5.1.2** Any further matters which the Adjudicator determines must be included in order that the Adjudication may be effective and/or meaningful.

**5.2** The Adjudicator may rule upon his own substantive jurisdiction, and as to the scope of the Adjudication.

## **6 THE PURPOSE OF THE ADJUDICATION AND THE ROLE OF THE ADJUDICATOR**

- 6.1** The underlying purpose of the Adjudication is to resolve disputes between the Parties that are within the scope of the Adjudication as rapidly and economically as is reasonably possible.
- 6.2** Decisions of the Adjudicator shall be binding until the dispute is finally determined by legal proceedings, by arbitration (if the Contract provides for arbitration or the parties otherwise agree to arbitration) or by agreement.
- 6.3** The decision of the Adjudicator shall reflect the legal entitlements of the parties.
- 6.4** The Adjudicator shall have the like power to open up and review any certificates or other things issued or made pursuant to the Contract as would an arbitrator appointed pursuant to the Contract and/or a court.
- 6.5** The Adjudicator shall act fairly and impartially, but shall not be obliged or empowered to act as though he were an arbitrator.

## **7 CONDUCT OF THE ADJUDICATION**

- 7.1** The Adjudicator shall establish the procedure and timetable for the Adjudication.
- 7.2** Without prejudice to the generality of Clause 7.1 the Adjudicator may if he thinks fit:
  - 7.2.1** Require the delivery of written statements of case.
  - 7.2.2** Require any Party to produce a bundle of key documents, whether helpful or otherwise to that Party's case, and to draw such inference as may seem proper from any imbalance in such bundle that may become apparent.
  - 7.2.3** Require the delivery to him and/or the other Parties of copies of any documents other than documents that would be privileged from production to a court.
  - 7.2.4** Limit the length of any written or oral submission.
  - 7.2.5** Require the attendance before him for questioning of any Party or employee or agent of any Party.
  - 7.2.6** Make site visits.
  - 7.2.7** Make use of his own specialist knowledge.
  - 7.2.8** Obtain advice from specialist consultants, provided that at least one of the Parties so requests or consents.

- 7.2.9** Meet and otherwise communicate with any Party without the presence of other parties.
  - 7.2.10** Make directions for the conduct of the Adjudication orally or in writing.
  - 7.2.11** Review and revise any of his own previous directions.
  - 7.2.12** Conduct the Adjudication inquisitorial, and take the initiative in ascertaining the facts and the law.
  - 7.2.13** Reach his decision with or without holding an oral hearing, and with or without having endeavoured to facilitate an agreement between the Parties.
- 7.3** The Adjudicator shall exercise such powers with a view of fairness and impartiality, giving each Party a reasonable opportunity, in light of the timetable, of putting his case and dealing with that of his opponents.
- 7.4** The Adjudicator may not:
  - 7.4.1** Receive any written submissions from one Party that are not also made available to the others.
  - 7.4.2** Refuse any Party the right at any hearing or meeting to be represented by any representative of that Party's choosing who is present.
  - 7.4.3** Act or continue to act in the face of a conflict of interest.
- 7.5** The Adjudicator shall reach a decision within 28 days of referral or such longer period as is agreed by the parties after the dispute has been referred to him. The Adjudicator shall be entitled to extend the said period of 28 days by up to 14 days with the consent of the Party by whom the dispute was referred.

## **8 ADJUDICATOR'S FEES AND EXPENSES**

- 8.1** If a Party shall request Adjudication, and it is subsequently established that he is not entitled to do so, that Party shall be solely responsible for the Adjudicator's fees and expenses.
- 8.2** Save as aforesaid, the Parties shall be jointly responsible for the Adjudicator's fees and expenses including those of any specialist consultant appointed under 7.2.8. In his decision, the Adjudicator shall have the discretion to make directions with regard to those fees and expenses. If no such directions are made, the Parties shall bear such fees and expenses in equal shares, and if any Party has paid more than such equal share, that Party shall be entitled to contribution from other parties accordingly.

## **9 DECISIONS**

- 9.1** The Adjudicator may in any decision direct the payment of such compound or simple interest as may be commercially reasonable.
- 9.2** The Adjudicator may at the request of either Party require any Party to pay or make a contribution to the legal costs of another Party arising in the Adjudication. If the Adjudicator does not do so then neither Party shall be obliged to pay or make any contribution to the legal costs of the other arising in the Adjudication.
- 9.3** All decisions shall be in writing and shall include any reasons.

## **10 ENFORCEMENT**

Every decision of the Adjudicator shall be implemented without delay. The Parties shall be entitled to such reliefs and remedies as are set out in the decision, and shall be entitled to summary enforcement thereof, regardless of whether such decision is or is to be the subject of any challenge or review. No Party shall be entitled to raise any right of set-off, counterclaim or abatement in connection with any enforcement proceedings.

## **11 IMMUNITY CONFIDENTIALITY AND NON-COMPELLABILITY**

- 11.1** Neither the Institution of Civil Engineers, nor its President, nor deputy, nor the Adjudicator nor any employee or agent of any of them shall be liable for anything done or not done in the discharge or purported discharge of his functions as Adjudicator, whether in negligence or otherwise, unless the act or omission is in bad faith.
- 11.2** The Adjudication and all matters arising in the course thereof are and will be kept confidential by the parties except insofar as necessary to implement or enforce any decision of the Adjudicator or as may be required for the purpose of any subsequent proceedings.
- 11.3** In the event that any Party seeks to challenge or review any decision of the Adjudicator in any subsequent litigation or arbitration, the Adjudicator shall not be joined as a party to, nor shall be subpoenaed or otherwise required to give evidence or provide his notes in such litigation or arbitration.

## **12 LAW**

- 12.1** These Rules shall be governed by Isle of Man law and under the jurisdiction of the Isle of Man Courts.
- 12.2** No Party shall, save in case of bad faith on the part of the Adjudicator, make any application to the courts whatsoever in relation to the conduct of the Adjudication or the decision of the Adjudicator until such time as the Adjudicator has made his decision, or

refused to make a decision, and until the Party making the application has complied with any such decisions.



## SCHEDULE 14 RIGHTS ATTACHING TO THE GOLDEN SHARE

- 1 The Golden Share shall be constituted as a separate class of shares in the capital of ProjectCo.
- 2 If the Department requires ProjectCo to issue the Golden Share pursuant to Clause 6.8 of the Project Agreement the following provisions of this schedule shall apply.
- 3 The share capital of ProjectCo shall be increased and the rights attaching to such share shall be amended or the rights attaching to an existing unissued share in the capital of ProjectCo shall be amended, in either case, so that:-

3.1 the holder from time to time of the Golden Share shall be described as "the Golden Shareholder";

3.2 the rights as described in the specific article set out in Clause 4 below shall be attached to the Golden Share;

3.3 the Golden Share shall be transferable by the Golden Shareholder to any person to whom the Department shall be entitled to assign the benefit of the Project Agreement and only in connection with an assignment, transfer or vesting of rights under the Project Agreement but shall not otherwise be transferable except with the consent of the Directors of ProjectCo.

- 4 The Articles of Association of ProjectCo shall be altered so as to include the following specific article and to effect such specific consequential amendments as may be required to give effect thereto:-

"The Company shall not without the prior written consent of the Golden Shareholder do, agree to do or pass any resolution to do any of the following matters:

- (a) sell, lease, transfer, assign or otherwise dispose of or grant any right in or interest over all or part of the Facility or the Site; or
- (b) issue any new shares in or register the transfer of any existing shares in the capital of the Company if a consequence of such issue or registration would be that a majority of the shares in the capital of ProjectCo carrying the right to vote at a general meeting of ProjectCo would be held by any person other than United Waste Limited;
- (c) undertake, or agree to undertake, any activities apart from the treatment, recycling, reprocessing and disposal of such wastes as are delivered to by or at the discretion of the Department of Local Government and the Environment of the Isle of Man Government (or the successors to the said Department), the operation of a waste

incineration plant, the generation of electricity and streams and the sale of any assets produced from such processes;

- (d) accept a contract for the storage, treatment and/or disposal of waste from any person other than the Department (or Waste Management Board), for the sale of electricity to any person other than the Manx Electricity Authority or for the sale of steam for use in connection with a district heating or similar scheme;
- (e) save as is expressly permitted in the Project Agreement sub-contract of any part of ProjectCo's obligations under the Project Agreement or take any steps towards the passing of a resolution for the voluntary winding up of the Company or pass any resolution which would or would purport to vary the rights attached to the Golden Share."

## SCHEDULE 15 HEALTH AND SAFETY OBLIGATIONS

### 1 Interpretation

1.1 In these Health and Safety Obligations unless the context otherwise requires:

"Cleaning Works"	means the cleaning of any window or any transparent or translucent wall, ceiling or roof where such cleaning involves a risk of a person falling more than 2 metres;
"Client"	means ProjectCo ;
"Construction Phase"	means the D & B Phase as defined in the main body of this Agreement
"Construction Works"	means the Works and Services as defined in the main body of this Agreement
"Contractor"	<p>means any person who carries on a trade, business or other undertaking (whether for profit or not) in connection with which he:</p> <p>(a) undertakes to or does carry out or manage the Construction Works,</p> <p>(b) arranges for any person at work under his control (including, where he is an employer, any employee of;</p>
"Design"	means any design carried out in relation to the Construction Works
"Designer"	means any person employed to carry out the Design
"Executive"	means the Health and Safety Department of the Department of Local Government and the Environment
"Health and Safety File"	means a file, or other record in permanent form, containing the information required by virtue of Clause 10.4 of this Schedule;
"Health and Safety Plan"	means the plan prepared by virtue of Clause 11 of this Schedule;
"Planning Supervisor"	means any person for the time being appointed under Clause 2.1.1 of this Schedule;

"Principal Contractor" means any person for the time being appointed under Clause 2.1.2 of this Schedule;

"Project" means the Facility as defined in the main body of this Agreement.

**1.2** Any reference in these Health and Safety Obligations to a person being reasonably satisfied:

**1.2.1** as to another person's competence is a reference to that person being satisfied after the taking of such steps as it is reasonable for that person to take (including making reasonable enquiries or seeking advice where necessary) to satisfy himself as to such competence; and

**1.2.2** as to whether another person has allocated or will allocate adequate resources is a reference to that person being satisfied that after the taking of such steps as it is reasonable for that person to take (including making reasonable enquiries or seeking advice where necessary):

**1.2.2.1** to ascertain what resources have been or are intended to be so allocated; and

**1.2.2.2** to establish whether the resources so allocated or intended to be allocated are adequate.

## **2 Appointments of Planning Supervisor and Principal Contractor**

**2.1** Subject to Clause 2.6.2 of this Schedule, the Client shall appoint:

**2.1.1** a Planning Supervisor; and

**2.1.2** a Principal Contractor,

in respect of the Project.

**2.2** The Client shall not appoint as Principal Contractor any person who is not a Contractor.

**2.3** The Planning Supervisor shall be appointed as soon as is practicable after the Client has such information about the Project and the Construction Works involved in it as will enable him to comply with the requirements imposed on him by Clause 4.1 and 5.1 of this Schedule.

- 2.4** The Principal Contractor shall be appointed as soon as is practicable after the Client has such information about the Project and the Construction Works involved in it as will enable the Client to comply with the requirements imposed on him by Clauses 4.3 and 5.2 of this Schedule when making an arrangement with a Contractor to manage the Construction Works where such arrangement consists of the appointment of the Principal Contractor.
- 2.5** The appointments mentioned in Clause 2.1 of this Schedule shall be terminated, changed or renewed as necessary to ensure that those appointments remain filled at all times until the end of the Construction Phase.
- 2.6** Clause 2.1 of this Schedule does not prevent:
- 2.6.1** the appointment of the same person as Planning Supervisor and as Principal Contractor provided that person is competent to carry out the functions under these Health and Safety Obligations of both appointments; or
  - 2.6.2** the appointment of the Client as Planning Supervisor or as Principal Contractor or as both, provided the Client is competent to perform the relevant functions under these Health and Safety Obligations.

### **3 Notification of Project**

- 3.1** The Planning Supervisor shall ensure that notice of the Project in respect of which he is appointed is given to the Executive in accordance with Clause 3.2 to 3.4 of this Schedule.
- 3.2** Any notice required by Clause 3.1 of this Schedule shall be given in writing or in such other manner as the Executive may from time to time approve in writing and shall contain the particulars specified in Clause 3.3 of this Schedule or, where applicable, Clause 3.4 of this Schedule and shall be given at the times specified in those Clauses.
- 3.3** Notice containing such of the particulars specified in Annex 1 of this Schedule as are known or can reasonably be ascertained shall be given as soon as is practicable after the appointment of the Planning Supervisor.
- 3.4** Where any particulars specified in Annex 1 of this Schedule have not been notified under Clause 3.2 of this Schedule, notice of such particulars shall be given as soon as is practicable after the appointment of the Principal Contractor and, in any event, before the start of the Construction Works.

### **4 Competence of Planning Supervisor, Designers and Contractors**

- 4.1** The Client shall not appoint any person as Planning Supervisor unless the Client is reasonably satisfied that the person he intends to appoint has the competence to

perform the functions of Planning Supervisor under these Health and Safety Obligations  
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**4.2** The Client shall not arrange for a Designer to prepare a Design unless he is reasonably satisfied that the Designer has the competence to prepare that Design.

**4.3** The Client shall not arrange for a Contractor to carry out or manage the Construction Works unless he is reasonably satisfied that the Contractor has the competence to carry out or, as the case may be, manage, the Construction Works.

**4.4** Any reference in this Clause 4 of this Schedule to a person having competence shall extend only to his competence:

**4.4.1** to perform any requirement; and

**4.4.2** to conduct his undertaking without contravening any prohibition, imposed on him by or under any of the relevant statutory provisions.

## **5 Provision for Health and Safety**

**5.1** The Client shall not appoint any person as Planning Supervisor unless the Client is reasonably satisfied that the person he intends to appoint has allocated or, as appropriate, will allocate adequate resources to enable him to perform the functions of the Planning Supervisor under these Health and Safety Obligations.

**5.2** The Client shall not arrange for a Designer to prepare the Design unless he is reasonably satisfied that the Designer has allocated or, as appropriate, will allocate adequate resources to enable the Designer to comply with Clause 9 of this Schedule. The Client shall not arrange for a Contractor to carry out or manage the Construction Works unless he is reasonably satisfied that the Contractor has allocated or, as appropriate, will allocate adequate resources to enable the Contractor to comply with the requirements and prohibitions imposed on him by or under the relevant statutory provisions.

## **6 START OF CONSTRUCTION PHASE**

The Client shall ensure, so far as is reasonably practicable, that the Construction Phase of the Project does not start unless a Health and Safety Plan has been prepared and submitted to the Executive.

## **7 CLIENT TO ENSURE INFORMATION IS AVAILABLE**

**7.1** The Client shall ensure that the Planning Supervisor for the Project is provided (as soon as is reasonably practicable but in any event before the commencement of the work to which the information relates) with all information mentioned in Clause 7.2 of this Schedule about the state or condition of any premises at or on which the

Construction Works included or intended to be included in the Project is or is intended to be carried out.

- 7.2** The information required to be provided by Clause 7.1 of this Schedule is information which is relevant to the functions of the Planning Supervisor under these Health and Safety Obligations and which the Client has or could ascertain by making enquiries which it is reasonable for a person in his position to make.

## **8 Client to ensure Health and Safety File is available for inspection**

- 8.1** The Client shall take such steps as it is reasonable for a person in his position to take to ensure that the information in the Health and Safety File which has been delivered to him is kept available for inspection by any person who may need information in the file for the purpose of complying with the requirements and prohibitions imposed on him by or under any relevant statutory provisions.
- 8.2** It shall be sufficient compliance with Clause 8.1 by the Client who disposes of his entire interest in the Project if he delivers the Health and Safety File for the Project to the person who acquires his interest in the Project and ensures such person is aware of the nature and purpose of the Health and Safety File.

