

DATED

2012

BARNSELY METROPOLITAN BOROUGH COUNCIL (1)

and

ROTHERHAM BOROUGH COUNCIL (2)

and

DONCASTER BOROUGH COUNCIL (3)

and

LLOYDS TSB BANK PLC AS FACILITY AGENT (4)

and

LLOYDS TSB BANK PLC AS SECURITY TRUSTEE (5)

and

3SE (BARNSELY, DONCASTER & ROTTERHAM) LIMITED (6)

FUNDER DIRECT AGREEMENT

relating to a development known as the BDR Municipal Waste PFI Project

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THIS AGREEMENT is made on

2012

BETWEEN:

- (1) **BARNSELY METROPOLITAN BOROUGH COUNCIL** whose principal office is at The Town Hall, Barnsley, South Yorkshire S70 2TA ("**Barnsley**");
- (2) **DONCASTER BOROUGH COUNCIL** whose principal office is at PO Box 71, Copley House, Waterdale, Doncaster DN1 3EQ ("**Doncaster**");
- (3) **ROTHERHAM BOROUGH COUNCIL** whose principal office is at Riverside House, Main Street, Rotherham S60 1AE ("**Rotherham**");
- (4) **LLOYDS TSB BANK PLC** a company incorporated under the laws of England and Wales with registered number 00002065, whose registered office is at 25 Gresham Street, London EC2V 7HN as facility agent for the Senior Finance Parties (the "**Facility Agent**");
- (5) **LLOYDS TSB BANK PLC** a company incorporated under the laws of England and Wales with registered number 00002065, whose registered office is at 25 Gresham Street, London EC2V 7HN as security trustee for the Secured Creditors (the "**Security Trustee**"); and
- (6) **3SE (BARNSELY, DONCASTER AND ROTTERHAM) LIMITED** a company incorporated under the laws of England and Wales with registered number 07820886 whose registered office is at Dunedin House, Auckland Park, Mount Farm, Milton Keynes MK1 1BU (the "**Contractor**"),

each a "**Party**" and together the "**Parties**".

WHEREAS

- (A) Under the Senior Financing Agreements dated on or around the date of this Agreement, the Senior Finance Parties have agreed to make available certain credit facilities to the Contractor and/or as applicable have entered into the Hedging Agreements with the Contractor.
- (B) The Contractor has provided certain security in favour of the Security Trustee which the Security Trustee holds in its capacity as security trustee for the Secured Creditors.
- (C) Under the Contract, the Councils and the Contractor have agreed the terms on which the Contractor will carry out the Works and provide the Service.

- (D) This Agreement sets out certain agreements between the Councils, the Contractor, the Facility Agent and the Security Trustee.

IT IS AGREED as follows:

1 DEFINITIONS AND INTERPRETATION

1.1 Definitions

In this Agreement, unless the context otherwise requires:

"Accrued Rights"	has the meaning given to that term in Clause 10 (Councils' Rights);
"Accrued Rights Value"	means each of the Construction Accrued Rights Liquidated Damages Value, the Construction Accrued Rights Value, the Operating Accrued Rights Termination Value and the Operating Accrued Rights Value;
"Appointed Representative"	means a Representative that has assumed the Contractor's rights under the Contract pursuant to Clause 5.1 (Representative) hereof;
"Construction Accrued Rights Liquidated Damages Value"	means the amounts that would count against the Construction Sub-Contractor's Liquidated Damages Cap upon realisation of the Accrued Rights based upon the assessment notified to the Councils under Clause 10.14 (Councils' Rights), as the same may be adjusted in accordance with Clause 20 (Dispute Resolution);
"Construction Accrued Rights Value"	means the amounts that would count against the Construction Sub-Contractor's Liability Cap upon realisation of the Accrued Rights based upon the assessment notified to the Councils under Clause 10.14 (Councils' Rights) as the same may be adjusted in accordance with Clause 20 (Dispute Resolution);
"Construction/Operating/SRF Offtake Sub-Contract"	means a contract relating to the provision of Works or Services or SRF Offtake Services which is the subject of a Sub-Contractor Direct Agreement/Collateral Warranty;
"Construction Sub-Contract"	means the Construction Contract as defined in the Contract and/or any novation thereof pursuant to the Construction Sub-Contractor Direct Agreement (Councils);

"Construction Sub- Contractor Default"	has the meaning given to EPC Contractor Default in the Construction Sub-Contract;
"Construction Sub-Contractor Direct Agreement (Councils)"	means the direct agreement between (1) the Councils (2) the Contractor and (3) the Construction Sub-Contractor;
"Construction Sub- Contractor's Liability Cap"	has the meaning given to EPC Contractor Liability Cap in the Construction Sub-Contract;
"Construction Sub- Contractors Liquidated Damages Cap"	has the meaning given to LD Cap in the Construction Sub-Contract;
"Contingent Loan Agreement"	means a thirty million pound (£30,000,000) contingent loan agreement made on or about the date hereof between Shanks PFI Investments Limited (company number 03158124) and the Contractor;
"Contingent Loan Discharge Date"	<p>means the later of:</p> <p>(a) (if there has been a drawdown of the Contingent Loan under the Contingent Loan Agreement) the date when all the obligations of the Contractor under the Contingent Loan Agreement have been unconditionally and irrevocably discharged; and</p> <p>(b) the Final Discharge Date;</p>
"Contract"	means the contract dated on or about the date of this Agreement between the Councils and the Contractor;
"Councils"	means Barnsley, Doncaster and Rotherham;
"Councils' Alternative SRF Account Charge"	means the charge in relation to the Alternative SRF Charged Account entered into on or about the date of this Agreement between the Contractor and the Councils;
"Councils Construction Liability Cap"	means the Construction Sub-Contractor's Liability Cap less the Construction Accrued Rights Value;
"Councils Construction Liquidated Damages Cap"	means the Construction Sub-Contractor's Liquidated Damages Cap less the Construction Accrued Liquidated Damages Value;