## **9 Requirements on Designer**

- 9.1** The Client shall not cause or permit any employee of his to prepare, and no self-employed person shall prepare, a Design in respect of the Project unless he has taken reasonable steps to ensure that the employee is aware of the duties to which the Client is subject by virtue of these Health and Safety Obligations.
- 9.2** Every Designer shall:
- 9.2.1** ensure that any Design he prepares and which he is aware will be used for the purposes of the Construction Works includes among the Design considerations adequate regard to the need:
    - 9.2.1.1** to avoid foreseeable risks to the health and safety of any person at work carrying out the Construction Works or the Cleaning Works in connection with the Project at any time, or of any person who may be affected by the work of such a person at work,
    - 9.2.1.2** to combat at source risks to the health and safety of any person at work carrying out the Construction Works or the Cleaning Works in connection with the Project at any time, or of any person who maybe affected by the work of such a person at work, and

**9.2.1.3** to give priority to measures which will protect all persons at work who may carry out the Construction Works or the Cleaning Works at any time and all persons who may be affected by the work of such persons at work over measures which only protect each person carrying out such work;

**9.2.2** ensure that the Design includes adequate information about any aspect of the Project or materials (including articles or substances) which might affect the health or safety of any person at work carrying out the Construction Works or the Cleaning Works in connection with the Project at any time or of any person who may be affected by the work of such a person at work; and

**9.2.3** co-operate with the Planning Supervisor and with any other Designer who is preparing any Design in connection with the Project so far as is necessary to enable each of them to comply with the requirements and prohibitions placed on him in relation to the Project by or under the relevant statutory provisions.

**9.3** Clauses 9.2.1 and 9.2.2 of this Schedule shall require the Design to include only the matters referred to therein to the extent that it is reasonable to expect the Designer to address them at the time the Design is prepared and to the extent that it is otherwise reasonably practicable to do so.

## **10 Requirements on the Planning Supervisor**

The Planning Supervisor appointed for the Project shall:

**10.1** ensure, so far as is reasonably practicable, that the Design of the Construction Works comprised in the Project:

**10.1.1** includes among the Design considerations adequate regard to the needs specified in Clauses 9.2.1.1 to 9.2.1.3 of this Schedule, and

**10.1.2** includes adequate information as specified in Clause 9.2.2 of this Schedule;

**10.2** take such steps as it is reasonable for a person in his position to take to ensure co-operation between Designers so far as is necessary to enable each Designer to comply with the requirements placed on him by Clause 9 of this Schedule ;

**10.3** be in a position to give adequate advice to:



- 10.3.1** the Client and any Contractor with a view to enabling each of them to comply with Clause 4.2 of this Schedule and 5.2 of this Schedule, and to
  - 10.3.2** the Client with a view to enabling him to comply with Clause 4.3, 5.2 and 6 of this Schedule;
- 10.4** ensure that a Health and Safety File is prepared in respect of the Construction Works comprised in the Project containing:
  - 10.4.1** information included with the Design by virtue of Clause 9.2.2, and
  - 10.4.2** any other information relating to the Project which it is reasonably foreseeable will be necessary to ensure the health and safety of any person at work who is carrying out or will carry out the Construction Works or the Cleaning Works in connection with the Project or of any person who may be affected by the work of such a person at work;
- 10.5** review, amend or add to the Health and Safety File prepared by virtue of Clause 10.4 as necessary to ensure that it contains the information mentioned in that paragraph when it is delivered to the Client in accordance with Clause 10.6; and
- 10.6** ensure that, on completion of the Construction Works comprised in the Project, the Health and Safety File in respect of the Construction Works is delivered to the Client.

## **11 Requirements relating to the Health and Safety Plan**

- 11.1** The Planning Supervisor shall ensure that the Health and Safety Plan has been prepared no later than the time specified in Clause 11.2 of this Schedule and contains the information specified in Clause 11.3 of this Schedule.
- 11.2** The time when the Health and Safety Plan is required by Clause 11.1 of this Schedule to be prepared is such time as will enable the Health and Safety Plan to be provided to any Contractor before arrangements are made for the Contractor to carry out or manage the Construction Works.
- 11.3** The information required by Clause 11.1 of this Schedule to be contained in the Health and Safety Plan is:
  - 11.3.1** a general description of the Construction Works comprised in the Project;
  - 11.3.2** details of the time within which it is intended that the Project, and any intermediate stages, will be completed;

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- 11.4.2** sufficient information about arrangements for the welfare of persons at work by virtue of the Project to enable any Contractor to understand how he can comply with any requirements placed upon him in respect of welfare by or under the relevant statutory provisions.

**11.5** An activity is an activity referred to in Clause 11.4.1.2 of this Schedule if:

- 11.5.1** it is an activity of persons at work; and
- 11.5.2** it is carried out in or on the premises where the Construction Works is or will be carried out; and
- 11.5.3** either:
- 11.5.3.1** the activity may affect the health or safety of persons at work carrying out the Construction Works or persons who may be affected by the work of such persons at work, or
- 11.5.3.2** the health or safety of the persons at work carrying out the activity may be affected by the work of persons at work carrying out the Construction Works.

## **12 Requirements on and powers of Principal Contractor**

**12.1** The Principal Contractor appointed for the Project shall:

- 12.1.1** take reasonable steps to ensure co-operation between all Contractors whether they are sharing the Construction Site or otherwise) so far as is necessary to enable each of those Contractor to comply with the requirements and prohibitions imposed on him by or under the relevant statutory provisions relating to the Construction Works;
- 12.1.2** ensure, so far as is reasonably practicable, that every Contractor, and every employee at work in connection with the Project complies with any rules contained in the Health and Safety Plan;
- 12.1.3** take reasonable steps to ensure that only authorised persons are allowed into any premises or part of premises where the Construction Works is being carried out;
- 12.1.4** ensure that the particulars required to be in any notice given under Clause 3 of this Schedule are displayed in a readable condition in a position where they can be read by any person at work on the Construction Works in connection with the Project; and

- 12.1.5** promptly provide the Planning Supervisor with any information which:
- 12.1.5.1** is in the possession of the Principal Contractor or which he could ascertain by making reasonable enquiries of any Contractor, and
  - 12.1.5.2** it is reasonable to believe the Planning Supervisor would include in the Health and Safety File in order to comply with the requirements imposed on him in respect thereof in Clause 9 of this Schedule , and
  - 12.1.5.3** is not in the possession of the Planning Supervisor.

**12.2** The Principal Contractor may:

- 12.2.1** give reasonable directions to any Contractor so far as is necessary to enable the Principal Contractor to comply with his duties under these Health and Safety Obligations;
- 12.2.2** include in the Health and Safety Plan rules for the management of the Construction Works which are reasonably required for the purposes of health and safety.

**12.3** Any rules contained in the Health and Safety Plan shall be in writing and shall be brought to the attention of persons who may be affected by them.

## **13 INFORMATION AND TRAINING**

**13.1** The Principal Contractor appointed for any Project shall ensure, so far as is reasonably practicable, that every Contractor is provided with comprehensible information on the risks to the health or safety of that Contractor or of any employees or other persons under the control of that Contractor arising out of or in connection with the Construction Works.

**13.2** The Principal Contractor shall ensure, so far as is reasonably practicable, that every Contractor who is an employer provides any of his employees at work carrying out the Construction Works with:

- 13.2.1** any information which the employer is required to provide to those employees in respect of that work by virtue of any relevant statutory obligations
- 13.2.2** any health and safety training which the employer is required to provide to those employees in respect of that work by virtue of any relevant statutory obligations

## **14 Advice from, and views of, persons at work**

### **14.1** The Principal Contractor shall:

- 14.1.1** ensure that employees and self-employed persons at work on the Construction Works are able to discuss, and offer advice to him on, matters connected with the Project which it can reasonably be foreseen will affect their health or safety; and
- 14.1.2** ensure that there are arrangements for the co-ordination of the views of employees at work on the Construction Works, or of their representatives, where necessary for reasons of health and safety having regard to the nature of the Construction Works and the size of the premises where the Construction Works is carried out.

## **15 Requirements and prohibitions on Contractors**

### **15.1** Every Contractor shall, in relation to the Project-

- 15.1.1** co-operate with the Principal Contractor so far as is necessary to enable each of them to comply with his duties under the relevant statutory provisions;
- 15.1.2** so far as is reasonably practicable, promptly provide the Principal Contractor with any information including any relevant part of any risk assessment in his possession or control which might affect the health or safety of any person at work carrying out the Construction Work or of any person who may be affected by the work of such a person at work or which might justify a review of the Health and Safety Plan;
- 15.1.3** comply with any directions of the Principal Contractor given to him under Clause 12.2.1 of this Schedule;
- 15.1.4** comply with any rules applicable to him in the Health and Safety Plan;
- 15.1.5** promptly provide the Principal Contractor with the information in relation to any death, injury, condition or dangerous occurrence which the Contractor is required to notify or report by virtue of any relevant statutory obligations ; and
- 15.1.6** promptly provide the Principal Contractor with any information which:
  - 15.1.6.1** is in the possession of the Contractor or which he could ascertain by making reasonable enquiries of persons under his control, and

**15.1.6.2** it is reasonable to believe the Principal Contractor would provide to the Planning Supervisor in order to comply with the requirements imposed on the Principal Contractor in respect thereof by Clause 12.1.5 of this Schedule, and

**15.1.6.3** which is not in the possession of the Principal Contractor.

**15.2** No employer shall cause or permit any employee of his to work on the Construction Works unless the employer has been provided with the information mentioned in Clause 15.4 of this Schedule.

**15.3** No self-employed person shall work on the Construction Works unless he has been provided with the information mentioned in Clause 15.4 of this Schedule.

**15.4** The information referred to in Clauses 15.2 and 15.3 of this Schedule is:

**15.4.1** the name of the Planning Supervisor for the Project;

**15.4.2** the name of the Principal Contractor for the Project; and

**15.4.3** the contents of the Health and Safety Plan or such part of it as is relevant to the Construction Works which any such employee or, as the case may be, which the self-employed person, is to carry out.

**ANNEX 1**  
**Clause 3**

**PARTICULARS TO BE NOTIFIED TO THE  
EXECUTIVE (HEALTH AND SAFETY)**

1. Date of forwarding.
2. Exact address of the construction site.
3. Name and address of the Client .
4. Type of Project.
5. Name and address of the Planning Supervisor.
6. A declaration signed by or on behalf of the Planning Supervisor that he has been appointed as such.
7. Name and address of the Principal Contractor.
8. A declaration signed by or on behalf of the Principal Contractor that he has been appointed as such.
9. Date planned for start of the Construction Phase.
10. Planned duration of the Construction Phase.
11. Estimated maximum number of people at work on the Construction Site.
12. Planned number of Contractors on the Construction Site.
13. Name and address of any Contractor or Contractors already chosen.

**SCHEDULE 16**  
**CONDITIONS PRECEDENTPART 1: PARTIES' OBLIGATIONS**

**1 PROJECTCO'S OBLIGATIONS**

**1.1** Delivery by ProjectCo to the Department in form and substance satisfactory to the Department (acting reasonably) of the documents listed below. Where listed as a duly certified copy, the document is to be certified by a Director or the Secretary of ProjectCo as being a true copy, in full force and effect at a date no earlier than the Execution Date:

**1.1.1** A copy, duly certified, of the Reserved Matters Approval.

**1.1.2** A copy, duly certified, of ProjectCo's Certificate of Incorporation and of any Certificate of Incorporation on change of name or certificate of re-registration as a public company of ProjectCo together with a copy of the Memorandum and Articles of Association of ProjectCo stating in the Articles of Association but not the Memorandum that the company shall not be restricted from entering into and giving effect to the provisions of the Project Agreement (as amended from time to time).

**1.1.3** A copy, duly certified, of minutes of a meeting of the Board of Directors of ProjectCo evidencing:-

(A) consideration by the Directors of:-

- (1) a final draft of this Agreement;
- (2) ProjectCo's rights and obligations under this Agreement;
- (3) any limit or restriction on any of ProjectCo's powers or any limit or restriction on the right or ability of the Directors to exercise any of ProjectCo's powers;

(B) a resolution of the Board of Directors approving the execution, delivery and performance by ProjectCo of this Agreement and authorising two Directors to sign this Agreement on behalf of ProjectCo and to approve any amendments to this Agreement produced to the Directors and authorising a specified person or persons to sign and despatch all notices and other communications required or permitted to be given by ProjectCo under this Agreement.

**1.1.4** A specimen of the signature of each person authorised by ProjectCo to sign this Agreement and to sign and despatch all notices and other communications required or permitted to be given by ProjectCo under this Agreement.



- 1.1.5** Each of the following, duly executed and delivered by the relevant parties:
- 1.1.5.1** the Parent Company Guarantee as set out in Schedule 10 Part I of this Agreement
  - 1.1.5.2** the Parent Company Guarantee set out in Schedule 10 Part II of this Agreement
  - 1.1.5.3** the D&B Performance Bond set out in Schedule 11 Part I of this Agreement
  - 1.1.5.4** the D&B Contractor's Warranty set out in Schedule 9 Part I of this Agreement
  - 1.1.5.5** a copy, duly certified, of the Electricity Agreement to be entered into by ProjectCo and the Manx Electricity Authority substantially in the form set out in Schedule 6 of this Agreement
  - 1.1.5.6** a letter from lawyers authorised to practice in the Belgian jurisdiction in a form acceptable to the Department confirming the capacity of Groupe Fabricom S.A. to enter into the Parent Company Guarantee
- 1.1.6** Copies, duly certified of the proposed insurance policies to be put in place to comply with ProjectCo's obligations in respect of insurance under this Agreement.

## **2 DEPARTMENT'S OBLIGATIONS**

- 2.1** Delivery by the Department to ProjectCo in form and substance satisfactory to ProjectCo (acting reasonably) of the documents listed below. Where listed as a duly certified copy, the document is to be certified by the Minister of the Department as being a true copy, in full force and effect at a date no earlier than the Execution Date:-
- 2.1.1** The approval of Tynwald and/or Treasury as appropriate to the Department entering into this Agreement and, insofar as is necessary, approval to the execution of the documentation hereunder
  - 2.1.2** A copy, duly certified, of the executed deed of conveyance or deed poll of conveyance to the Department of lands and rights at Richmond Hill acquired as a result of the resolution of Tynwald on the 18<sup>th</sup> November 1997 and the original of such deed to be recorded in the Deeds Registry of the Isle of Man at the expense of the Department

- 2.1.3** A specimen of the signature of each person authorised by the Department to sign the Project Agreement or any other document to which the Department is a party pursuant to this Agreement and to sign and despatch all notices and other communications required or permitted to be given by the Department under the Project Agreement or any other document to which the Department is a party pursuant to this Agreement.

### **3 REMEDIATION WORKS**

- 3.1** Completion of the Remediation Works.