"Councils Liability Cap"	means each of the Councils Operating Liability Cap, the Councils Operating Termination Cap, the Councils Construction Liability Cap, the Councils Construction Liquidated Damages Cap or the Councils SRF Offtake Liability Cap;
"Councils Operating Liability Cap"	means the Operating Sub-Contractor Liability Cap for the Relevant Year less the Operating Accrued Rights Value;
"Councils Operating Termination Cap"	means the Operating Sub-Contractor Termination Cap less the Operating Accrued Rights Termination Value;
"Councils SRF Offtake Liability Cap"	means the SRF Offtake Contractor's Liability Cap less the SRF Offtake Accrued Rights Value;
"Expert"	means an expert appointed pursuant to Clause 20 (Dispute Resolution) to determine a dispute relating to this Agreement;
"Final Discharge Date"	has the meaning given to that term in the Facility Agreement;
"Final Statement"	has the meaning given to Final Account and Final Statement in the Construction Sub-Contract;
"Interim Payment"	has the meaning given to Interim Payment in the Construction Sub-Contract;
"Letter of Credit (Contingent Loan Agreement)"	means a thirty million pound (£30,000,000) letter of credit in respect of the obligations of Shanks PFI Investments Limited (company number 03158124) under the Contingent Loan Agreement;
"Monthly Service Fee Payment"	has the meaning given to the Operating Fee and/or the Commissioning Fee in the Operating Sub-Contract;
"Operating Accrued Rights Termination Value"	means the amount that would count against the Operating Sub-Contractor Termination Cap upon realisation of the Accrued Rights based upon the assessment notified to the Councils under Clause 10.14 (Councils' Rights), as the same may be adjusted in accordance with Clause 20 (Dispute Resolution);
"Operating Accrued Rights Value"	means the amount that would count against the Operating Sub-

Contractor Liability Cap upon realisation of the Accrued Rights based upon the assessment notified to the Councils under Clause 10.14 (Councils' Rights), as the same may be adjusted in accordance with Clause 20 (Dispute Resolution);

"Operating Sub-Contract"	means the Operating Sub-Contract as defined in the Contract and/or any novation thereof pursuant to the Operating Sub-Contractor Direct Agreement (Councils);
"Operating Sub-Contractor Default"	has the meaning given to Operator Default in the Operating Sub-Contract;
"Operating Sub-Contractor Direct Agreement (Councils)"	means the direct agreement between (1) the Councils, (2) the Contractor and (3) the Operating Sub-Contractor;
"Operating Sub-Contractor Liability Cap"	has the meaning given to Annual Operating Contract Liability Cap in the Operating Sub-Contract;
"Operating Sub-Contractor Termination Cap"	has the meaning given to Termination Cap in the Operating Sub-Contract;
"Payment Mechanism"	means the payment mechanism set out in Schedule 4 (Payment Mechanism) to the Contract;
"Relevant Required Insurances"	means the Required Insurances described in Schedule 17A (Required Insurances) of the Contract;
"Relevant Sub-Contractor"	means a sub-contracting party to a Construction/Operating/SRF Offtake Sub-Contract;
"Relevant Year"	means the Contract Year (as defined in the Operating Sub-Contract) in which the Termination Date occurs;
"Representative"	means: <ul style="list-style-type: none">(a) the Facility Agent, the Security Trustee, any Secured Parties and/or any of their Affiliates;(b) an administrator, administrative receiver, receiver or receiver and manager of the Contractor appointed under the Security

Documents;

- (c) a person directly or indirectly owned or controlled by the Facility Agent, the Security Trustee and/or any Secured Parties; or
- (d) any other person approved by the Councils (such approval not to be unreasonably withheld or delayed);

"Required Period"

means, subject to Clause 4 (No Liquid Market) the period starting on the date of a Termination Notice and:

- (a) prior to and including the Service Commencement Date, ending one hundred and twenty (120) days after the date of the Termination Notice; and
- (b) after the Service Commencement Date, ending ninety (90) days after the date of Termination Notice,

in either case, ending on such earlier date as the Facility Agent may specify by written notice to the Councils;

"Senior Finance Parties"

has the meaning given to the term **"Finance Parties"** in the Facility Agreement;

"Senior Secured Parties"

means the Senior Finance Parties;

"Secured Creditors"

has the meaning given to that term in the Intercreditor Deed;

"Secured Creditors' Alternative SRF Account Charge"

means the charge entered into on or about the date of this Agreement between the Contractor and the Security Trustee;

"SRF Offtake Accrued Rights Value"

means the amounts that would count against the SRF Offtake Contractor's Liability Cap upon realisation of the Accrued Rights based upon the assessment notified to the Councils under Clause 10.14 (Councils' Rights) as the same may be adjusted in accordance with Clause 20 (Dispute Resolution);

"SRF Offtake Contractor Default"

has the meaning given to Offtaker Default in the SRF Offtake Sub-Contract;

"SRF Offtake Contractor's Liability Cap"	has the meaning set out in Clause 41 (Limitations on Liability) of the SRF Offtake Sub-Contract;
"SRF Offtake Sub-Contract"	means the SRF Offtake Contract as defined in the Contract and/or any novation thereof pursuant to the SRF Offtake Councils Direct Agreement;
"Step-In Date"	means the date on which the Facility Agent takes any action under Clause 5.1 (Representative);
"Step-In Period"	<p>means the period from the Step-In Date up to and including the earlier of:</p> <ul style="list-style-type: none"> (a) the date specified in a notice issued pursuant to Clause 7.1 (Step-Out) (a) the date of any transfer under Clause 8 (Novation); (b) the date of any termination for breach under Clause 6 (Step-in Period); and (c) the date of expiry of the Contract;
"Step-Out Date"	has the meaning given to it in Clause 7.1 (Step-Out);
"Sub-Contractor Direct Agreement/Collateral Warranty"	means any Sub-Contractor Direct Agreement or Collateral Warranty or the SRF Offtake Councils Direct Agreement;
"Suitable Substitute Contractor"	<p>means a person approved by the Councils (such approval not to be unreasonably withheld or delayed) as:</p> <ul style="list-style-type: none"> (a) having the legal capacity, power and authority to become a party to and perform the obligations of the Contractor under the Contract; (b) employing persons having the appropriate qualifications, experience and technical competence and having the resources available to it (including committed financial resources and sub contracts) which are sufficient to enable it to perform the obligations of the Contractor under the

Contract; and

(c) being a Suitable Third Party;

"Suitable Third Party"

means any person who is not an Unsuitable Third Party;

"Surplus SRF Funds"

has the meaning given to it in Clause 10.22 (Councils' Rights);

"Termination Notice"

means a notice given by the Councils to the Facility Agent under Clause 3.1 (Notice of Termination and Existing Liabilities);

"Unrestricted Assets"

means those Assets (or part thereof), excluding the Alternative SRF Charged Account and any amounts in the Alternative SRF Charged Account and any revenues or cash balances or rights accrued as at the Expiry Date, or if earlier, the Termination Date, under or pursuant to or in connection with any of the Relevant Required Insurances (but not other Required Insurances), any Construction/Operating/SRF Offtake Sub-Contract or any Ancillary Document, which are required by the Councils or their nominee or any replacement of the Contractor for the purposes of the construction, operation or maintenance of the Facilities following termination or expiry of the Contract assuming such construction, operation or maintenance is carried out on terms substantially the same as the terms of the Contract;

"Unsuitable Third Party"

means any person referred to in either limb (b) or limb (c) of the definition of Restricted Share Transfer in Clause 1.1 (Definitions and Interpretation) of the Contract; and

"Warning Notice"

means a formal warning notice served by the Councils under Clause 82 (Persistent Breach) of the Contract.