**PART 2: CLAUSES WHICH ARE NOT CONDITIONAL  
ON SATISFACTION OF THE CONDITIONS PRECEDENT**

Clause 1  
Clause 2  
Clause 3  
Clause 4.2  
Clause 4A  
Clause 6.1  
Clause 6.3  
Clause 6.6  
Clause 7.1  
Clause 9.1  
Clause 15  
Clause 22  
Clause 23.1  
Clauses 25-34 inclusive

and the schedules referred to in such clauses

## SCHEDULE 17 HANDBACK

- 1 Up to twenty-four months before the Expiry Date the Department will provide ProjectCo with a schedule of meetings and test and evaluation processes designed to enable the Department to assess the anticipated state and condition at the Expiry Date of the Facility, the Site, spare parts, data, documentation and the CMS System.
- 2 ProjectCo shall without cost to the Department co-operate with the Department and its representatives in the complete and timely provision of such data and information as the Department shall reasonably request (including insurance assessors' reports) and shall give the Department such full and free access to the Facility, the Site, Wear Parts, Strategic Spare Parts, data, documentation and CMS System and, for these purposes, to ProjectCo's staff as the Department shall require (acting reasonably), to enable the Department and its representatives to carry out such test and evaluation processes as the Department shall reasonably consider necessary. ProjectCo shall (without liability on the part of the Department) allow the Department and/or its representatives to participate under the supervision of ProjectCo, in the operation and maintenance of the Facility and to subject the CMS System to processes of test and evaluation.
- 3 ProjectCo shall procure the co-operation of its staff in connection with any meetings and test and evaluation procedures required by the Department pursuant to these provisions.
- 4 The Department anticipates that the meeting and test and evaluation procedures may include all or some of those set out in the Department's Requirements at ~~paragraph~~[Schedule 7<sup>318</sup>](#) but the parties acknowledge that the Department shall be entitled (acting reasonably) to decide on further or other meetings or procedures.
- 5 ProjectCo shall take all necessary steps to procure:
  - 5.1 the assignment to the Department or as the Department may direct of any warranties or guarantees subsisting at the Expiry Date of which it enjoys the benefit relating to the Facility;
  - 5.2 the transfer to the Department, or as the Department may direct with full title guarantee of all Wear Parts and Strategic Spare Parts;
  - 5.3 the transfer of the contracts of employment of nominated staff working at the Facility.
- 6 For the purpose of this Schedule 17 the reasonableness of the Department shall be considered in the context of what is necessary to achieve the effective and efficient continued operation of the Facility.

<sup>318</sup> [Borges Salmon amendment. Department's Requirements to be inserted at Schedule 7 of this Conformed Copy.](#)



	<p>Directives not applicable to the Isle of Man but specified in the Project Agreement or the Department's Requirements as applicable to the incinerator project.</p>
<p>"Approvals"</p>	<p>means all licences, consents, permits, authorisations validations and approvals or any similar permissions required to be granted to ProjectCo of or from Tynwald the Governor in Council any Government Department Statutory Board, Local Authority or regulatory authority for the performance of any of the obligations of ProjectCo under this Agreement.</p>
<p>"Bottom Ash"</p>	<p>means the residue or other products of incineration but excluding fly ash produced by the Facility and conforming with the Specification contained in the Department's Requirements and which is to be removed from the Incinerator for disposal in accordance with this Agreement.</p>
<p>"Consignment Note System"</p>	<p>means a process broadly equivalent to that set out in the Special Waste Regulations 1996 (SI 1996/972) applicable in England and Wales relating to the pre-notification provision and retention of information relating to special waste (as defined therein).</p>
<p>"the Department's Requirements"</p>	<p>means the Department's Requirements as set out in Schedule 7.</p>
<p>"the Duty of Care"</p>	<p>means that duty of care as prescribed in the Public Health Act 1990 as amended by legislation bringing into force the Public Health (Amendment) Bill 1999.</p>

“the Facility”	means the integrated incineration (energy from waste) plant and associated works and services to be operated by ProjectCo in accordance with the Project Agreement.
“the Fee”	means the fee calculated at the rate of £25 per tonne of Bottom Ash collected from the Facility.
“the Landfill Site”	means the site [owned and operated by the Department] situate at [ ] and which is duly licensed to accept the Bottom Ash or any other duly licensed site which the Department may designate and use for the disposal of Bottom Ash.
“the Prescribed Rate”	has the meaning ascribed to it in the Project Agreement
“the Plan”	means the Plan attached to this Agreement.
“Quinquennial Review”	means the Quinquennial Review to be carried out by the Parties under the Project Agreement
“the Services”	means the disposal of Bottom Ash.
“the Site”	means the Site described in Part 1 of Schedule 4 of the Project Agreement.
“the Tests”	means such tests as may be designated in the Department’s Requirements or any other such tests as may be agreed by the Department’s Representative and ProjectCo in order that the Department may verify that Bottom Ash is being produced stored and transported in accordance with the Department’s Requirements.

“Transfer Note System”

means a process broadly equivalent to that set out in the Environmental Protection (Duty of Care) Regulations (SI 1991 (2839)) applicable in England and Wales relating to the provision and retention of information to transferees of controlled waste.

## 2 INTERPRETATION

- 2.1** Words importing any gender include any other gender and words in the singular include the plural and vice versa.
- 2.2** References to any statute or statutory provision in this Agreement shall be to Acts of Tynwald and shall be deemed to refer to and include any modification, amendment or re-enactment thereof for the time being in force whether by statute or applied by order in council or regulation.
- 2.3** The headings and index are inserted for convenience only and shall be ignored in interpreting the terms and provisions of this Agreement.
- 2.4** References in this Agreement to any Clause Annex or Schedule without further designation shall be construed as a reference to the Clause or Schedule to this Agreement as so numbered.
- 2.5** Where consent or approval of any party hereto is required for any purpose under or in connection with the terms hereof it shall be given in writing.
- 2.6** Any reference to the Department in this Agreement shall, where applicable, include a reference to any successor to its statutory functions or any emanation of the Government or organisation or entity which has taken over all or some of its functions or responsibilities and its permitted assigns and any reference to ProjectCo in this Agreement shall, where applicable, include a reference to any successor in title or permitted assigns.
- 2.7** References to this Agreement include references to Schedules, and vice versa.
- 2.8** Reference to employees of ProjectCo shall be deemed to include ProjectCo’s agents and sub-contractors unless the context otherwise requires.
- 2.9** Any agreement by ProjectCo not to do an act or thing shall be deemed to include an obligation not to permit such an act or thing to be done.
- 2.10** No deletion, addition to or variation of these terms shall be valid or of any effect unless agreed in writing and signed by the parties.



**2.11** This Agreement is without prejudice to the Department's statutory powers functions and responsibilities regarding waste disposal or any of its other functions whatsoever.

**2.12** Words and phrases defined in the Project Agreement shall have the same meaning in this Agreement unless inconsistent with the subject or context in which they appear.

### **3 CONDITIONS PRECEDENT**

**3.1** The obligations of the parties contained in this Agreement shall be conditional upon the parties entering into the Project Agreement and to the Conditions Precedent having been satisfied.

### **4 APPOINTMENT AND DURATION**

**4.1** ProjectCo grants the Department the exclusive right to perform the Services and the Department agrees to perform the Services on the terms and subject to the conditions of this Agreement.

**4.2** This Agreement shall remain in force until terminated in accordance with the provisions of Clause 8.

### **5 OBLIGATIONS OF THE DEPARTMENT**

**5.1** The Department shall accept Bottom Ash delivered to the Landfill Site by ProjectCo and in respect of which ProjectCo has at least two clear working days in advance notified the Department it intends to commence deliveries to the Landfill Site.

**5.2** The Department shall dispose of the Bottom Ash at the Landfill Site in accordance with the terms of all Applicable Laws, the Approvals, the Duty of Care and the Department's Requirements.

**5.3** The Department shall maintain an accurate weighbridge at the Landfill Site and shall weigh each consignment of Bottom Ash delivered by ProjectCo and shall make a record of the same and deliver a copy to ProjectCo.

**5.4** In the event of a Consignment Note system or a Transfer Note system being introduced into the Isle of Man during the term of this Agreement the Department shall comply with the requirements of such systems imposed on the producers carriers and disposers of waste.

**5.5** The Department shall keep all records relating to the reception, storage, treatment and disposal of the Bottom Ash at the Landfill Site for at least five years following its receipt and shall make such records available to ProjectCo to enable ProjectCo to:

- 5.5.1** ensure the Department is complying with its obligations under this Agreement;
  - 5.5.2** ensure that ProjectCo is complying with its Duty of Care; and
  - 5.5.3** for audit purposes.
- 5.6** The Department shall not be obliged to accept Bottom Ash which is not in substance quality or quantity in accordance with the Department's Requirements or is not in conformity with the Approvals or any Applicable Laws.
- 5.7** The Department shall submit an invoice in respect of the Fee to ProjectCo each calendar month containing sufficient details to enable ProjectCo to identify individual deliveries against the Fee for any such month.

## **6 OBLIGATIONS OF PROJECTCO**

- 6.1** ProjectCo shall notify the Department at least two clear working days in advance before commencing or ceasing deliveries to the Landfill Site of Bottom Ash and of the intended quantities to be delivered for disposal at the Landfill Site.
- 6.2** Such Bottom Ash shall be delivered at the cost of ProjectCo to the Landfill Site in a vehicle specially adapted for the purpose and approved by the Department or in sealed containers and in either case in accordance with the Approvals the Applicable Laws and the Department's Requirements.
- 6.3** ProjectCo shall when delivering Bottom Ash to the Landfill Site keep a record of the amount of Bottom Ash delivered and furnish a copy of such record to the Department. If during the term of this Agreement a Consignment Note System or a Transfer Note System is introduced to the Isle of Man ProjectCo will comply with all obligations placed upon the consignor or transferor of waste of the description of Bottom Ash by such System.
- 6.4** ProjectCo shall be responsible for maintaining at the Facility an accurate weighbridge and shall weigh all Bottom Ash before delivery to the Landfill Site and shall keep and deliver copies of the records relating to the Bottom Ash delivery to the Department.
- 6.5** ProjectCo shall permit subject to every effort being made to minimise interference with the operation of the Facility the Department and its employees or agents together with all appropriate vehicles and equipment to enter the Facility upon reasonable notice or forthwith in the case of emergency for the following purposes:
  - 6.5.1** to ensure ProjectCo is carrying out its duties under this Agreement;
  - 6.5.2** to obtain access to and test the weighbridge;

**6.5.3** to carry out the Tests;

**6.5.4** to examine and take copies of ProjectCo's records for audit purposes as required under this Agreement.

**6.6** ProjectCo shall comply fully with:

**6.6.1** the provisions of all Approvals given or in force throughout the term of this Agreement and all Applicable Laws; and

**6.6.2** its Duty of Care.

**6.7** ProjectCo shall pay the Fee to the Department within 21 days of the date of the delivery to ProjectCo of an invoice issued by the Department.

## **7 THE FEE**

**7.1** ProjectCo shall pay the Fee to the Department within 21 days after the delivery of the Department's invoice. All amounts are exclusive of VAT which shall be payable at the rate applicable to the Isle of Man at the relevant invoice date on production of an appropriate VAT invoice.

**7.2** The Fee shall be paid in accordance with Clause 5.7.

**7.3** ProjectCo shall pay interest at the Prescribed Rate on late payment of all sums due from it pursuant to this Agreement until such sums are paid as well after as before any judgement.

**7.4** The Fee shall be reviewed at and as part of a Quinquennial Review conducted in accordance with the provisions of the Project Agreement and shall follow the procedure set out in Clause 2.19 of Schedule 3 (O&M Obligations).

## **8 TERMINATION**

**8.1** This Agreement shall terminate unless previously determined upon the date of the termination of the Project Agreement or if the Parties mutually agree to its termination.

**8.2** Without prejudice to any other right or remedy it may possess the Department shall be entitled to terminate this Agreement forthwith without notice if:

**8.2.1** ProjectCo abandons or repudiates this Agreement;

**8.2.2** ProjectCo is in material breach of any of the terms of this Agreement and has failed within 28 days of the date of a notice in writing served on it by the Department requiring it to remedy such breach or breaches to remedy such breach or breaches;

- 8.2.3** ProjectCo has surrendered or has had revoked or suspended any Approval relating to the operation of the Facility and the disposal of Bottom Ash.
- 8.2.4** an order being made for the administration of ProjectCo; or
- 8.2.5** a petition being presented or a meeting being convened to consider the passing of a resolution or any other action being taken for or with a view to the winding up of ProjectCo in any case other than frivolously or vexatiously and ProjectCo failing within 14 days of the date of presentation of such petition or prior to the date of such meeting to take appropriate steps to challenge the relevant procedure; or
- 8.2.6** ProjectCo entering into liquidation whether compulsorily or voluntarily (except for the purposes of amalgamation or reconstruction of a solvent company); or
- 8.2.7** ProjectCo ceasing or appearing likely to cease trading; or
- 8.2.8** ProjectCo suffering any process of execution to be levied on its assets and the same not having been lifted within 14 days; or
- 8.2.9** an administrative receiver or a receiver being appointed of all or any material part of the undertaking, property or assets of ProjectCo; or
- 8.2.10** ProjectCo stopping or appearing likely to stop its payments to creditors generally; or
- 8.2.11** ProjectCo convening a meeting of its creditors or any class or group of its creditors with a view to proposing or making any assignment arrangement or composition with, or for the benefit of, its creditors or any class or group thereof except for the purpose of an amalgamation or reconstruction and ProjectCo then being solvent; or
- 8.3** Without prejudice to any other right or remedy it may possess ProjectCo shall be entitled to terminate this Agreement forthwith without notice if:

  - 8.3.1** the Department has surrendered or has had revoked or suspended any Approval relating to the operation of the Landfill Site or is legally unable to accept Bottom Ash;
  - 8.3.2** the Department is unable to accept any further deliveries of Bottom Ash at the Landfill Site and has been unable or has refused to accept

Bottom Ash after being given 28 days notice in writing of its requirement to do so by ProjectCo;

**8.3.3** the Landfill Site has closed;

**8.3.4** the Department is in material breach of any of its obligations under this Agreement and has failed to remedy the same after being given at least 28 days notice of the same and the requirement to remedy by ProjectCo;

**8.3.5** the operation of the Landfill Site is not in conformity with Applicable Laws.

## **SCHEDULE 19 EMERGENCY PLAN**

- 1** In the event of an Emergency:
  - 1.1** Primary Waste is to be baled at the Facility.
  - 1.2** If baling is not possible at the Facility then unbaled Primary Waste shall be transported and stored off site and a mobile baler and weighing facility are to be hired immediately.
  - 1.3** Off site storage for ten months' baled Primary Waste is to be procured by the Department.
  - 1.4** An emergency landfill site is to be procured if necessary by the Department pursuant to Clause 1.7.2 below.
  - 1.5** Protocols for exporting secondary waste stream are to be established between the parties and complied with.
  - 1.6** Baled Primary Waste stored off site will be returned to the Facility for incineration if possible.
  - 1.7** After four months' use of off site storage a meeting shall be convened between the parties to determine whether:
    - 1.7.1** the Facility will be Available within the next six months;
    - 1.7.2** It is necessary to commence the procedure to engineer the emergency landfill site;
  - 1.8** The secondary waste stream is to be analysed to identify those elements which may be disposed of locally, eg through primary waste stream if this is still available.
  - 1.9** Elements of the secondary waste stream which cannot be disposed of within the Isle of Man are to be exported.
- 2** ProjectCo shall:
  - 2.1** Notify the Department immediately if it anticipates a need to use off site storage or to export waste.
  - 2.2** Submit a formal request to use off site storage or to export waste as soon as such a requirement is confirmed.
  - 2.3** Bale the Primary Waste at the Facility to the extent possible.

- 2.4** If necessary arrange and bear the cost of hiring a mobile baler and weighing facility.
  - 2.5** Transport the Primary Waste to the off site storage or emergency landfill as appropriate.
  - 2.6** Record the weight of all Primary Waste destined for storage or landfill.
  - 2.7** Analyse the secondary waste stream with a view to local disposal.
  - 2.8** Export relevant elements of secondary waste stream.
  - 2.9** Keep the Department fully informed of all relevant matters whilst the Emergency persists.
- 3** The Department shall:
- 3.1** Provide off site storage for ten months' baled Primary Waste.
  - 3.2** Provide an emergency landfill site if required.
  - 3.3** Engineer the emergency landfill site if and when necessary.
  - 3.4** Prepare and put in place legal protocols to permit the export of wastes which cannot be disposed of in the Isle of Man.