The following terms have the meaning given to them in the Contract:

"Additional Permitted Borrowing"

"Adjusted Estimated Fair Value of the Contract"

"Affiliate"

"Alternative SRF Charged Account"

"Assets"

"Base Senior Debt Termination Amount"

"Business Day"

"Certification Requirements"

"Collateral Warranty"

"Contractor Default"

"Deductions"

"Distribution"

"Expiry Date"

"Facilities"

"Facility Agreement"

"Final Warning Notice"

"Holdco"

"Joint Insurance Account"

"Liquid Market"

"Mileage Deductions"

"Month"

"Non-Acceptance Deductions"

"Operating Sub-Contractor's Guarantor"

"PFI"

"Physical Damage Policies"

"Project"

"Project Documents"

"Ratchets"

**"Revised Senior Debt
Termination Amount"**

"Senior Financing Agreements"

"Senior Lender"

"Service"

"Service Commencement Date"

"Service Period"

**"SRF Offtake Councils Direct
Agreement"**

"SRF Offtake Services"

"SRF Offtaker"

**"Sub-Contractor Direct
Agreement"**

"Termination Date"

"Termination Sum"

"Unitary Charge"

"Works".

The following terms have the meaning given to them in the Senior Financing Agreements:

"Account Bank"

"Direct Agreements"

"Event of Default"

"Final Discharge Date"

"Finance Parties"

"Hedging Agreement"

"Intercreditor Deed"

"Proceeds Account"

"Secured Parties"

"Security Documents".

1.2 Interpretation

In this Agreement except where the context otherwise requires:

- 1.2.1 the masculine includes the feminine and vice-versa;
- 1.2.2 the singular includes the plural and vice versa;
- 1.2.3 a reference to any clause, sub-clause, paragraph, schedule or annex is, except where expressly stated to the contrary a reference to such clause, sub-clause, paragraph, schedule or annex of and to this Agreement;
- 1.2.4 save where stated to the contrary, any reference to this Agreement or to any other document shall include any permitted variation, amendment or supplement to such document;
- 1.2.5 any reference to any enactment, order, regulation or other similar instrument shall be construed as a reference to the enactment, order, regulation or instrument as amended, replaced, consolidated or re-enacted;
- 1.2.6 a reference to a person includes firms, partnerships and corporations and their successors and permitted assignees or transferees;
- 1.2.7 headings are for convenience of reference only; and
- 1.2.8 words preceding **"include"**, **"includes"**, **"including"** and **"included"** shall be construed without limitation by the words which follow those words.

- 1.3 Barnsley, Doncaster and Rotherham shall each be jointly and severally liable for obligations and liabilities of the Councils or any of them arising under or in connection with the entering into, performance or non-performance of this Agreement.

2 CONSENT TO SECURITY

- 2.1 The Councils acknowledge notice of, and consent to, the security interests granted over the Contractor's rights under the Contract, Project Documents and Relevant Required Insurances effected by the Contractor in favour of each of the Secured Creditors under the Security Documents.
- 2.2 The Councils confirm that they have not received notice of any other security interest granted over the Contractor's rights under the Contract or Project Documents.
- 2.3 Without prejudice to the provisions of Clause 100 (Change of Ownership) of the Contract the Councils acknowledge notice of and consent to the security interest granted by Holdco in favour of each of the Senior Secured Parties over the entire issued share capital of the Contractor.
- 2.4 Notwithstanding the terms of the Senior Financing Agreements, where required by Clause 64.15.2 (Reinstatement) of the Contract the Parties agree and shall direct that all insurance proceeds paid under the Physical Damage Policies shall be paid into the Joint Insurance Account except as otherwise agreed by the Facility Agent and the Councils and shall be applied in accordance with the Contract.
- 2.5 Subject to Clause 2.4 the Contractor and the Facility Agent hereby instruct the Councils (and the Councils agree) to pay all sums payable by the Councils to the Contractor under the Project Documents into the Proceeds Account. Following the occurrence of an Event of Default, if so directed by the Facility Agent upon giving reasonable notice, the Councils shall, subject to Clause 2.4, pay any sum which it is obliged to pay to the Contractor under the Project Documents to a bank account specified by the Facility Agent.

3 NOTICE OF TERMINATION AND EXISTING LIABILITIES

- 3.1 Prior to the Final Discharge Date the Councils shall not terminate or give notice terminating the Contract pursuant to Clause 83 (Termination on Contractor Default) of the Contract on the grounds of Contractor Default without giving to the Facility Agent:
- 3.1.1 at least the Required Period of prior written notice stating:
- (a) the proposed Termination Date; and
 - (b) the grounds for termination in reasonable detail; and

3.1.2 not later than the date falling twenty (20) Business Days after the date of a Termination Notice or (if earlier) the date falling twenty (20) Business Days after the date on which the Facility Agent informs the Councils that an Event of Default has occurred, a notice containing details of any amount owed by the Contractor to the Councils, and any other existing liabilities or unperformed obligations of which the Councils are aware (having made reasonable enquiry):

- (a) at the time of the Termination Notice or the notification of an Event of Default; and
- (b) (if relevant) which will fall due on or prior to the end of the Required Period,

under the Project Documents.

3.2 The Councils shall notify the Facility Agent in writing as soon as reasonably practicable of:

3.2.1 any change in the amounts, liabilities or obligations referred to in Clause 3.1.2; and

3.2.2 any further amounts, liabilities or obligations falling due and payable to the Councils but unpaid or falling due for performance or discharge by the Contractor and unperformed or not discharged (as the case may be),

in each case, of which the Councils are or become aware before the earlier of the Step-In Date and (if relevant) the expiry of the Required Period but after the date of a notice given under Clause 3.1.2 and, if such details are provided within the last ten (10) Business Days of the Required Period, then the Required Period shall be extended by ten (10) Business Days.

4 NO LIQUID MARKET

4.1 At any time during the Required Period the Facility Agent may issue a written notice (the "**No Liquid Market Notice**") to the Councils setting out the reasons why the Facility Agent does not believe that a Liquid Market exists.

4.2 On or before the date falling fourteen (14) days after the date on which a No Liquid Market Notice is received by the Councils, the Councils shall notify the Facility Agent

of its opinion as to whether or not a Liquid Market exists. Where the Councils believe that a Liquid Market does exist, such notice shall set out the reasons for the Councils' belief. If the Parties do not agree whether or not a Liquid Market exists, then any Party may refer the dispute to be determined in accordance with Clause 20 (Dispute Resolution).

4.3 If the Parties agree or it is determined in accordance with Clause 20 (Dispute Resolution) that no Liquid Market exists, the Contract shall automatically terminate and the provisions of Clause 84.3 (No Retendering Procedure) of the Contract shall apply.

4.4 If any dispute relating to this Clause 4 is determined under Clause 20 (Dispute Resolution), the Required Period shall be extended by the period of time spent determining such dispute pursuant to such Clause 20 (Dispute Resolution).

5 REPRESENTATIVE

5.1 Prior to the Final Discharge Date, without prejudice to the rights of the Facility Agent or Security Trustee under the Security Documents, at any time:

5.1.1 during which an Event of Default is subsisting (whether or not a Termination Notice has been served); or

5.1.2 during the Required Period,

the Facility Agent or Security Trustee may procure that a Representative assumes, jointly and severally with the Contractor, all of the Contractor's rights under the Project Documents.

5.2 The Facility Agent or Security Trustee (as appropriate) shall give the Councils five (5) Business Days prior written notice of any action to be taken by it referred to in this Clause 5.

6 STEP-IN PERIOD

6.1 Without prejudice to Clause 3 (Notice of Termination and Existing Liabilities), but subject to Clause 6.2, the Councils shall not terminate the Contract during the Step-In Period on grounds:

6.1.1 that the Facility Agent or the Security Trustee has taken any action referred to in Clause 5 (Representative) or enforced any Security Document; or

6.1.2 arising on or prior to the Step-In Date of which the Councils are aware (having made reasonable enquiry and whether or not continuing at the Step-In Date); or

6.1.3 arising solely in relation to the Contractor,

unless, in the case of Clause 6.1.2 above:

(a) the grounds arose prior to the Service Commencement Date and the Service Commencement Date has not occurred on or before the date falling twelve (12) Months after the date on which the Councils would have been entitled to terminate the Contract for non completion; or

(b) the grounds arose after the Service Commencement Date and neither the Appointed Representative nor the Contractor is using all reasonable endeavours (including implementation of any remedial programme) to remedy any breach of the Contract that:

(i) arose prior to the Step-In Date; and

(ii) is continuing (and capable of remedy); and

(iii) would have entitled the Councils to terminate the Contract.

6.2 The Councils shall be entitled to terminate the Contract by written notice to the Contractor and the Appointed Representative:

6.2.1 if permitted by Clause 6.1;

6.2.2 if any amount referred to in Clause 3.1.2(a) (Notice of Termination and Existing Liabilities) has not been paid to the Councils on or before the Step-In Date;

6.2.3 if any amount referred to in Clause 3.1.2(b) (Notice of Termination and Existing Liabilities) has not been paid on or before the last day of the Required Period;

6.2.4 if amounts, of which the Councils were not aware (having made reasonable enquiry) at the time of the Termination Notice or the Event of Default, subsequently become payable and are not discharged on or before the later of:

- (a) the date falling twenty (20) Business Days after the date on which the liability for these amounts is notified to the Facility Agent;
- (b) the date falling twenty (20) Business Days after the date on which the liability for these amounts falls due; and
- (c) the last day of the Required Period; or

6.2.5 on grounds arising after the Step-In Date in accordance with the terms of the Contract provided that, subject to Clause 7.3 (Step-Out), for the purposes only of termination under the Contract (and without prejudice to the rights of the Councils to make deductions and/or adjustments pursuant to the Payment Mechanism):

- (a) Deductions, Warning Notices and Final Warning Notices that arose prior to the Step In Date shall not be taken into account during the Step In Period but shall be taken into account after the Step Out Date; and
- (b) Ratchets subsisting at the Step-In Date shall be suspended during the Step-In Period but shall be re-applied with effect from the Step-Out Date.

6.3 The Councils shall deal with the Appointed Representative and not the Contractor during the Step-In Period.

7 STEP-OUT

7.1 The Appointed Representative will, on the earlier of:

7.1.1 the date specified in a written notice from the Facility Agent or the Appointed Representative to the Councils, (which date shall be at least twenty (20) Business Days after such notice is received by the Councils); and

7.1.2 the expiry of the Step-In Period,

(such date being the "**Step-Out Date**"), be released from all of its obligations and liabilities to the Councils under the Project Documents arising prior to the Step-Out Date and rights of the Appointed Representative against the Councils will be cancelled.

7.2 The Contractor shall continue to be bound by the terms of the Project Documents, notwithstanding the occurrence of the Step-Out Date.

- 7.3 If following the Step-Out Date the Councils are satisfied (acting reasonably) that the circumstances giving rise to the Facility Agent electing to exercise its rights under Clause 5 (Representative) have been remedied in full, then for the purposes of termination of the Contract only, and without prejudice to the rights of the Councils to make deductions/adjustments pursuant to the Payment Mechanism, any Deductions, Warning Notices and Final Warning Notices that arose prior to the Step-In Date or Ratchets subsisting at the Step-In Date shall be immediately cancelled, provided that where, during the Step-In Period, the Contractor has substituted or replaced the defaulting Operating Sub-Contractor, or a defaulting sub-contractor to the Operating Sub-Contractor, and has elected to exercise its rights under Clause 99.7 (Replacement of Sub-Contractors) of the Contract, the provisions of Clause 99.7 (Replacement of Sub-Contractors) of the Contract will apply from the date of substitution or replacement of that Operating Sub-Contractor or sub-contractor to that Operating Sub-Contractor.

8 NOVATION

- 8.1 Prior to the Final Discharge Date, subject to Clause 8.2 below, at any time:
- 8.1.1 during which an Event of Default is subsisting; or
 - 8.1.2 during the Step-In Period,
- the Facility Agent may, on at least twenty (20) Business Days' prior written notice to the Councils and any Appointed Representative, procure the transfer of the Contractor's rights and liabilities under the Project Documents to a Suitable Substitute Contractor.
- 8.2 The Councils shall notify the Facility Agent as to whether any person to whom the Facility Agent proposes to transfer the Contractor's rights and liabilities under the Project Documents is a Suitable Substitute Contractor, on or before the date falling twenty (20) Business Days after the date of receipt of all information reasonably required by the Councils to decide whether the proposed transferee is a Suitable Substitute Contractor.
- 8.3 The Councils shall not unreasonably withhold or delay their decision on whether the proposed transferee is a Suitable Substitute Contractor.
- 8.4 On any transfer referred to in Clause 8.1 becoming effective:
- 8.4.1 the Contractor and the Appointed Representative shall be released from any obligations arising under or in connection with this Agreement and the Project

Documents from that date and the new contractor shall become liable for obligations arising on or after that date;

- 8.4.2 any Deductions, Warning Notices or Final Warning Notices incurred or Ratchets subsisting shall, for the purposes of termination of the Contract only, and without prejudice to the rights of the Councils to make deductions/adjustments pursuant to the Payment Mechanism, be cancelled;
- 8.4.3 any then subsisting ground for termination of the Contract by the Councils shall be deemed to have no effect and any subsisting Termination Notice shall be automatically revoked; and
- 8.4.4 the Councils shall enter into a direct agreement with the Facility Agent and the security trustee of the finance parties providing senior debt financing to the new contractor on substantially the same terms as this Agreement.