**SCHEDULE 20  
EC APPOINTMENT**



**DATED**

**2000**

**ISLE OF MAN GOVERNMENT (DEPARTMENT OF LOCAL GOVERNMENT AND THE  
ENVIRONMENT) (1)**

**UNITED WASTE (ISLE OF MAN) LIMITED (2)**

**- and -**

**[ENVIRONMENTAL CONSULTANT] (4)**

**DEED OF APPOINTMENT**

**IN RELATION TO A WASTE MANAGEMENT STRATEGY AND INTEGRATED INCINERATION  
FACILITY  
ISLE OF MAN**

**BEVAN  
ASHFORD  
SOLICITORS**

**35 Colston Avenue, Bristol BS1 4TT  
TEL: 0117 923 0111 FAX: 0117 929 1865  
DX: 7828 Bristol**

**24 October 2000**



**THIS DEED OF APPOINTMENT** is made the                      day of                      2000

**BETWEEN**

- (1) **ISLE OF MAN GOVERNMENT (DEPARTMENT OF LOCAL GOVERNMENT AND THE ENVIRONMENT)** of Murray House, Mount Havelock, Douglas, Isle of Man, IM1 2SF ("the Department")
- (2) **UNITED WASTE (ISLE OF MAN) LIMITED** being a company incorporated under the Companies Acts of the Isle of Man and having its registered office situate at 15-19 Athol Street, Douglas, Isle of Man, IM1 1LB ("ProjectCo")
- (3) **[ENVIRONMENTAL CONSULTANT ]**("the Environmental Consultant")

**BACKGROUND**

- (A) The Department and ProjectCo proposes to develop and implement a waste management strategy for all waste arisings on the Isle of Man. Part of the Department's strategy is to procure the design, installation and operation of an Integrated Incinerator Facility ("the Project").
- (B) The Department and ProjectCo has requested the Environmental Consultant to provide environmental consultancy services for the Project on the terms set out in this Appointment and perform additional services in connection herewith.
- (C) The Environmental Consultant has offered to carry out and complete the Services for the Fee.
- (D) The Department may transfer the whole or part of its statutory obligations in respect of waste management and disposal in the future in which case it wishes to do so with the benefit of such design concept and other associated services performed or to be performed by the Environmental Consultant and such rights under this Appointment as may be appropriate.

## 1 DEFINITIONS AND INTERPRETATIONS

In this Appointment unless the context otherwise requires:

### 1.1 The following expressions shall have the following meanings:

"Applicable Laws"	shall mean any law, regulation, statute, rule, order, standards or delegated legislation of the Isle of Man (whether primary or subordinate legislation and specifically including regulations made thereunder) or applied to the Isle of Man by order in council or specifically by Act of the Imperial Parliament, European Community Directives directly applicable to the Isle of Man and/or any other such laws, regulations, statutes, rules, orders, standards delegated legislation or European Community Directives not applicable to the Isle of Man but specified in this Appointment.
"Approvals"	shall mean all licences, consents, permits, authorisations, validations and approvals or any similar permissions required to be granted to the Environmental Consultant of or from Tynwald the Governor in Council any Government Department Statutory Board, Local Authority or Regulatory Authority for the performance of any of the obligations of the Environmental Consultant relevant to this Appointment.
"Construction Documents"	has the same meaning as defined in the Project Agreement
"D & B Contract"	means any contract for the Works or part thereof between ProjectCo and the D & B Contractor.
"D & B Contractor"	has same meaning as defined in the Project Agreement.
"Department's Requirements"	means the Department's Requirements set out in Schedule 7.

"Documents"	means all designs drawings schedules schematic diagrams CAD files test results data specifications reports method statements remediation specifications and other similar information relating to the Services prepared or procured by or on behalf of the Environmental Consultant pursuant to or in contemplation of this Appointment.
"Fee"	the sums referred to in Schedule 2 payable in accordance with Clause 4 and subject to such adjustment as may be made thereto in accordance with this Appointment plus any VAT properly chargeable.
"Funder"	any party providing finance to the Department connected to the Project.
"Good Professional Practice"	means the exercise of that degree of skill care diligence prudence and foresight which would reasonable and ordinarily be expected from a skilled and experienced environmental consultant engaged in works and services of similar size, scope and complexity as that comprised in the Remediation Works.
"Hazardous Materials"	means any substance whether a solid, liquid, gas or vapour which alone or in combination with anything else is capable of causing harm or damage to property or to man or to any other organism supported by the environment including without limitation, hazardous substances, pollutants, contaminants, petroleum, petroleum products and radioactive material and waste.
"ICRCL"	the Interdepartmental Committee on the Redevelopment of Contaminated Land Guidance Note 59/83 (2 <sup>nd</sup> Edition 1987).
"Indemnity Insurance"	professional indemnity insurance with insurers of repute in an amount of not less than [£10 million] for any occurrence or series of occurrences arising out of any one event.
"Integrated Incinerator Facility"	an integrated incinerator for the disposal of Isle of Man waste arisings.
"Key Personnel"	those persons named in Schedule 3.

"Project Agreement"	an agreement entered into or about to be entered in to between ProjectCo and the Department for the design construction operation maintenance and handback of the Integrated Incinerator Facility.
"ProjectCo's Proposal"	has the same meaning as defined in the Project Agreement.
"Remediation Works"	<p>means any remediation works which are in the opinion of the Environmental Consultant reasonably necessary in order to:</p> <ol style="list-style-type: none"> <li>1.Prevent the Facility being adversely affected by Hazardous Materials present at the Site, or land adjoining the Site, at the Execution Date,</li> <li>2.Prevent Hazardous Materials present at the Site at the Execution Date adversely affecting any adjoining land; and/or</li> <li>3.enable the safe and cost effective completion of the Facility and its operation in accordance with the terms of the Project Agreement.</li> </ol>
"Services"	the services to be provided by the Environmental Consultant listed in Schedule 1 including without limitation surveys, analysis, investigation, interpretation, reporting, design and contract administration described in or arising in consequence of undertaking this Appointment together with any amendments and/or variations thereto made in accordance with this Appointment (including any such services carried out prior to the date of this Appointment).
"Site"	has the same meaning as defined in the Project Agreement.
"Statutory Successor"	any statutory successor to the Department assuming the same or similar statutory functions in respect of waste management and disposal as those of the Department.
"Works"	has the same meaning as defined in the Project Agreement.

## 1.2 Successors

References to "the Department" or "ProjectCo" shall include the person or persons for the time being entitled to the benefit of this Appointment.

### **1.3 Joint Liability**

Where there are two or more persons included in the expression "Consultant" then the term Consultant shall include the plural number and any obligation expressed to be made by or with such party hereunder or pursuant hereto shall be deemed to be made and undertaken by such persons jointly and severally.

### **1.4 Headings**

The headings in this Appointment are inserted for convenience only and shall be ignored in construing its terms.

### **1.5 Notices**

A notice may only be served in writing by hand delivery, recorded delivery post or facsimile (for which there is a transmission sheet followed by hand delivery or recorded delivery post despatched within 48 hours of transmission):

- 1.5.1** as regards the Department or the Department's Representative as required by this Agreement, at the office specified at the head of this document or such address or facsimile number (if any) as the Department shall notify in writing to ProjectCo and the Environmental Consultant from time to time
- 1.5.2** as regards ProjectCo to ProjectCo's Representative (if given by hand) or at ProjectCo's registered office or its trading address or facsimile number (if any) as ProjectCo shall notify in writing to the Department and the Environmental Consultant from time to time
- 1.5.3** as regards the Environmental Consultant that the office specified at the head of this document or such address or facsimile number (if any) as the Environmental Consultant shall notify in writing to the Department and ProjectCo from time to time.

### **1.6 Legislation and Regulations**

Reference to any statute or regulation or code of practice or standard includes the reference to the same as amended or extended or re-enacted from time to time.

## **2 DUTIES OF THE ENVIRONMENTAL CONSULTANT**

- 2.1** The Environmental Consultant has and will with all reasonable skill care and diligence to be expected from a competent professional environmental consultant experienced in the scope type scale and complexity of the services comprised in the Services (at all times in consultation with the Department and ProjectCo):

- 2.1.1** carry out the Services in accordance with this Appointment and submit its findings and or variations or amendments thereto to the Department and ProjectCo
- 2.1.2** comply with the current Isle of Man national specifications, technical standards, building, construction and environmental regulations, regulations applicable to the Integrated Incinerator Facility the Remediation Works and the Works and Services and best practice applicable;
- 2.1.3** make all necessary enquiries that would have been made of such a professional in the class of work involved in the Services (including without limitation reviewing the Department's Requirements, the Project Agreement and ProjectCo's Proposal and enquiries regarding the requirements made known to it in outline by the Department and ProjectCo in relation to the Services);
- 2.1.4** identify and advise the Department and ProjectCo of any related and associated environmental services required to facilitate the design, construction, operation and maintenance of the Integrated Incinerator Facility.
- 2.1.5** procure that the Key Personnel shall be employed throughout the duration of this Appointment. Changes to such Key Personnel should only be made with the Department's and ProjectCo's consent, such consent not to be unreasonably withheld or delayed
- 2.1.6** provide the Services independently, fairly and impartially to and as between ProjectCo and the Department.
- 2.2** The Environmental Consultant warrants that all persons concerned in the carrying out of the Services or any part thereof are suitably qualified experienced and competent having regard to the tasks and functions expected of them and that they shall liaise as necessary between themselves and shall be given adequate management and supervision where necessary by a director or partner.
- 2.3** The Environmental Consultant warrants that no part of the Services shall be performed by a person who has not previously executed a written agreement with the Environmental Consultant incorporating an express term whereby any Intellectual Property Rights arising out of or relating to work done by that person will vest in the Environmental Consultant for all purposes.
- 2.4** The Environmental Consultant warrants that it has exercised and will continue to exercise all reasonable skill, care and diligence to ensure that materials and goods generally known within the Environmental Consultant's scope of works at the time of specification or selection to be deleterious or harmful in the context or particular

application in which used will not be specified or selected or approved by the Environmental Consultant for use in or the construction of the Remediation Works.

### **3 ACKNOWLEDGEMENT**

- 3.1** The Environmental Consultant acknowledges that the Department and ProjectCo will be relying on the skill expertise and experience of the Environmental Consultant in relation to the performance by the Environmental Consultant of its obligations under this Appointment.
- 3.2** The Environmental Consultant acknowledges that the duty of care it owes to the Department and ProjectCo will not be extinguished but will continue in the event that this Appointment is terminated or assigned as the case may be by the Department and/or ProjectCo
- 3.3** The Environmental Consultant acknowledges that its duties and obligations under this Appointment shall take effect retrospectively and shall apply to services provided to the Department and/or ProjectCo prior to the date of this Appointment.

### **4 FEE**

- 4.1** ProjectCo shall pay to the Environmental Consultant in full satisfaction of its services in respect of the Services set out in Stage 1 of Schedule 1 the Fee in the amounts and at the times stated in Part 1 of Schedule 2 and in full satisfaction of its services in respect of the Services set out in Stage 2 of Schedule 1 the Fee in the amounts and at the times stated in Part 2 of Schedule 2. For the avoidance of doubt the Department shall in no circumstance contribute to the Fee and shall have no liability whatsoever for paying the Fee or any part of the Fee to the Environmental Consultant.
- 4.2** [The Environmental Consultant acknowledges that a total of £ [ ] payable in respect of the Services has been paid up to the date of this Appointment.]
- 4.3** Payments due to the Environmental Consultant under this Appointment shall become due for payment on submission of the Environmental Consultant's VAT invoice thereof at the dates and times set out in the schedule of payments in Schedule 2 and the final date for payment shall be 28 days thereafter.
- 4.4** ProjectCo may not withhold any payment after the final date for payment of any sum due under this Appointment unless it gives not less than 5 day's notice before such final date, a notice specifying the amount proposed to be withheld and the ground for withholding payment or if there is more than one ground, each ground and the amount attributable to it.
- 4.5** Payment by ProjectCo shall be subject to Clause 13 below and shall be without prejudice to any claims or rights which ProjectCo may have against the Environmental Consultant and shall not constitute any admission by ProjectCo as to performance by the Environmental Consultant of its obligations hereunder.

- 4.6** All sums stated in this Appointment are exclusive of any Value Added Tax payable unless expressly stated otherwise.

## **5 INTELLECTUAL PROPERTY RIGHTS AND INDEMNITY**

- 5.1** Copyright in Documents prepared by the Environmental Consultant or on its behalf for the purposes of the Services shall remain vested in the Environmental Consultant but the Department and ProjectCo shall have an irrevocable transferable licence for the whole period for which copyright is to subsist without payment of any further fee to use the same for all the purposes including without limitation any purposes relating to the Project Agreement without the Department and/or ProjectCo being under any obligation to further employ or notify the Environmental Consultant. The Environmental Consultant shall have no liability for use of the Documents other than any use for which they were prepared.
- 5.2** The Environmental Consultant warrants and represents that the Documents prepared or procured by or on behalf of it or employed by it do not and will not infringe any Intellectual Property Rights of any third party.
- 5.3** The Environmental Consultant shall indemnify the Department and/or ProjectCo against all expenses losses damages costs claims or proceedings suffered or incurred by the Department and/or ProjectCo arising out of or in connection with the infringement or alleged infringement by any of the Services or Documents of any copyright registered design patent or other Intellectual Property Rights of third parties.
- 5.4** The Environmental Consultant agrees to keep confidential and to ensure that its personnel and subcontractors shall keep confidential any information belonging to the Department and/or ProjectCo at any time gained by or disclosed to the Environmental Consultant in connection with this Appointment and the Documents and not at any time to disclose the same to any third party except to the minimum extent necessary to enable the Environmental Consultant to carry out its obligations hereunder and that this requirement shall survive the expiry or termination of this Appointment howsoever arising provided that the Environmental Consultant is not prevented from disclosing information required to be disclosed pursuant to statutory obligations. In the event that disclosure to any third party is required by statute such requirement and details of the required disclosure shall be made in the first instance to the Department.
- 5.5** In addition to the supply of Documents provided for by this Appointment and allowed for in the Fee the Environmental Consultant shall within 14 days of receipt at any time of a written request by the Department and/or ProjectCo provide the Department and/or ProjectCo with a copy or further copy in printed and/or computer readable format (at the option of the Department and/or ProjectCo) of any of the Documents subject only to payment by the Department and/or ProjectCo of the Environmental Consultant's reasonable copying charges.

## **6 OBLIGATIONS OF THE DEPARTMENT/ PROJECTCO**



- 6.1** Throughout the period of this Appointment during normal business hours and on reasonable prior notice the Environmental Consultant shall be entitled to reasonable access to the Department's relevant sites and any relevant information and other written material in the possession of the Department and/or ProjectCo as the Environmental Consultant shall reasonably require to carry out the Services. The Contractor shall not be entitled to rely on any data, surveys, reports or other documents supplied to him by or on behalf of the Department and/or ProjectCo.
- 6.2** The Department and ProjectCo shall appoint one or more appropriate personnel to liaise with the Environmental Consultant.