9 INSURANCE PROCEEDS/ECONOMIC REINSTATEMENT

- 9.1 Notwithstanding the other provisions of this Agreement and the terms and conditions of the Senior Financing Agreements, the Facility Agent and Security Trustee shall only permit amounts to be released from the Joint Insurance Account in accordance with the requirements of Clause 64.15 (Reinstatement) of the Contract and the Facility Agent and the Security Trustee agree for themselves and on behalf of the Secured Creditors that they shall not exercise any rights under the Senior Financing Agreements or take any other steps to prevent amounts being released from the Joint Insurance Account in accordance with Clause 64.15 (Reinstatement) of the Contract.

10 COUNCILS' RIGHTS

- 10.1 Notwithstanding any provision in any Sub-Contractor Direct Agreement/Collateral Warranty to the contrary, and without prejudice to Clause 10.9, the Councils agree that they will not exercise or seek to exercise any of their step-in rights or other rights under or in respect of any Sub-Contractor Direct Agreement/Collateral Warranty prior to termination of the Contract until the earlier of:
 - 10.1.1 the Final Discharge Date; and
 - 10.1.2 the date on which the Facility Agent has given its written consent to such exercise following a request from the Councils or otherwise.

10.2 The Councils shall not, prior to the Final Discharge Date:

- 10.2.1 do anything pursuant to any Sub-Contractor Direct Agreement/Collateral Warranty or the Construction/Operating/SRF Offtake Sub-Contracts following the Termination Date (including any act which gives rise to any cross-claim, counterclaim, set off, variation or waiver) to prejudice the Accrued Rights relating to the Construction/Operating/SRF Offtake Sub-Contracts;
- 10.2.2 claim, recover, retain or receive (or seek to claim, recover, retain or receive) any amounts (including any costs, claims, damages, losses and liabilities) to which the Accrued Rights relate under, pursuant to or in connection with any Sub-Contractor Direct Agreement/Collateral Warranty and/or the Construction/Operating/SRF Offtake Sub-Contracts;
- 10.2.3 take any action to wind-up, dissolve, appoint an administrator, trustee, receiver (of any type), compulsory manager or similar officer, or sanction a voluntary arrangement or scheme of arrangement (or similar) in relation to the Contractor or take any other similar or analogous step relating to the insolvency of the Contractor;
- 10.2.4 take any action to wind-up, dissolve, appoint an administrator, trustee, receiver (of any type), compulsory manager or similar officer, or sanction a voluntary arrangement or scheme of arrangement (or similar) in relation to any Relevant Sub-Contractor or any of their respective guarantors or take any other similar or analogous step relating to the insolvency of any such person in each case on grounds (whether in whole or in part) relating to the Project;
- 10.2.5 save with the prior written consent of the Facility Agent, compete with the rights of the Senior Secured Parties on grounds (whether in whole or in part) relating to the Project (by virtue of a claim under any Sub-Contractor Direct Agreement/Collateral Warranty, the Contract or any other Ancillary Document or otherwise) on any formal insolvency of the Contractor, any Relevant Sub-Contractor or any of their respective guarantors, nor claim to be subrogated to any rights of any of the Senior Secured Parties.

10.3 The Parties agree that:

- 10.3.1 the request by the Councils that a Relevant Sub-Contractor accept the instructions of the Councils to the exclusion of the Contractor pursuant to and in accordance with the relevant Sub-Contractor Direct Agreement/Collateral Warranty or SRF Offtake Councils Direct Agreement; and
- 10.3.2 the exercise by the Councils of their rights pursuant to and in accordance with:
- (a) Clauses 10.5.1 and 10.5.2 to make deductions, retention or set-off against the Monthly Service Fee Payment under and in accordance with the Operating Sub-Contract;
 - (b) Clause 10.5.3 to terminate and claim termination compensation under and in accordance with the Operating Sub-Contract;
 - (c) Clauses 10.6.1, 10.6.2 and 10.6.4 to make deductions or withholdings against an Interim Payment under and in accordance with the Construction Sub-Contract;
 - (d) Clause 10.6.3 to terminate and claim compensation under and in accordance with the Construction Sub-Contract
 - (e) Clauses 10.7.1 and 10.7.2 to make deductions, retention or set-off against the payments under and in accordance with Clause 26 (Payment) of the SRF Offtake Sub-Contract; or
 - (f) Clause 10.7.3 to terminate and claim termination compensation under and in accordance with the SRF Offtake Sub-Contract,

shall not prejudice the Accrued Rights.

- 10.4 The Councils agree and undertake that if they claim, recover, retain or receive any amount:

- 10.4.1 in contravention of the provisions of Clauses 10.2, 10.5 and/or 10.6 and/or 10.7; or
- 10.4.2 pursuant to Clauses 10.5.5(b) or 10.6.5(b) or 10.7.4(b) which the final determination of any Accrued Rights Value demonstrates is in excess of the relevant Councils Liability Cap

they will promptly turn the same over to the Facility Agent and pending such payment, hold the same on trust for the Facility Agent and the Senior Secured Parties.

10.5 In addition to their rights under Clause 10.1, and subject to Clauses 10.2 and 10.3, where the Contract has been terminated, the Councils shall, from the Termination Date, be entitled to exercise any of their step-in rights or other rights under or in respect of the Operating Sub-Contractor Direct Agreement (Councils), provided that prior to the Final Discharge Date:

10.5.1 the Councils may not claim, recover, retain or receive (or seek to claim, recover, retain or receive) an amount under, pursuant to or in connection with the Operating Sub-Contractor Direct Agreement (Councils) and/or the Operating Sub-Contract other than the making of deductions, retention, or set-off against (and only up to the amount of) each Monthly Service Fee Payment under and in accordance with Clause 56 (Payment) and Schedule 4 (Operator Payment Mechanism) of the Operating Sub-Contract in respect of services provided following the Termination Date;

10.5.2 if and to the extent that realisation of the Accrued Rights would count against the Operating Sub-Contractor Liability Cap in the Relevant Year, the Councils shall only be entitled to make deductions, retention or set-off in the Relevant Year pursuant to Clause 10.5.1 to the extent such deductions, retention or set-off do not exceed the Councils Operating Liability Cap;