## **7 TERMINATION**

- 7.1** Upon the happening of one or more of the following events namely if the Environmental Consultant without reasonable cause:
- 7.1.1** fails to proceed regularly and diligently with the Services;
  - 7.1.2** suspends the execution of the Services or any part thereof before completion of the same;
  - 7.1.3** refuses or neglects to comply with any instruction which the Department and/or ProjectCo is empowered by Clause 11 of this Agreement to give;
  - 7.1.4** is otherwise in material breach of this Appointment
- then the Department and/or ProjectCo may without prejudice to any other right or remedy in addition to any other power enabling it to terminate this Appointment serve notice on the Environmental Consultant specifying the event and requiring its remedy and if the Environmental Consultant fails to remedy the same within 7 days of service of such notice or commits any further substantially similar breach of this Appointment the Department and/or ProjectCo may by further notice in writing forthwith terminate the employment of the Environmental Consultant.
- 7.2** Upon the happening of one or more of the following events namely if :-
- 7.2.1** ProjectCo fails to pay to the Environmental Consultant any amount properly due and payable under this Appointment (subject to any deductions which ProjectCo may be entitled to make);
  - 7.2.2** ProjectCo or the Department is otherwise in material breach of this Appointment and such breach has prevented the Environmental Consultant from carrying out its obligations for a continuous period of one month;

then the Environmental Consultant may without prejudice to any other right or remedy in addition to any other power enabling it to terminate

this Appointment serve notice in writing on the Department and ProjectCo specifying the event and requiring its remedy and if the Department or ProjectCo fails to remedy the same within 30 days of service of such notice the Environmental Consultant may by further notice in writing forthwith terminate its employment provided that such notice shall not be given unreasonably or vexatiously.

- 7.3** The Department and/or ProjectCo may terminate this Appointment by notice in writing to the other forthwith if the Environmental Consultant ceases for any reason to carry on its business or is unable to pay its debts or if any distress or execution shall be levied upon such other party's property or assets or if such other party shall make or offer to make any arrangement or composition with its creditors or commit any act of bankruptcy or if any petition or receiving order in bankruptcy shall be presented or made against it or (if it is a limited company) any resolution or petition to wind up such company's business (other than for the purpose of a bona fide reconstruction or amalgamation without insolvency) shall be passed or presented or if a receiver administrative receiver or administrator of such company's undertaking property or assets or any part of them shall be appointed.
- 7.4** If at any time the Department and/or ProjectCo decides to postpone or abandon the Services it may by notice in writing to the Environmental Consultant forthwith terminate this Appointment.
- 7.5** If the Environmental Consultant's employment is terminated by the Department and/or ProjectCo under this Clause 7 ProjectCo shall (subject to Clause 13) pay to the Environmental Consultant a fair and reasonable proportion of the Fee due to the Environmental Consultant up to the date of termination in accordance with this Appointment and upon such payment the Environmental Consultant shall upon the request of the Department and/or ProjectCo deliver to the Department and/or ProjectCo such Documents as are requested.
- 7.6** Termination of the Environmental Consultant's employment under this Appointment shall not prejudice the accrued rights and remedies of either party at the date of termination and in particular but without limitation the right to deduct by way of set-off or to sue for and recover any damages loss and/or expense incurred by either party arising out of or in connection with any breach by the other of this Appointment prior to such termination and generally to enforce any of its rights and remedies in relation to anything done prior to such termination. All provisions which are expressed to survive this Appointment shall remain in full force and effect.
- 7.7** The Department shall not commence the termination procedure under this Clause ~~9~~<sup>319</sup> without consent of ProjectCo save as provided in Clause ~~9.1~~<sup>7.1</sup> and in any event not unreasonably or vexatiously
- 7.8** ProjectCo shall not commence the termination procedure under this Clause ~~9~~ without the consent of the Department which shall thereafter have the right to step in and assume the obligations of ProjectCo.

<sup>319</sup> [Borges Salmon amendment to correct clause number \(previously referred to clause 9\).](#)

**8 ASSIGNMENT BY CONSULTANT**

The Environmental Consultant shall not without the prior written consent of the Department or ProjectCo assign transfer or sub-contract the benefit or obligations of this Appointment or any part thereof.

**9 ASSIGNMENT BY DEPARTMENT**

The Department or ProjectCo may assign or transfer any of its rights and obligations under this Appointment to:

- 9.1** any Statutory Successor or Funder without consent;
- 9.2** after completion of the Services any other person firm corporate body or company with an interest in the Integrated Incinerator Facility without consent; or
- 9.3** prior to the completion of the Services with consent (not to be unreasonably withheld or delayed) provided that it gives notice in writing of such assignment or transfer as soon as possible thereafter.

**10 ~~10~~ INSURANCE**

- 10.1** The Environmental Consultant shall take out and maintain Indemnity Insurance.
- 10.2** The Environmental Consultant shall maintain such Indemnity Insurance for a period of not less than 12 years from completion of all the Services provided that such insurance is available in the market at reasonable commercial rates.
- 10.3** Any increased or additional premium required by insurers by reason of the Environmental Consultant's own claims record or other acts or omissions particular to the Environmental Consultant shall be deemed to be within commercially reasonable rates.
- 10.4** The Environmental Consultant will provide to the Department and/or ProjectCo at the Department's and/or ProjectCo's reasonable request written confirmation by an independent company of insurance brokers that it has such insurances in force for the ensuing twelve months.
- 10.5** The Environmental Consultant shall immediately inform the Department and/or ProjectCo if the Indemnity Insurance ceases to be available at commercially reasonable rates in order that the Environmental Consultant the Department and ProjectCo can discuss means of best protecting their respective positions in the absence of such insurance.

**11 INSTRUCTIONS/ADDITIONAL SERVICES**

- 11.1** The Environmental Consultant shall undertake the services in relation to this Appointment for the Fee detailed in Part 3 of Schedule 2 if and when requested by the

Department and/or ProjectCo unless such instructions conflict with any statutory requirement. The Environmental Consultant shall immediately commence compliance with such instructions with all due diligence therewith.

**11.2** Subject to Clause 11.1 the Department and ProjectCo shall have the authority to issue instructions to the Environmental Consultant who shall as soon as reasonably practicable comply or commence compliance with all due diligence therewith unless such instruction conflicts with any statutory requirement.

**11.3** If any instruction issued under Clause 11.2 shall require the Environmental Consultant to undertake work or do any thing not provided for in or to be reasonably inferred from this Appointment or shall require the omission of any work or of any obligation or restriction and provided the same shall not have arisen out of or in connection with or shall not reveal any negligence omission or default of the Environmental Consultant or of any of its servants or agents then a fair and reasonable adjustment to the Fee shall be made in respect of the compliance by the Environmental Consultant with such instruction and any damage loss and/or expense incurred by the Environmental Consultant arising out of or in connection with such instruction.

## **12 COLLATERAL WARRANTIES**

Within 14 days of receipt of a written request from time to time from the Department and/or ProjectCo the Environmental Consultant shall execute as a deed one or more deeds of warranty in the form annexed in Appendix 1 to this Appointment such deed or deeds naming any purchaser, lessee(s) or Funder or Statutory Successor as the other party entitled to the benefits thereof.

## **13 SET-OFF**

Nothing contained elsewhere in this Appointment shall in any way limit or exclude the Department's and/or ProjectCo's rights and entitlements at common law to deduct or to set-off any monies due to it or which may become due to it from the Environmental Consultant (whether by reason of the provisions of this Appointment or in consequence of any negligence omission or default of the Environmental Consultant in the performance of its obligations under this Appointment) from or against any monies otherwise due to the Environmental Consultant under this Appointment or any other agreement between the Department and/or ProjectCo and the Environmental Consultant.

## **14 GENERAL TERMS**

**14.1** This Appointment shall not be construed to be an entire agreement. The Services are not exhaustive and the Department and/or ProjectCo may vary the extent and nature of the Services at a fee to be agreed provided that all additions, amendments and variations to this Appointment shall be binding only if in writing and signed by duly authorised representatives of each of the Department and ProjectCo.

**14.2** This Appointment shall not be amended modified varied or supplemented except in writing by duly authorised representatives of both parties.

- 14.3** No failure or delay on the part of the Department and/or ProjectCo to exercise any right or remedy under this Appointment shall be construed or operate as a waiver thereof nor shall any single or partial exercise of any right or remedy as the case may be so construed or operate.
- 14.4** The rights and remedies provided in this Appointment are cumulative and are not exclusive of any rights and remedies provided by law.
- 14.5** The Environmental Consultant's obligations under this Appointment shall not be modified released, diminished or in any way affected by any consent, approval, inspection, investigation or enquiry which may be made or carried out by the Department and/or ProjectCo nor by any failure or omission to carry out any such inspection, investigation, enquiry or lack of consent or approval.

## **15 MEDIATION**

The Department, ProjectCo or the Environmental Consultant may at any time (whether before or after service of a Notice to Refer to Adjudication or Arbitration under Clause 16.1 or 17.1) by notice in writing seek the agreement of the other for the dispute to be mediated by a mediator appointed by the Centre for Dispute Resolution of 7 St Katherine's Way, London, E1 9LB, England or any other appropriate or substitute impartial organisation set up for such a purpose.

## **16 ADJUDICATION**

- 16.1** The Department ProjectCo and the Environmental Consultant shall each have the right to refer any dispute under or arising out of this Agreement to adjudication and either party may give notice in writing (hereinafter called "the Notice of Adjudication") to the other at any time of his intention so to do. The adjudication shall be conducted under the Adjudication Rules as defined in the Project Agreement.
- 16.2** Unless the adjudicator has already been appointed he is to be appointed with the object of securing his appointment and referral of the dispute to him within 7 days of the Notice of Adjudication .
- 16.3** The adjudicator shall reach a decision within 28 days of such referral or such longer period as is agreed by the parties after the dispute has been referred to the adjudicator
- 16.4** The adjudicator may extend the period of 28 days by up to 14 days with the consent of the party by whom the dispute was referred.
- 16.5** The adjudicator shall act impartially.
- 16.6** The adjudicator may take the initiative in ascertaining the facts and the law.
- 16.7** The decision of the adjudicator shall be binding until the dispute is finally determined by arbitration or by agreement.

- 16.8** The adjudicator shall not be liable for anything done or omitted in the discharge or purported discharge of its functions as adjudicator unless the act or omission is in bad faith and any employee or agent of the adjudicator is similarly not liable.
- 16.9** If a party shall request adjudication, and it is subsequently established that he is not entitled to do so, that party shall be solely responsible for the adjudicator's fees and expenses.
- 16.10** Save as aforesaid, the parties shall be jointly responsible for the adjudicator's fees and expenses including those of any specialist consultant appointed by the adjudicator. In his decision, the adjudicator shall have the discretion to make directions with regard to those fees and expenses. If no such directions are made, the parties shall bear such fees and expenses in equal shares, and if any party has paid more than such equal share, that party shall be entitled to contribution from other parties accordingly.
- 16.11** The adjudicator may at the request of either party require any party to pay or make a contribution to the legal costs of another party arising in the adjudication. If the adjudicator does not do so then neither party shall be obliged to pay or make any contribution to the legal costs of the other arising in the adjudication.
- 16.12** The intention of the parties is that the practice, procedure and enforcement in respect of any adjudication in accordance with this Clause 16 shall reflect the practice, procedure and enforcement of adjudication in England (having regard to (without limitation) the Housing Grants Construction and Regeneration Act 1996 and any statutory modification, amendments thereto and any regulations made thereunder).
- 16.13** For the avoidance of doubt the parties shall not be obliged to adjudicate prior to commencing arbitration proceedings.
- 16.14** All matters and information placed before an adjudicator pursuant to a reference under this Clause 16 shall be deemed to be submitted to him without prejudice and the adjudicator shall not be called by the parties or anyone claiming through them in connection with any other legal proceedings arising out of or connection with any matters so referred to him.

## **17 ARBITRATION**

- 17.1** All disputes arising under or in connection with this Agreement other than failure to give effect to a decision of an adjudicator shall be finally determined by reference to arbitration. The parties seeking arbitration shall serve on the other party a notice in writing (called the "Notice to Refer") to refer the dispute to arbitration.
- 17.2** Where an adjudicator has given a decision under Clause 16.3 in respect of the particular dispute, the Notice to Refer shall be served within 3 months of the giving of the decision otherwise the adjudicator's decision shall be final as well as binding.
- 17.3** The arbitrator shall be a person appointed by agreement of the parties.

- 17.4** If the parties fail to appoint an arbitrator within one month of either party serving on the other party a notice in writing (hereinafter called the Notice to Concur) to concur in the appointment of an arbitrator the dispute shall be referred to a person to be appointed on the application of either party by the President for the time being of the Chartered Institute of Arbitrators of the International Arbitration Centre, 24 Angel Gate, City Road, London, EC1V 2RS.
- 17.5** If an arbitrator declines the appointment or after appointment is removed by order of a competent court or is incapable of acting or dies and the parties do not within one month of the vacancy arising fill the vacancy then either party may apply to the President of the time being of the Chartered Institute of Arbitrators to appoint another arbitrator to fill the vacancy.
- 17.6** In any case where the President for the time being of the Chartered Institute of Arbitrators is not able to exercise the functions conferred on him by this Clause the said function shall be exercised on his behalf by a Vice-President of the Chartered Institute of Arbitrators for the time being or any other officer of the Institute to whom such functions have been delegated by either the President or Vice-President.
- 17.7** Any reference to arbitration under this Clause 17 shall be deemed to be a submission to arbitration within the meaning of the Arbitration Act 1976 (as amended) or any statutory re-enactment or amendment thereof for the time being in force and the seat of the arbitration shall be the Isle of Man. Such arbitrator shall have full power to open up review and revise any decision opinion, instruction, directions, certificate of the Department's and/or ProjectCo's representative or an adjudicator.
- 17.8** Neither party shall be limited in the arbitration to the evidence or arguments put to the Department's and/or ProjectCo's representative or to any adjudicator.
- 17.9** Unless the parties otherwise agree in writing any reference to arbitration may proceed notwithstanding that the Works are not then complete or alleged to be complete.
- 17.10** No decision, opinion, instruction, direction or, certificate given by the Department's and/or ProjectCo's representative shall disqualify him from being called as a witness and giving evidence before an adjudicator or arbitrator on any matter whatsoever relevant to the dispute.

## **18 LIMITATION**

No action or proceedings for any breach of this Agreement shall be commenced against the Environmental Consultant after the expiry of 12 years from the completion of all the Services.

## **19 JURISDICTION AND LAW**

The laws applicable to this Appointment shall be the laws of the Isle of Man and the Isle of Man Courts shall have non exclusive jurisdiction with regard to all matters arising in connection with or under this Appointment except where expressly provided otherwise.

**IN WITNESS** whereof the parties hereto have set their hands and seals the day and year first before written

**EXECUTED** as a Deed by the Environmental  
Consultant in the presence of:

Director

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Director/Secretary

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**EXECUTED AS A DEED** on behalf of **the ISLE OF MAN GOVERNMENT** by authorised signatories:

Authorised Signatory

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Authorised Signatory

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**EXECUTED** as a Deed by **PROJECTCO** in  
the presence of:

Director

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Director/Secretary

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**SCHEDULE 1**  
**SERVICES TO BE PROVIDED BY THE**  
**ENVIRONMENTAL CONSULTANT**

The Services to be provided by the Environmental Consultant are listed below. No entitlement to extra payment attaches to these services unless this Appointment so provides. The list of services is not intended to be exhaustive and is without prejudice to the general scope and effect of the duty of care and obligations undertaken by the Environmental Consultant in this Appointment. The Environmental Consultant shall be responsible for carrying out within the Fee at his own cost any service which is reasonably necessary for or ancillary to the proper performance of this Appointment whether listed below or not unless the Department or ProjectCo expressly instructs otherwise

**Stage 1**

**1**      General

- 1.1**      The Environmental Consultant shall provide all services reasonably required to give effect to the role of the Environmental Consultant pursuant to the Project Agreement including without limitation investigating and reporting on the nature and condition of the Site and designing the Remediation Works for the remediation of any Hazardous Materials or potential Hazardous Materials in on or under the Site and/or for preventing the migration to and from the Site to any adjoining land of any Hazardous Materials prior to the Expiry Date as defined in the Project Agreement and all services ancillary thereto.]
- 1.2**      Prior to commencing the services set out in Clause 1.1 the Environmental Consultant shall review the Project Agreement, ProjectCo's Proposal and the Department's Requirements to ensure that the Remediation Works are designed and carried out to enable ProjectCo and the Department to carry out their obligations under the Project Agreement

**2**      Services prior to commencement of the Remediation Works

The Environmental Consultant shall perform the Services in connection with the design of the proposed Remediation Works in compliance with all Applicable Laws and Approvals and shall as a minimum carry out the following:

- 2.1**      obtain and review all available information in relation to the Integrated Incinerator Facility and ensure that the design of the Remediation Works are compatible with the design and construction of the Integrated Incinerator Facility ;
- 2.2**      obtain and review all available background information as to the condition of the Site;
- 2.3**      visit the Site and carry out an initial appraisal (including if necessary carrying out of an intrusive site investigation and laboratory testing) having studied all data, information and reports relating to the Integrated Incinerator Facility;

- 2.4** provide each of the Department and ProjectCo with [ ] copies of a report giving an assessment of the likely level, extent and potential for contamination of the Site and an assessment of any Remediation Works which may be necessary taking into account the nature of the Integrated Incinerator Facility;
- 2.5** design the necessary Remediation Works and prepare a specification and method statement in sufficient detail for inclusion in the Construction Documents forming part of the Project Agreement [and the Employer's Requirements forming part of the D&B Contract], having regard to the outcome of all available information obtained from site investigations and testing and all relevant guidelines, including, but not limited to, those published by ICRCCL and the Water Supply (Water Quality) Regulations 1989 (Maximum Admissible Concentrations) and Good Professional Practice;
- 2.6** meet and liaise with the D&B Contractor prior to the design and execution of the Remediation Works
- 2.7** liaise with the relevant Local Authority, the Department [and the Waste Management Board] such other organisations as may be required in connection with the Remediation Works to analyse their requests and comment in relation to the Remediation Works and advise ProjectCo and the Department accordingly
- 2.8** *(Any additional services agreed).*

## **Stage 2**

### **3 Services during the Remediation Works**

The Environmental Consultant shall perform the Services in connection with the carrying out of the Remediation Works and their compliance with Applicable Laws and Approvals and shall carry out the following:

- 3.1** monitor the execution by the D&B Contractor of the Remediation Works and advise the Department and ProjectCo regarding compliance with the Construction Documents and the Department's Requirements and other terms of the D&B Contract insofar as it relates to contamination, including monitoring of any further tests required to be carried out by the D&B Contractor
- 3.2** *[Any additional services agreed].*

## SCHEDULE 2

### PAYMENT

- 1** The total fee payable for the Services will be [£                      ]("the Fee") apportioned against the stages as follows:

#### Part 1

Satisfactory completion Stage 1 Services        %

#### Part 2

Satisfactory completion Stage 2 Services        %

- 2** The Fee shall include salaries, other payroll costs and overheads and secretarial services. Expenses directly associated with the work shall be paid at cost.
- 3** Not earlier than 12 months after the date of this Deed the Environmental Consultant shall be entitled to make reasonable revisions to its inclusive daily rates provided that it shall not make any such revisions more than once every twelve months. The Environmental Consultant shall give not less than one month's notice in writing to ProjectCo of any proposed revision to its inclusive daily rates.

#### Part 3

#### Further Services

- 4** ProjectCo shall pay to the Environmental Consultant for its services in respect of the services carried out pursuant to the Department's or ProjectCo's instructions under Clause 11.1 of this Appointment a fixed fee agreed in advance or failing such agreement for directors, salaried principals and technical and supporting staff the following rates per 7.5 hour day or pro rata:

Director	£	
Associate		£
Senior Engineer	£	
Intermediate Engineer		£
Junior Engineer	£	

or such revised daily rates as have been agreed pursuant to paragraph 3 of Part 2 of this Schedule 2.

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- 5** These rates include salaries, other payroll costs and overheads and secretarial services. Expenses directly associated with the work shall be paid at cost.
  - 6** The Environmental Consultant shall submit to ProjectCo a monthly invoice in arrears for services carried out together with such supporting data as may be reasonably required by ProjectCo.
  - 7** Not earlier than 12 months after the date of this Deed the Environmental Consultant shall be entitled to make reasonable revisions to its inclusive daily rates provided that it shall not make any such revisions more than once every twelve months. The Environmental Consultant shall give not less than one month's notice in writing to ProjectCo of any proposed revision to its inclusive daily rates.

**SCHEDULE 3**  
**KEY PERSONNEL**

**APPENDIX 1- FORM OF COLLATERAL WARRANTY TO BE GIVEN IN FAVOUR OF THE  
STATUTORY SUCCESSOR ~~OR FUNDER~~ OR FUNDER**



**DATED**

**2000**

**[LIMITED] (1)**

**- and -**

**[STATUTORY SUCCESSOR/FUND/PURCHASER/LESSEE(S)] (2)**

**DEED OF WARRANTY**

**IN RELATION TO CONTAMINATION REMEDIATION WORKS AND INTEGRATED INCINERATION  
FACILITY  
ISLE OF MAN**

**BEVAN  
ASHFORD  
SOLICITORS**

**35 Colston Avenue, Bristol BS1 4TT  
TEL: 0117 923 0111 FAX: 0117 929 1865  
DX: 7828 Bristol**

**24 October 2000**

**DEED OF WARRANTY** made this                      day of                      2000

**BETWEEN**

**1-1** [THE ENVIRONMENTAL CONSULTANT ] ("the Environmental Consultant")

**2-2** STATUTORY SUCCESSOR/ FUND/ PURCHASER/ LESSEE(S) (~~registered number~~)

~~of~~ REGISTERED NUMBER ) OF

(“the Waste Management Board”) (“the Fund”) (“the Purchaser”) (“the Lessee”)

**NOW THIS DEED WITNESSETH:**

## **1 DEFINITIONS AND INTERPRETATIONS**

In this Deed unless the context otherwise requires:

### **1.1** The following expressions shall have the following meanings:

"Appointment"	an agreement made between the Department and ProjectCo and the Environmental Consultant whereby the Department and ProjectCo have procured certain design works and services and reports to be carried out by the Environmental Consultant on behalf of the Department and ProjectCo in connection with any Remediation Works prior to the construction of the Integrated Incinerator Facility
"Department"	Isle of Man Government (Department of Local Government and the Environment) of Murray House Mount Havelock Douglas Isle of Man IM1 2SF
"Indemnity Insurance"	professional indemnity insurance with insurers of repute in an amount of not less than [£10 million] for any occurrence or series of occurrences arising out of any one event for a period of 12 years from the date of completion of the Environmental Consultant's obligation under the Appointment provided that such insurance is available in the market at reasonable commercial rates. Any increase or additional premium required by insurers by reason of the Environmental Consultant's own claims record or other acts or omissions particular to the Environmental Consultant shall be deemed to be within reasonable commercial rates

"Integrated Incinerator Facility"	an integrated incinerator for the disposal of Isle of Man waste arisings
"ProjectCo"	any contractor appointed to design construct operate and maintain the Integrated Incinerator Facility.
"Project Agreement"	an agreement entered into or about to be entered in to between ProjectCo and the Department for the design construction and maintenance of the Integrated Incinerator Facility
"Remediation Works"	has the same meaning as defined in the Project Agreement

Words defined in the Appointment unless expressly stated otherwise are to have the same meaning in this Deed.

## 1.2 Headings

The headings in this Deed are inserted for convenience only and shall be ignored in construing the terms

## 1.3 Notices

Any notice provided for in this Deed shall be duly given if delivered by hand or sent by first class pre-paid registered delivery post to the party named therein at the address of such party shown above in this Deed or at such other address as such party may specify from time to time by written notice to the other party hereto and if sent by first class pre-paid registered delivery post it shall be deemed to have been received on the second working day after the date of posting.

## 2 DUTY OF CARE

The Environmental Consultant hereby agrees and undertakes to the [Fund/Waste Management Board/Purchaser/Lessee] that in respect of such matters as lie within the scope of its professional duties as set out in the Appointment (whether express or implied) it has exercised and will continue to exercise all the reasonable skill and care to be expected of a competent Consultant experienced in works of similar scope and complexity to those comprised in the Services in the performance of its duties in relation to the Appointment and it hereby acknowledges that it owes a duty of care to the [Fund/Waste Management Board/Purchaser/Lessee] to do so provided that the Environmental Consultant shall have no greater liability to the [Fund/Waste Management Board/Purchaser/Lessee] than it would have had if the [Fund/Waste Management Board/Purchaser/Lessee] had been named as the Appointor in the Appointment.

## 3 DELETERIOUS MATERIALS



The Environmental Consultant warrants that it has exercised and will continue to exercise all reasonable skill, care and diligence to ensure that materials and goods generally known within the Environmental Consultant's scope of works at the time of specification or selection to be deleterious or harmful in the context or particular application in which used will not be specified or selected or approved by the Environmental Consultant for use in or the construction of the Remediation Works .

## **4 COPYRIGHT**

- 4.1** Copyright in Documents prepared by the Environmental Consultant or on its behalf for the purposes of the Services shall remain vested in the Environmental Consultant but the [Fund / Waste Management Board / Purchaser / Lessee] shall have an irrevocable transferable licence for the whole period for which copyright is to subsist without payment of any further fee to use the same for all the purposes without the [Funder / Waste Management Board / Purchaser / Lessee] being under any obligation to further employ or notify the Environmental Consultant. The Environmental Consultant shall have no liability for use of the Documents other than any use for which they were prepared.
- 4.2** The Environmental Consultant warrants and represents that the Documents prepared or procured by or on behalf of it or employed by it do not and will not infringe any Intellectual Property Rights of any third party.
- 4.3** The Environmental Consultant shall indemnify the [Funder / Waste Management Board / Purchaser / Lessee] against all expenses losses damages costs claims or proceedings suffered or incurred by the [Funder / Waste Management Board / Purchaser / Lessee] arising out of or in connection with the infringement or alleged infringement by any of the Services or Documents of any copyright registered design patent or other Intellectual Property Rights of third parties.
- 4.4** The Environmental Consultant shall within 14 days of receipt at any time of a written request by the [Funder / Waste Management Board / Purchaser / Lessee] provide the [Funder / Waste Management Board / Purchaser / Lessee] with a copy or further copy in printed and/or computer readable format (at the option of the [Funder / Waste Management Board / Purchaser / Lessee] of any of the Documents subject only to payment by the [Funder / Waste Management Board / Purchaser / Lessee] of the Environmental Consultant's reasonable copying charges.

## **5 INSURANCE**

The Environmental Consultant covenants:

- 5.1** to take out and maintain Indemnity Insurance cover
- 5.2** to inform the [Fund/Waste Management Board/Purchaser/Lessee] or its assignees in writing immediately if Indemnity Insurance cover ceases to be available at reasonable commercial rates

- 5.3** when requested by the [Fund/Waste Management Board/Purchaser/Lessee] (but not more often than is reasonable) to produce written evidence of the Indemnity Insurance cover and confirmation that the premiums have been paid

## **6 ASSIGNMENT**

The [Fund/Waste Management Board/Purchaser/Lessee] will (at any time whether now or in the future) be entitled to assign the benefit of this Deed and the rights and remedies available to it and the assignee shall do all such things as may reasonably be necessary to effect such assignment, provided the number of such assignments shall be limited to twice only.

## **7 OTHER REMEDIES**

The provisions of this Deed shall be without prejudice to any rights or remedies which the [Fund/Waste Management Board/Purchaser/Lessee] may have against the Environmental Consultant whether in tort or otherwise and shall not be deemed or construed so as to limit or exclude any such rights or remedies.

## **8 SUCCESSORS**

Subject to any limitation on assignments in this Deed reference to the [Fund/Waste Management Board/Purchaser/Lessee] shall include the person or persons for the time being entitled to the benefit of this Deed

## **9 INDEPENDENT ENQUIRY CLAUSE**

The liability of the Environmental Consultant under this Deed shall not be modified released, diminished or in any way affected by any independent inspection investigation or enquiry into any relevant matter which may be made or carried out by or for the [Fund/Waste Management Board/Purchaser/Lessee] nor by any failure or omission to carry out any such inspection, investigation or enquiry nor by the appointment by the [Fund/Waste Management Board/Purchaser/Lessee] of any independent firm, company, or party whatsoever to review the progress of or otherwise report to the [Fund/Waste Management Board/Purchaser/Lessee] in respect of the Remediation Works nor by any action or omission of any such firm, company or party whether or not such action or omission might give rise to any independent liability of such firm, company or party to the [Fund/Waste Management Board/Purchaser/Lessee] provided always that nothing in this clause shall modify or affect any rights which the Environmental Consultant might have but for the existence of this clause to claim contribution from any third party whether under statute or at common law

## **10 JURISDICTION AND LAW**

The laws applicable to this Deed shall be the law of the Isle of Man and the Isle of Man Courts shall have non exclusive jurisdiction with regard to all matters arising in connection with or under this Deed except where expressly provided otherwise.

**IN WITNESS** whereof this document is executed as a Deed and is delivered on the date stated at the beginning of this Deed

**EXECUTED** as a Deed by the Environmental  
Consultant in the presence of:

Director

\_\_\_\_\_

Director/Secretary

\_\_\_\_\_

**[EXECUTED AS A DEED** on behalf of **the WASTE MANAGEMENT BOARD** by authorised signatories: ]

Authorised Signatory

\_\_\_\_\_

Authorised Signatory

\_\_\_\_\_

**[EXECUTED** as a Deed by the  
**FUND/PURCHASER/LESSEE** in the  
presence of:]

Director

\_\_\_\_\_

Director/Secretary

\_\_\_\_\_

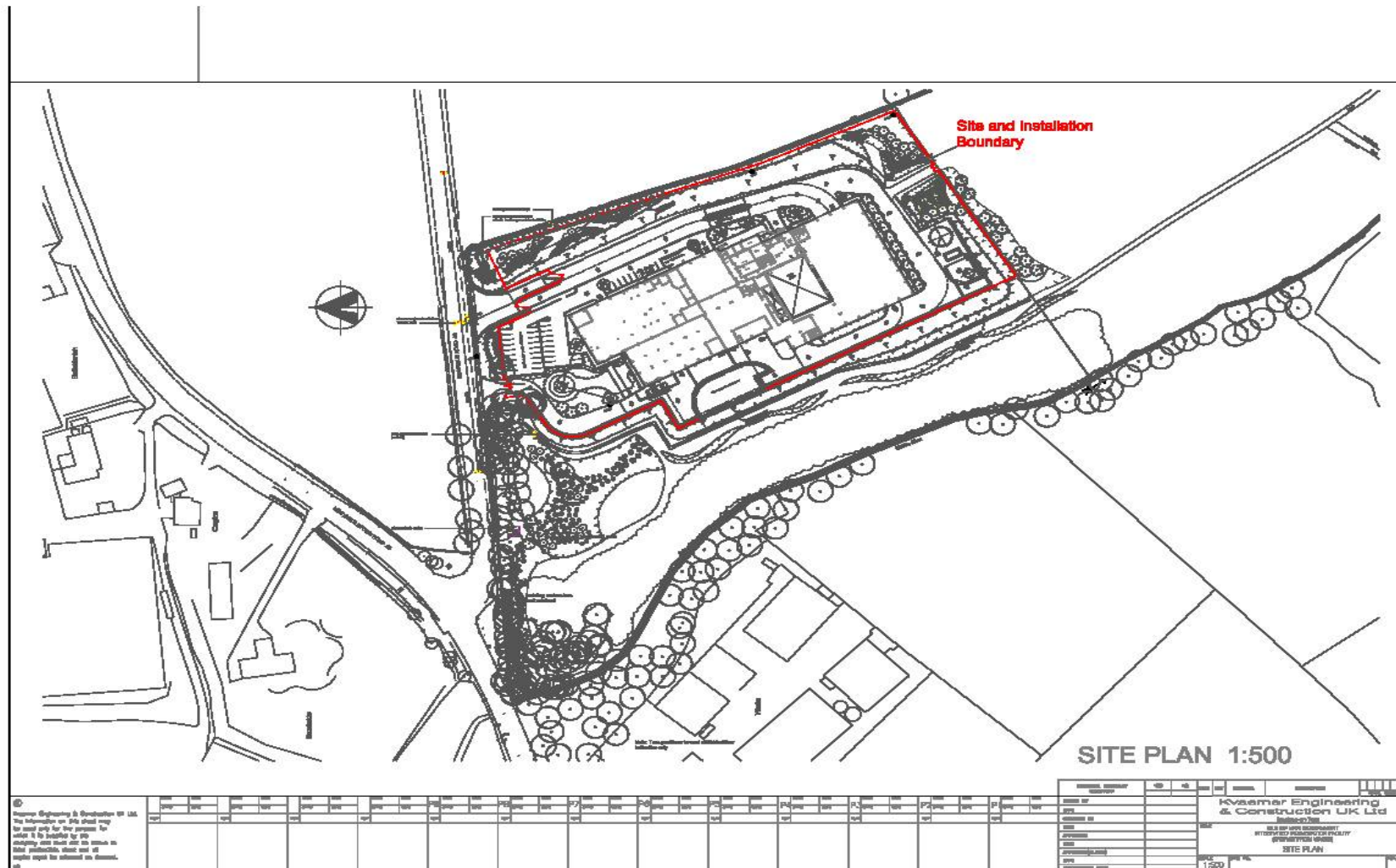
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**APPENDIX 2 : PRICING CHANGES**