10.5.3 if and to the extent that realisation of the Accrued Rights would count against the Operating Sub-Contractor Termination Cap, the Councils shall only be entitled to exercise their rights to terminate the Operating Sub-Contract pursuant to Clause 83 (Termination on Operator Default) thereof and to claim termination compensation to the extent that such compensation does not exceed the Councils Operating Termination Cap;

10.5.4 Not Used;

10.5.5 if the Councils and the Facility Agent do not agree the Operating Accrued Rights Value:

(a) either of the Councils or the Facility Agent may refer the dispute for resolution in accordance with Clause 20 (Dispute Resolution); and

- (b) pending agreement or determination of the Operating Accrued Rights Value the Councils shall be entitled to exercise their rights under the Operating Sub-Contractor Direct Agreement (Councils) subject always to Clause 10.4; and
- 10.5.6 unless permitted by Clause 10.13, the Councils shall not be entitled to exercise their rights under the Operating Sub-Contractor Direct Agreement (Councils) where the event giving rise to termination of the Contract is an event of Operating Sub-Contractor Default.
- 10.6 In addition to their rights under Clauses 10.1, and subject to Clauses 10.2 and 10.3, where the Contract has been terminated, the Councils shall, from the Termination Date, be entitled to exercise any of their step-in rights or other rights under or in respect of the Construction Sub-Contractor Direct Agreement (Councils), provided that prior to the Final Discharge Date:
 - 10.6.1 the Councils may not claim, recover, retain or receive (or seek to claim recover, retain or receive) an amount under, pursuant to or in connection with the Construction Sub-Contractor Direct Agreement (Councils) and/or the Construction Sub-Contract other than the making of deductions or withholdings against (and only up to the amount of) each Interim Payment and/or Final Statement under and in accordance with Clause 56 (Payment Provisions) and Clause 57 (Final Account and Final Statement) of the Construction Sub-Contract in respect of works carried out following the Termination Date;
 - 10.6.2 if and to the extent that realisation of the Accrued Rights would count against the Construction Sub-Contractor's Liability Cap the Councils shall only be entitled to make deductions or withholdings pursuant to Clause 10.6.1, to the extent that such deductions or withholdings, when aggregated with any termination compensation claimed pursuant to Clause 10.6.3, do not exceed the Councils Construction Liability Cap;
 - 10.6.3 if and to the extent that realisation of the Accrued Rights would count against the Construction Sub-Contractor's Liability Cap, the Councils shall only be entitled to exercise their rights to terminate the Construction Sub-Contract (pursuant to Clause 83 (Termination on EPC Contractor Default) thereof) and to claim termination compensation (pursuant to Clause 84 (Compensation on

Termination on EPC Contractor Default) thereof), to the extent that such compensation, does not exceed the Councils Construction Liability Cap;

10.6.4 if and to the extent that realisation of the Accrued Rights would count against the Construction Sub-Contractor's Liquidated Damages Cap, the Councils shall only be entitled to make deductions or withholdings pursuant to Clause 10.6.1 which relate to the Construction Sub-Contractor's Liquidated Damages Cap to the extent that such deductions or withholdings do not exceed the Councils Construction Liquidated Damages Cap;

10.6.5 if the Councils and the Facility Agent do not agree the Construction Accrued Rights Value:

- (a) either of the Councils or the Facility Agent may refer the dispute for resolution in accordance with Clause 20 (Dispute Resolution); and
- (b) pending agreement or determination of the Construction Accrued Rights Value, the Councils shall be entitled to exercise their rights under the Construction Sub-Contractor Direct Agreement (Councils) subject always to Clause 10.4; and

10.6.6 unless permitted by Clause 10.13, the Councils shall not be able to exercise any of their step-in rights or other rights under or in respect of the Construction Sub-Contractor Direct Agreement (Councils) where the event giving rise to termination of the Contract is an event of Construction Sub-Contractor Default.

10.7 In addition to their rights under Clause 10.1, and subject to Clauses 10.2 and 10.3, where the Contract has been terminated, the Councils shall, from the Termination Date, be entitled to exercise any of their step-in rights or other rights under or in respect of the SRF Offtake Councils Direct Agreement, provided that prior to the Final Discharge Date:

10.7.1 the Councils may not claim, recover, retain or receive (or seek to claim, recover, retain or receive) an amount under, pursuant to or in connection with the SRF Offtake Councils Direct Agreement and/or SRF Offtake Sub-Contract other than the making of deductions or withholdings against (and only to the amount of) each monthly payment under and in accordance with

Clause 26 (Payment) of the SRF Offtake Sub-Contract in respect of SRF Offtake Services carried out following the Termination Date;

- 10.7.2 if and to the extent that realisation of the Accrued Rights would count against the SRF Offtake Contractor's Liability Cap the Councils shall only be entitled to make deductions or withholdings pursuant to Clause 10.7.1, to the extent that such deductions or withholdings, when aggregated with any termination compensation claimed pursuant to Clause 10.7.3 do not exceed the Councils SRF Offtake Liability Cap;
- 10.7.3 if and to the extent that realisation of the Accrued Rights would count against the SRF Offtake Contractor's Liability Cap, the Councils shall only be entitled to exercise their rights to terminate the SRF Offtake Sub-Contract (pursuant to Clause 32 (Termination for Offtaker Default) thereof) and to claim termination compensation (pursuant to Clause 38 (Compensation on Termination) thereof) to the extent that such compensation, does not exceed the Councils SRF Offtake Liability Cap;
- 10.7.4 if the Councils and the Facility Agent do not agree the SRF Offtake Accrued Rights Value:
 - (a) either of the Councils or the Facility Agent may refer the dispute for resolution in accordance with Clause 20 (Dispute Resolution); and
 - (b) pending agreement or determination of the SRF Offtake Accrued Rights Value, the Councils shall be entitled to exercise their rights under the SRF Offtake Councils Direct Agreement subject always to Clause 10.4, and
- 10.7.5 unless permitted by Clause 10.13, the Councils shall not be able to exercise any of their step-in rights or other rights under or in respect of the SRF Offtake Councils Direct Agreement where the event giving rise to termination of the Contract is an event of SRF Offtake Contractor Default.
- 10.8 Notwithstanding the terms of any Sub-Contractor Direct Agreement/Collateral Warranty or any other provisions of this Clause 10, each of the Relevant Sub-Contractors, together with any guarantors thereof, shall remain responsible, and be liable, to the Contractor and the Senior Secured Parties in respect of all costs, claims, damages, losses and liabilities which have arisen out of or in connection with the

Construction/Operating/SRF Offtake Sub-Contracts, or the Security Documents and Direct Agreements relating thereto, in respect of the period prior to and including the Termination Date and the Contractor and the Senior Secured Parties (and the Facility Agent and/or the Security Trustee acting on behalf of the Contractor and/or the Senior Secured Parties) shall retain the benefit of all their respective rights to all such costs, claims, damages, losses and liabilities (the "**Accrued Rights**").