**The following table shows changes made to pricing as agreed between the parties through Variation Orders set out in the DofV 2 :**

<u>VO</u>	<u>D &amp; B Contract Price</u>	<u>Provisional Sums</u>	<u>Availability Fee</u>	<u>Operating Fee</u>
<u>2 &amp; 3</u>	<u>+ £27,195 (effective 14.05.2005)</u>	<u>+ £25,000</u>	<u>£</u>	<u>£</u>
<u>5</u>	<u>£</u>	<u>£</u>	<u>£</u>	<u>£</u>
<u>6</u>	<u>£</u>	<u>+£211,872</u>	<u>£</u>	<u>£</u>
<u>7</u>	<u>£</u>	<u>£</u>	<u>£</u>	<u>£</u>
<u>8</u>	<u>£</u>	<u>£</u>	<u>£</u>	<u>£</u>
<u>10</u>	<u>£</u>	<u>£</u>	<u>£</u>	<u>£</u>
<u>11</u>	<u>£</u>	<u>£</u>	<u>£</u>	<u>£</u>
<u>12</u>	<u>+ £212,137<sup>320</sup></u>	<u>£</u>	<u>+ £35,875/annum</u>	<u>+ £0.15/tonne</u>
<u>13</u>	<u>£</u>	<u>£</u>	<u>£</u>	<u>£</u>
<u>15</u>	<u>- £54,729</u>	<u>£</u>	<u>£</u>	<u>£</u>
<u>16</u>	<u>£</u>	<u>£</u>	<u>£</u>	<u>£</u>
<u>17</u>	<u>+ £33,297</u>	<u>£</u>	<u>+ £14,391</u>	<u>£</u>
<u>DofV1 The pricing changes made by DofV1 are incorporated into the body of Schedule 1 in the Conformed Copy.</u>				
<u>In accordance with Clause 9.4 of DofV 2, the Parties record their agreement to the Availability and Operating Fee amounts set out in Appendix 8 to this PA (Appendix 17 of DofV2) which are payable with effect from 0001hrs on August 1<sup>st</sup>, 2010.</u>				

<sup>320</sup> In accordance with VO12 (Appendix 10 of DofV2), payment for the dioxin monitoring system as set out at paragraph 1.18 of Schedule 1 shall be of €267,623 plus £44,663 (in total and converted corresponding to £212,136.72), both amounts being exclusive of any VAT. Costs will be covered as an add-on to the D&B Contract Price. Payment shall become part of the Stage Payments as follows: Stage Payment 6: £31,203 and €133,811; and Stage Payment 7: £13,460 and €133,812.

**APPENDIX 3 - PLAN SHOWING REVISED WESTERN PERIMETER**

**APPENDIX 4– REVISED REMEDIATION WORKS AND ASSOCIATED COSTS****Part 1**

- 1 Subject to paragraph 2 below the Department grants authority with effect from 7 September 2001 for the commencement of the Remediation Works in accordance with the revised estimated costs as set out in the letter and accompanying enclosures dated 4 September 2001 from Kvaerner Engineering & Construction UK Ltd set out in Part 2 of this Appendix 5.
- 2 The Revised Estimated Costs are indicative and there will be a commitment by ProjectCo to minimise costs and improve on the schedule.
- 3 Financial matters will be carried out by ProjectCo in accordance with clause 21 ('Open Book Accounting, Access and Audit') of this Agreement.
- 4 The Department and/or the Department's Representative shall be entitled to audit the accounts relating to the Remediation Works to ensure compliance prior to certification by the Department's Representative and payment of the new milestone.
- 5 No additional costs are to be incurred as a consequence of claimed delay on the part of the Department in the grant of authorisation.

This variation shall have effect from and including 7 September 2001

**Part 2**

**[insert letter and accompanying enclosure dated 4 September 2001 from Kvaerner Engineering]**

**APPENDIX 5 - WASTE OIL SAMPLING SAFE WORKING PROCEDURE**

 ISLE-OF-MAN	<b>SAFE WORKING PROCEDURE</b>	
	WASTE OIL SAMPLING	IOM-SWP-OPS-07-17


## SAFE WORKING PROCEDURE

This document supplements any procedures published  
in SITA Intranet Policy and Procedures

INFORMATION SUPPLIED IN THIS PROCEDURE	
1	The Task or Activity
2	The Site Business Function
3	Date this procedure was issued
4	Date this procedure should be reviewed
5	Who developed the procedure
6	Who was consulted during the development
7	Whether a Permit to Work is required
8	Risk Assessment number
9	Hazards that are identified
10	What training is required to carry out the work
11	What persons could be at risk
12	Personal Protective Equipment needed (PPE)
13	Current Control Measures in place
14	The Safe Working Procedure
15	First Aid Precautions
16	List of First Aiders
17	Additional Information

Date First Issued: 28/04/2008		By: J. Brennan		Authorised by:	
Rev	Date	Description	Reviewed By	Authorised	
1	15/01/13	Minor changes to procedure	J. Garrad		
2					
3					
4					
5					
6					
7					
8					
9					
10					




		<h2 style="text-align: center;">SAFE WORKING PROCEDURE</h2>					
ISLE OF MAN		WASTE OIL SAMPLING				IOM-SWP-OPS-07-17	

1. Task or Activity	As above	2. Business Function	EW Plant
3. Date Issued	16/01/13	4. Next Review Date	16/01/14
5. Developed By	J. Brennan	6. Consulted	Day ops
7. Permit Required?	NO	8. Risk Assess No.	IOM-RA-OPS-07-10

9. HAZARDS THAT ARE IDENTIFIED ON THE RISK ASSESSMENT						
						
	Slips, Trips and Falls					



  

10. TRAINING REQUIRED							
H&S CD	This SWP						

11. PERSONS AT RISK							
SITA Employee							

12. PERSONAL PROTECTIVE EQUIPMENT (PPE)							
							
		Eye & head Protection	Safety Boots				


  

13. CURRENT CONTROL MEASURES IDENTIFIED IN RISK ASSESSMENT
Should have had the H&S CD ROM Site Induction
Should have had undertaken the training modules relevant to this Safe Working Procedure
Only use items of plant for which you are trained and authorised
Wear the required PPE
All defects, accidents and incidents to be reported
Safety Monitoring should be in place
COSHH assessments should be available and studied
Spill kits available
Toolbox talks

Dana Reak

 ISLE-OF-MAN	<b>SAFE WORKING PROCEDURE</b>	
	WASTE OIL SAMPLING	IOM-SWP-OPS-07-17

14. - SAFE WORKING PROCEDURE
<p><b>BACKGROUND</b></p> <p>Our licence requires that <u>all</u> waste oils received on site must have representative samples taken as far as possible to verify conformity to the license. The license states that samples shall be kept for at least 1 month after incineration.</p> <p>The samples will not be analysed prior to incineration but will be stored for a minimum of 1 month until the oil has been processed.</p> <p>Waste oil will normally be delivered to site on Wednesdays. Samples need to be taken as soon as possible after delivery preferably by the Day Operations Assistants.</p> <p><b>EQUIPMENT</b></p> <p>Sample bottles are stored in the lab on the ground floor along with labels.</p> <p><b>HEALTH &amp; SAFETY</b></p> <p>The following PPE must be worn when taking waste oil samples:</p> <ul style="list-style-type: none"> <li>→ Rubber Gloves</li> <li>→ Eye protection</li> <li>→ Overalls</li> <li>→ Safety foot wear</li> </ul> <p><b>ENVIRONMENTAL</b></p> <p>All spillages must be clean up and material used to absorb the spillage disposed of in the primary or secondary incinerator. All sampling must be done inside the reception hall to prevent any oil spilling into the drains.</p> <p><b>PROCEDURE</b></p> <p>Select the number of 100ml sample bottle required and apply sticky labels to the</p>

 ISLE-OF-MAN	<b>SAFE WORKING PROCEDURE</b>	
	WASTE OIL SAMPLING	IOM-SWP-OPS-07-17

bottles. Open one of the openings on top of the Metano. Use the jug to take a sample from the oil. Empty contents into the sample bottle and enter the information below onto the label.

Repeat this process for all Metanos which have arrived containing waste oil.

Take the full sample bottles to the lab and put them in the yellow flam cabinet for storage.

Bottles shall be removed from the cupboard and disposed of after 6 months once the corresponding Metanos oil has been incinerated.

Fill in the bottle label with:

- Metano Serial Number (MTOU.....)
- Date sample was taken
- Sampled By

<b>15. FIRST-AID FACILITIES</b> <p>First Aid boxes are available at:</p> <ul style="list-style-type: none"> <li>→ Control Room</li> <li>→ Maintenance Office</li> <li>→ Maintenance Workshop</li> <li>→ Fifth Floor Reception</li> </ul>	<b>16. FIRST-AID PERSONNEL</b> <p>There is usually at least one qualified First Aider on every Operations shift. These, as well as First Aiders in other departments, are listed on the H&amp;S notice board on the Second Floor adjacent to the Control Room.</p>
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**17. ADDITIONAL INFORMATION**

This is a license requirement and therefore failure to apply this procedure could result in disciplinary action being taken.

Section Break (Next Page)

**APPENDIX 6 – ABATEMENTS APPLICABLE TO THE PERIOD 1/4/2010 TO 31/3/2012**<sup>321</sup>

<b><u>Abatement Number</u></b>	<b><u>2004/5 £</u></b>	<b><u>2005/6 £</u></b>	<b><u>2006/7 £</u></b>	<b><u>2007/8 £</u></b>	<b><u>2008/9 £</u></b>	<b><u>2009/10 £</u></b>	<b><u>2010/11 £</u></b>	<b><u>2011/12</u></b>
<u>Index %</u>	<u>8.3373</u>	<u>3.2837</u>	<u>3.8006</u>	<u>5.0713</u>	<u>4.0762</u>	<u>4.4824</u>	<u>0.2233</u>	<u>4.5966</u>
<u>2</u>	<u>541.69</u>	<u>559.47</u>	<u>580.74</u>	<u>610.19</u>	<u>635.06</u>	<u>663.53</u>	<u>665.01</u>	<u>695.58</u>
<u>3</u>	<u>5416.87</u>	<u>5594.74</u>	<u>5807.37</u>	<u>6101.88</u>	<u>6350.61</u>	<u>6635.27</u>	<u>6650.08</u>	<u>6955.76</u>
<u>4</u>	<u>1083.37</u>	<u>1118.95</u>	<u>1161.47</u>	<u>1220.38</u>	<u>1270.12</u>	<u>1327.05</u>	<u>1330.02</u>	<u>1391.15</u>
<u>5</u>	<u>5416.87</u>	<u>5594.74</u>	<u>5807.37</u>	<u>6101.88</u>	<u>6350.61</u>	<u>6635.27</u>	<u>6650.08</u>	<u>6955.76</u>
<u>6 (unit rate only starts from 0.285 p/kWh) see abatement.</u>	<u>0.309</u>	<u>0.319</u>	<u>0.331</u>	<u>0.348</u>	<u>0.362</u>	<u>0.378</u>	<u>0.379</u>	<u>0.396</u>
<u>7</u>	<u>541.69</u>	<u>559.47</u>	<u>580.74</u>	<u>610.19</u>	<u>635.06</u>	<u>663.53</u>	<u>665.01</u>	<u>695.58</u>
<u>8</u>	<u>541.69</u>	<u>559.47</u>	<u>580.74</u>	<u>610.19</u>	<u>635.06</u>	<u>663.53</u>	<u>665.01</u>	<u>695.58</u>

<sup>321</sup> Appendix 16 of DoV2. These changes take effect from 0001hrs on 17 August 2009 (see clause 8.1 of DoV2).

<u>Abatement Number</u>	<u>2004/5</u> £	<u>2005/6</u> £	<u>2006/7</u> £	<u>2007/8</u> £	<u>2008/9</u> £	<u>2009/10</u> £	<u>2010/11</u> £	<u>2011/12</u>
<u>9</u>	<u>325.01+541.69</u>	<u>335.68+559.47</u>	<u>348.44+580.74</u>	<u>366.11+610.19</u>	<u>381.04+635.06</u>	<u>398.12+663.53</u>	<u>399.00+665.01</u>	<u>417.35+695.58</u>
<u>10</u>	<u>325.01</u>	<u>335.68</u>	<u>348.44</u>	<u>366.11</u>	<u>381.04</u>	<u>398.12</u>	<u>399.00</u>	<u>417.35</u>
<u>11</u>	<u>1083.37+541.69</u>	<u>1118.95+559.47</u>	<u>1161.47+580.74</u>	<u>1220.38+610.19</u>	<u>1270.12+635.06</u>	<u>1327.05+663.53</u>	<u>1330.02+665.01</u>	<u>1391.15+695.58</u>

## APPENDIX 7 – AVAILABILITY AND OPERATING FEES<sup>322</sup>

### Availability and Operating Fees

#### PRICING SCHEDULE FOR THE IoM EfW Service Price Review 17<sup>th</sup> August 2009

0.2232809%

<u>R</u> <u>ef</u>	<u>Item</u>	<u>Unit</u>	<u>Price Indexation</u> <u>April 2009.</u> <u>4.4824%</u>	<u>Service</u> <u>Changes 8</u> <u>(effect on</u> <u>04/09)</u>	<u>(1) PR August</u> <u>2009</u>	<u>(2) Service</u> <u>Change</u> <u>Maintenance</u> <u>Profile</u>	<u>(3) Price</u> <u>Indexation</u> <u>April 2010.</u>	<u>(4) Service</u> <u>Change 9</u> <u>April 2010</u> <u>LFT</u> <u>Increase</u>	<u>(5) Service</u> <u>Change SWI</u> <u>Fuel removal</u> <u>and changes in</u> <u>Labour and</u> <u>Maintenance</u> <u>split</u>	<u>(6) Service</u> <u>Change</u> <u>APCR</u> <u>disposal</u>
<u>1</u>	<u>Availability</u> <u>Fee</u>	<u>£/Annu</u> <u>m</u>	<u>2,966,098</u>	<u>2,966,098</u>	<u>2,933,268</u>	<u>3,345,998</u>	<u>3,352,547</u>	<u>3,352,547</u>	<u>3,833,390</u>	<u>3,833,390</u>
<u>2</u>	<u>Operating</u> <u>Fee</u>	<u>£/ton</u>	<u>28.89</u>	<u>29.19</u>	<u>32.83</u>	<u>32.83</u>	<u>32.90</u>	<u>33.23</u>	<u>19.64</u>	<u>17.19</u>
<u>Effective</u> <u>Date</u>					<u>16th August</u> <u>2009</u>	<u>16th August</u> <u>2009</u>	<u>01st April</u> <u>2010</u>	<u>01st April</u> <u>2010</u>	<u>1st August</u> <u>2010</u>	<u>1st August</u> <u>2010</u>

<sup>322</sup> Appendix 17 of DoV 2.

## APPENDIX 8 – CONSUMABLES SUMMARY TABLE<sup>323</sup>

### Consumables Summary Table

<u>Operating Gate Fee Ref.</u> <u>2.2 Consumables</u>	<u>Justified</u> <u>[yes/no]</u>	<u>SITA Claim</u>	<u>Accepted</u>	<u>Rejection/acceptance grounds, comments</u>
<u>Lime</u>				
<u>Price</u>	<u>Yes</u>	<u>0.075 £/kg</u>	<u>0.075 £/kg</u>	<u>Claim through Gateway 4 partly accepted.</u> <u>Agreed to use mid-point from usage in bid</u> <u>model and Steady State.</u>
<u>Usage</u>	<u>Yes</u>	<u>14.256 kg/t waste</u>	<u>11.63 kg/t waste</u>	
<u>Carbon</u>				
<u>Price</u>	<u>Yes</u>	<u>0.930 £/kg</u>	<u>0.930 £/kg</u>	<u>Actual realised savings on usage not readily</u> <u>recoverable through Gateway</u>
<u>Usage</u>	<u>Yes</u>	<u>1.15 kg/t waste</u>	<u>1.15 kg/t waste</u>	
<u>Ammonia</u>				
<u>Price</u>	<u>Yes</u>	<u>0.295 £/kg</u>	<u>0.295 £/kg</u>	<u>Actual realised savings on usage not readily</u> <u>recoverable through Gateway</u>
<u>Usage</u>	<u>Yes</u>	<u>2.67 kg/t waste</u>	<u>2.67 kg/t waste</u>	
<u>Fuel</u>				
<u>Price</u>	<u>Yes</u>	<u>0.609 £/l</u>	<u>0.609 £/l</u>	<u>Claim not recoverable through Gateway 4.</u>
<u>Usage</u>	<u>No</u>	<u>4.34 l/t of waste</u>	<u>2.00 l/t of waste</u>	
<u>Process Water</u>				
<u>Price</u>	<u>Yes</u>	<u>1.545 £/m<sup>3</sup></u>	<u>1.545 £/m<sup>3</sup></u>	<u>Actual realised savings on usage not readily</u> <u>recoverable through Gateway</u>
<u>Usage</u>	<u>Yes</u>	<u>PWI 0.229, SWI 1</u> <u>m<sup>3</sup>/t of waste</u>	<u>PWI 0.229, SWI 1</u> <u>m<sup>3</sup>/t of waste 2</u>	

<sup>323</sup> Appendix 18 of DoV 2

## APPENDIX 9 – QR TRACKING SHEET<sup>324</sup>



**QR/PR Tracking Sheet 2009/2010**  
August 2009 to July 2010

Consumables Usage agreed in PR 2009		
Included in Operating Gate Fee element 2.2 of Pricing Schedule		
	Unit*	Usage
Lime	kg/tonne	11.63
Carbon	kg/tonne	1.15
Ammonia	kg/tonne	2.67
Water Line 1	cu. m/tonne	0.23
Water Line 2	cu. m/tonne	1.00
Fuel	lt/tonne	2.00

\*tonne = tonne of waste incinerated

	Unit	Aug-09	Sep-09	Oct-09	Nov-09	Dec-09	Jan-10	Feb-10	Mar-10	Apr-10	May-10	Jun-10	Jul-10	Year 1
Variance (monthly)	£													0
Variance (YTD)	£													
Variance (cumulative)*	£	0	0	0	0	0	0	0	0	0	0	0	0	

\* Cumulative Figure includes previous year's variance

### Actual tonnage into EFW

	Aug-09	Sep-09	Oct-09	Nov-09	Dec-09	Jan-10	Feb-10	Mar-10	Apr-10	May-10	Jun-10	Jul-10	Year 1
PWI - Tonnage													0
SWI - Tonnage													0
Total Tonnage	0	0	0	0	0	0	0	0	0	0	0	0	0
Annual indexation									0.00%				

### CONSUMABLES

Ref. Operating Gate Fee 2.2

	Unit	Aug-09	Sep-09	Oct-09	Nov-09	Dec-09	Jan-10	Feb-10	Mar-10	Apr-10	May-10	Jun-10	Jul-10	
<b>Lime (usage)</b>	tonne	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	
Price (gate fee)	£/tonne													
Price (actual)	£/tonne													
Variance	£	0	0	0	0	0	0	0	0	0	0	0	0	0
<b>Carbon (usage)</b>	tonne	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	
Price (gate fee)	£/tonne													
Price (actual)	£/tonne													
Variance	£	0	0	0	0	0	0	0	0	0	0	0	0	0
<b>Ammonia (usage)</b>	tonne	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	
Price (gate fee)	£/tonne													
Price (actual)	£/tonne													
Variance	£	0	0	0	0	0	0	0	0	0	0	0	0	0
<b>Water (usage)</b>	cu m.	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	
Price (gate fee)	£/cu. m													
Price (actual)	£/cu. m													
Variance	£	0	0	0	0	0	0	0	0	0	0	0	0	0
<b>Fuel (usage)</b>	lt	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	
Price (gate fee)	£/lt													
Price (actual)	£/lt													
Variance	£	0	0	0	0	0	0	0	0	0	0	0	0	0

## APPENDIX 10 – SECONDARY WASTE INCINERATOR FUEL INCENTIVE<sup>325</sup>

<sup>324</sup> Appendix 19 of DoV 2

<sup>325</sup> Appendix 20 of DoV 2





## APPENDIX 11 – MAINTENANCE SCHEDULE<sup>326</sup>

Projected Planned Maintenance Investment 2008-2029 (x £1000)																							
Activity	Year																						
Routine Major Maintenance Primary	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019	2020	2021	2022	2023	2024	2025	2026	2027	2028	2029	
1 Grate Components replacement	£30	£50	£55	£60	£100	£50	£55	£60	£100	£50	£55	£60	£50	£100	£50	£55	£60	£100	£50	£55	£60	£50	
2 Repairs to water/air cooled system		£15	£15	£10	£10	£10	£10	£30	£10	£10	£10	£10	£10	£10	£10	£10	£30	£10	£10	£10	£10	£10	
3 Refractory Repairs	£53	£50	£48	£45	£30	£30	£150	£20	£20	£30	£30	£30	£30	£30	£30	£150	£20	£20	£30	£30	£30	£30	
4 Tube Wall Thickness Survey	£5	£5	£5	£5	£5	£5	£5	£5	£5	£5	£5	£5	£5	£5	£5	£5	£5	£5	£5	£5	£5	£5	
5 Hydraulics	£10					£10					£10					£10				£10			
6 Feed Ram			£5			£5			£5			£5				£5			£5			£5	
7 Control Valves	£16	£15	£20	£23	£5	£5	£15	£15	£20	£20	£10	£5	£5	£5	£5	£15	£15	£20	£20	£10	£5	£5	
8 Instrument calibrations	£11	£10	£10	£10	£10	£10	£10	£10	£10	£10	£10	£10	£10	£10	£10	£10	£10	£10	£10	£10	£10	£10	
9 Bottom ash Conveyors	£19	£8	£15	£15	£2	£2	£19	£8	£15	£15	£2	£5	£2	£2	£2	£19	£8	£15	£15	£2	£5	£2	
10 Combustion Air Fans	£5		£15		£5		£15		£5		£15		£5		£5	£15		£5		£15		£5	
11 Destagger	£6		£5		£5		£5		£5		£5		£5		£5	£5		£5		£5		£5	
12 Boiler Feed Pump		£20		£20		£20		£20		£20		£20		£20		£20		£20		£20		£20	
13 Vacuum Pump	£15	£15	£15	£15	£15	£15	£15	£15	£15	£15	£15	£15	£15	£15	£15	£15	£15	£15	£15	£15	£15	£15	
14 Waste Crane	£10	£9	£15	£30	£7	£9	£15	£30	£7	£9	£15	£30	£7	£9	£15	£30	£7	£9	£15	£30	£7	£9	
15 Waste Grab			£15	£15			£15	£15			£15	£15			£15	£15			£15	£15			
16 Ash Crane/Grab	£6	£5	£5	£15	£5	£15	£5	£15	£5	£15	£5	£15	£5	£5	£15	£5	£15	£5	£15	£5	£15	£5	
17 SNCR System	£5		£5	£5		£5		£5		£5		£5		£5		£5		£5		£5		£5	
18 Lime Pump/system	£10	£10	£10	£10	£10	£40	£10	£10	£10	£10	£10	£10	£10	£10	£10	£40	£10	£10	£10	£10	£10	£10	
19 Primary Burners		£5		£5		£5		£5		£5		£5		£5		£5		£5		£5		£5	
20 Atomiser	£30	£30	£30	£30	£30	£30	£100	£30	£30	£30	£30	£30	£30	£30	£30	£100	£30	£30	£30	£30	£30	£30	
21 CEMs Equipment	£12	£40	£40	£30	£10	£10	£10	£30	£30	£10	£10	£10	£10	£10	£10	£30	£30	£10	£10	£10	£10	£10	
22 Vibratory Conveyors			£10						£10							£10							
23 APCR Conveyors	£15	£5			£5				£5			£5			£5					£5			
24 Gas Cleaning General	£5		£5	£20		£10		£10		£10		£10		£10		£10		£10		£10		£10	
25 Plant Control System		£10	£10	£10	£10	£10	£10	£10	£10	£10	£10	£10	£10	£10	£10	£10	£10	£10	£10	£10	£10	£10	
26 Condensate Pumps			£5					£5								£5							
27 Air Cooled Condensor	£15	£15	£15	£30	£15	£15	£30	£15	£15	£30	£15	£15	£15	£15	£15	£30	£15	£15	£30	£15	£15	£15	
28 Demin Plant			£4			£4			£4			£15			£4			£4			£4		
29 Plant Critical pumps				£15				£15				£15					£15				£15		
30 Air compressors		£10					£10				£5					£10					£5		
31 Diesel Generator		£5		£5			£5		£5		£5					£5		£5		£5		£5	
32 HV System		£5		£5		£5		£5		£5		£5				£5		£5		£5		£5	
33 Chiller			£7			£7			£7			£7				£7			£7			£7	
34 Turbine		£20	£14	£15	£15	£15	£15	£30	£15	£15	£15	£15	£15	£15	£15	£15	£30	£15	£15	£15	£15	£15	
35 Utilities	£8	£8	£8	£8	£8	£8	£8	£8	£8	£8	£8	£8	£8	£8	£8	£8	£8	£8	£8	£8	£8	£8	
36 Plant Cleaning	£20	£20	£20	£20	£20	£20	£20	£20	£20	£20	£20	£20	£20	£20	£20	£20	£20	£20	£20	£20	£20	£20	
37 Scaffold	£50	£50	£50	£50	£50	£50	£50	£50	£50	£50	£50	£50	£50	£50	£50	£50	£50	£50	£50	£50	£50	£50	
Total	£366	£445	£486	£531	£582	£450	£612	£516	£436	£417	£390	£454	£327	£382	£450	£612	£516	£436	£417	£390	£454	£327	
Routine Major Maintenance Secondary																							
1 Refractory Repairs	£4	£15	£15	£15	£100	£10	£10	£10	£10	£100	£10	£10	£10	£10	£100	£10	£10	£10	£10	£100	£10	£10	
2 Hydraulics/valves		£10	£10			£10				£10					£10					£10			
3 Hearth Rams Replacement/overhaul	£30				£30					£30					£30					£30			
4 Combustion Air Fans	£20				£20					£20					£20					£20			
5 Burner Overhaul	£30		£10			£10			£30			£10			£10			£30		£10			
6 Waste Heat Boiler				£5			£100			£5			£5			£5			£100		£5		
Total	£84	£25	£35	£20	£150	£30	£110	£10	£50	£155	£10	£30	£15	£10	£170	£15	£10	£150	£10	£165	£20	£10	
Routine Major Maintenance Total	£450	£470	£521	£551	£532	£480	£722	£526	£486	£572	£400	£484	£342	£392	£620	£526	£586	£427	£555	£474	£337		
Major Maintenance Exceptional																							
1 Replacement bag filters		£300					£300					£300					£300						
2 Inconel overlay/tube replacement			£300		£200		£200	£200	£200				£300		£200			£200		£200			
3 Replacement Superheaters				£300		£300				£300			£300						£300				
4 Control System				£30		£30			£30			£30			£30			£30			£30		
5 CEMs				£200									£200										
Major Maintenance Exceptional Total	£0	£300	£300	£500	£200	£530	£300	£230	£200	£330	£0	£330	£200	£230	£0	£30	£300	£230	£300	£230	£0	£0	
Total Major Maintenance	£450	£770	£821	£1,081	£732	£1,010	£1,022	£756	£686	£902	£400	£1,114	£542	£622	£620	£657	£826	£816	£727	£785	£474	£337	
Routine Monthly Maintenance	£720	£720	£720	£720	£720	£720	£720	£720	£720	£720	£720	£720	£720	£720	£720	£720	£720	£720	£720	£720	£720	£720	
Contingency (at 5% of total)	£68	£75	£75	£87	£73	£84	£87	£72	£70	£85	£68	£80	£68	£68	£67	£67	£77	£76	£72	£74	£85	£63	
Total Maintenance	£1,229	£1,565	£1,618	£1,890	£1,525	£1,815	£1,829	£1,548	£1,476	£1,702	£1,176	£1,924	£1,325	£1,408	£1,407	£1,444	£1,623	£1,611	£1,519	£1,579	£1,254	£1,110	
D+B Defect Related Cost																							
	1050	0																					

<sup>326</sup> Appendix 21 of DoV 2 (see clause 5.4 of DoV2). These changes take effect from 0001hrs on 17 August 2009 (see clause 8.1 of DoV2).



Document comparison by Workshare Compare on 27 September 2016  
20:32:29

Input:	
Document 1 ID	interwovenSite://TESTDMSSERVERS/WORK/8947099/1
Description	#8947099v1<WORK> - DH Project Agreement Draft 15 - Clean
Document 2 ID	interwovenSite://TESTDMSSERVERS/WORK/22454794/6
Description	#22454794v6<WORK> - IOM CONFORMED COPY PA September 2016
Rendering set	NC06 no headers

Legend:	
<u>Insertion</u>	
<del>Deletion</del>	
<del>Moved from</del>	
<u>Moved to</u>	
Style change	
Format change	
<del>Moved deletion</del>	
Inserted cell	
Deleted cell	
Moved cell	
Split/Merged cell	
Padding cell	

Statistics:	
	Count
Insertions	2021
Deletions	862
Moved from	13
Moved to	13
Style change	0
Format changed	0
Total changes	2909