10.9 In addition to their other rights under this Clause 10, where following service of a Termination Notice but before expiry of the Required Period a Relevant Sub-Contractor has served a notice of termination, discontinuance or suspension on their contracting counterparty (whether the Contractor or otherwise) in accordance with the terms of the relevant Construction/Operating/SRF Offtake Sub-Contract, the Councils may pay directly, or undertake to make a payment directly, to the Relevant Sub-Contractor, amounts properly due, payable and undisputed (whether as a result of counterclaim, set-off or otherwise) under or pursuant to the relevant Construction/Operating/SRF Offtake Sub-Contract and may set off such sums after they have been paid against any amounts payable by the Councils to the Contractor under the Contract, so as to satisfy them pro tanto, provided that the Councils shall not be able to exercise their rights pursuant to this Clause 10.9 in circumstances where the Senior Secured Parties:

10.9.1 have stepped-in to, or otherwise, directly or indirectly, taken control over the relevant Construction/Operating/SRF Offtake Sub-Contract and not stepped out of it or otherwise relinquished control; or

10.9.2 are seeking to preserve continuity of the service or build obligation (as relevant) under the relevant Construction/Operating/SRF Offtake Sub-Contract or otherwise with reasonable diligence.

10.10 To the extent that the Councils make a payment under Clause 10.9 above, the Councils shall not be entitled to make double recovery by making a deduction from the Unitary Charge under the Contract in respect of performance failure by the Relevant Sub-Contractor without making an equivalent deduction against the payment made direct by the Councils to the Relevant Sub-Contractor.

10.11 On early termination of the Contract for any reason the Councils shall be entitled to set-off any payments made to sub-contractors under Clause 10.9 (to the extent not previously set-off in accordance with that Clause) against any payments made under the Contract (subject to Clause 11.7 (Miscellaneous) of this Agreement and Clause 93.1 (Set-Off on Termination) of the Contract).

10.12 Where following the Termination Date:

10.12.1 the Senior Secured Parties do not have any Accrued Rights in respect of the Relevant Sub-Contractor;

10.12.2 all claims which may arise from any Accrued Rights in respect of the Relevant Sub-Contractor have been settled or written off by the Senior Finance Parties or become exhausted; or

10.12.3 the Facility Agent fails to comply with Clause 10.14,

the Councils may exercise their rights under the relevant Sub-Contractor Direct Agreement/Collateral Warranty without restriction. The Facility Agent shall notify the Councils as soon as reasonably practicable but in any event within five (5) Business Days after as claims arising from the Accrued Rights are settled or written off by the Senior Finance Parties, or become exhausted.

10.13 On and after the earlier of:

10.13.1 the Final Discharge Date; and

10.13.2 the date on which the Facility Agent has given its written consent,

the Councils shall be entitled to exercise their rights under any Sub-Contractor Direct Agreement/Collateral Warranty in connection with the Construction Sub-Contract, Operating Sub-Contract, or other Construction/Operating/SRF Offtake Sub-Contract in accordance with the Sub-Contractor Direct Agreement/Collateral Warranties without restriction.

10.14 Following termination of the Contract, the Facility Agent shall, within ten (10) Business Days of receipt of a written request from the Councils, provide to the Councils written details of all Accrued Rights of which it is aware, having made enquiry of the Contractor and the Senior Secured Parties:

10.14.1 that the Contractor may claim against the Relevant Sub-Contractor; and

10.14.2 that any of the Secured Parties may claim against the Relevant Sub-Contractor,

together with an indicative non-binding assessment of the Operating Accrued Rights Value, the Operating Accrued Rights Termination Value, the Construction Accrued

Rights Value, the Construction Accrued Rights Liquidated Damages Value and the SRF Offtake Accrued Rights Value.

- 10.15 Following termination of the Contract, where the Secured Creditors have enforced their security and a receiver appointed by or on behalf of the Secured Creditors has made a prescribed part of the Contractor's net property available for the satisfaction of unsecured debts (under section 176A of the Insolvency Act 1986) the Councils may claim as an unsecured creditor against the Contractor for a share of such prescribed part.
- 10.16 Notwithstanding the terms of the Contract and Security Documents, the Facility Agent and the Security Trustee agree that the Councils may exercise their rights to have transferred any Unrestricted Assets to the Councils or their nominee following the Expiry Date or Termination Date (as the case may be) and neither the Facility Agent nor the Security Trustee shall exercise or seek to exercise any enforcement rights and shall, on or before the date any Unrestricted Assets are transferred to the Councils or their nominee, as the case may be, each release their security over them.
- 10.17 Notwithstanding the terms of the Contract, and subject to Clause 10.18, the Councils agree that they will not exercise or seek to exercise any of their rights to require a transfer of any revenues or cash balances (including the Alternative SRF Charged Account and any amounts in the Alternative SRF Charged Account) or rights accrued as at the Termination Date under or pursuant to or in connection with any of the Relevant Required Insurances, any Construction/Operating/SRF Offtake Sub-Contract or any Project Document comprised in the Assets to the Councils or their nominee on or following the Termination Date until the Final Discharge Date.
- 10.18 The Councils may, at their option, and subject to agreement of the value of any such revenues, cash balances, or claims by the Facility Agent in its absolute discretion, and payment of such sum to the Facility Agent, require a transfer of any revenues or cash balances or rights accrued (other than any in respect of the Alternative SRF Charged Account and any amounts in the Alternative SRF Charged Account) as at the Termination Date under or pursuant to or in connection with any Construction/Operating/SRF Offtake Sub-Contract comprised in the Assets to the Councils or their nominee on or following the Termination Date.
- 10.19 As envisaged by Clause 79.6.1 (Contractor Account for Incremental SRF Costs Charged to Secured Creditors and the Councils) of the Contract, the Contractor will enter into:

10.19.1 the Secured Creditors' Alternative SRF Account Charge; and

10.19.2 the Councils' Alternative SRF Account Charge,

on or about the date of this Agreement in each case in relation to the account numbered 00415729 with sort code 30-00-02 in the name of the Contractor held with the Account Bank, and any monies standing to the credit of such account from time to time.

10.20 The Councils acknowledge that the account referred to in Clause 10.19 is the Alternative SRF Charged Account which the Contractor is obliged to establish pursuant to Clause 79.6.1 (Contractor Account for Incremental SRF Costs Charged to Senior Lenders and the Councils) of the Contract.

10.21 Notwithstanding the terms of the Contract, and regardless of which of this Agreement, the Contract, the Senior Financing Agreements, the Secured Creditors' Alternative SRF Account Charge and the Councils' Alternative SRF Account Charge are entered into first in time, the Councils acknowledge and confirm that the Councils' Alternative SRF Account Charge shall be a second ranking charge behind the Secured Creditors' Alternative SRF Account Charge, and the Councils shall not be entitled to receive or withdraw any funds from the Alternative SRF Account (or otherwise seek to enforce their security over the account) prior to the Contingent Loan Discharge Date.

10.22 The Councils acknowledge the Secured Creditors' Alternative SRF Account Charge, and accept that on the occurrence of any Event of Default (as defined under the Senior Financing Agreements) where there are sums standing to the credit of the Alternative SRF Charged Account (the "**Surplus SRF Funds**"), the Security Trustee is entitled to withdraw any or all of the Surplus SRF Funds up to a maximum of any amounts which may be or become owing by the Contractor to each of the Secured Creditors under the Senior Financing Agreements and/or the Contingent Loan Agreement (as applicable), and apply such funds solely in order to repay such amounts.

10.23 For the avoidance of doubt, the Facility Agent and the Security Trustee hereby consent to the entry by the Contractor into the Councils' Alternative SRF Account Charge and the creation and continuance of the same.

11 MISCELLANEOUS

11.1 The Councils shall, at the Contractor's expense, take whatever action the Facility Agent, an Appointed Representative or a Representative taking a transfer in accordance with Clause 8.1 (Novation) may require for perfecting any transfer or release under Clauses

5 (Representative), 7 (Step-Out) and 8 (Novation) including the execution of any transfer or assignment, and the giving of any notice, order or direction and the making of any registration which, in each case, the Facility Agent, Appointed Representative or Representative reasonably requires.

11.2 Subject always to the continuing obligations of the Parties under Clause 1 (Definitions and Interpretation), Clause 2.5 (Consent to Security), Clause 10 (Councils' Rights), Clause 11.3 (Miscellaneous), Clause 12 (Assignment), Clause 13 (Third Party Rights), Clause 14 (Entire Agreement), Clause 15 (Counterparts), Clause 16 (Waiver), Clause 17 (Severability), Clause 18 (Notices), Clause 19 (Local Government (Contracts) Act 1997) and Clause 20 (Dispute Resolution), this Agreement shall remain in effect until:

11.2.1 the date on which all amounts which may be or become owing by the Councils to the Contractor under Clause 81 (Compensation on Councils Default) of the Contract have been irrevocably paid in full; or

11.2.2 in the event that the Councils elect to pay the Adjusted Estimated Fair Value of the Contract or the Senior Debt element of any Termination Sum in instalments in accordance with Clause 93.2 (Method of Payment) of the Contract, the date on which such election is made whereupon the Facility Agent or Security Trustee (as relevant) agrees on behalf of itself and the Secured Creditors to release any security granted in their favour over the Unrestricted Assets.

11.3 On the Expiry Date the Facility Agent or Security Trustee (as relevant), acting on behalf of itself and the Secured Creditors, shall release any security in its favour over any Unrestricted Assets which have not previously been assigned to the Councils.

11.4 On the Contingent Loan Discharge Date the Facility Agent or Security Trustee (as relevant), acting on behalf of itself and the Secured Creditors, shall release any security granted in its favour over any Assets which have not previously been assigned or otherwise transferred to the Councils and this Agreement shall terminate in full.

11.5 The Facility Agent, in respect of Clauses 11.5.1, 11.5.2 and 11.5.3, the Contractor in respect of Clause 11.5.4, and the Security Trustee in respect of Clause 11.5.5 shall promptly notify the Councils of:

- 11.5.1 any decisions to accelerate the maturity of any amounts owing by the Contractor to the Senior Finance Parties under the Senior Financing Agreements and/or demand repayment;
- 11.5.2 the Final Discharge Date on or before the date falling twenty (20) Business Days after its occurrence;
- 11.5.3 the details and amount of any proposed Additional Permitted Borrowing, including:
 - (a) the circumstances giving rise to it and reasons for it; and
 - (b) the terms on which it will be borrowed; and
- 11.5.4 on the first Business Day of each calendar month during which any Additional Permitted Borrowing is, or may be, subsisting, the amount outstanding under the Senior Financing Agreements (as the same may be amended (whether or not with the approval of the Councils), and, to the extent it is aware (having made reasonable and proper enquiry):
 - (a) the amount of any Distribution made by the Contractor; and
 - (b) the amount of any credit balance on any account of the Contractor; and
- 11.5.5 the Contingent Loan Discharge Date on or before the date falling twenty (20) Business Days after its occurrence;
- 11.6 The Security Trustee shall promptly following the occurrence of each of the Final Discharge Date and, if later, the Contingent Loan Discharge Date, and in any event within five (5) Business Days of each such date, serve notice on the Account Bank of the occurrence of the same.
- 11.7 The Contractor joins in this Agreement, inter alia, to acknowledge and consent to the arrangements set out and agrees not knowingly to do or omit to do anything that may prevent any Party from enforcing its rights under this Agreement.
- 11.8 For the avoidance of doubt, if there is any conflict or inconsistency between the provisions of this Agreement and the Contract, the provisions of this Agreement shall prevail.

- 11.9 If the Councils elect to pay the Adjusted Estimated Fair Value of the Contract or the Senior Debt element of any Termination Sum in instalments in accordance with Clause 93.2 (Method of Payment) of the Contract, the Councils shall not subsequently set off against or make any deduction from any instalment or interest relating thereto in respect of any claim or liability of which the Councils becomes aware after the Termination Sum has been finally agreed or determined, save to the extent that after such amount has been set off or deducted, the termination payment made (excluding interest payable pursuant to Clause 93.2 (Method of Payment) of the Contract) would be an amount greater than or equal to the Base Senior Debt Termination Amount or the Revised Senior Debt Termination Amount, as the case may be at the time.
- 11.10 If funds are advanced to the Contractor under the Contingent Loan Agreement or the Letter of Credit (Contingent Loan Agreement) (as the case may be), then as soon as reasonably practicable thereafter the Contractor shall utilise all such funds for early repayment of the Senior Debt which is outstanding at such time.
- 11.11 Each Council warrants that as at the date of this Agreement it has not received notice of any legal proceedings and is not aware of the institution of any proceedings in the High Court in each case to challenge the decision to award the Contract to the Contractor.
- 11.12 The Councils confirm that they have informed all economic operators who have submitted an offer in relation to the Contract of their decision in relation to the award of the contract in accordance with Regulation 32 of the Public Contracts Regulations 2006 (SI 2006/5).

12 ASSIGNMENT

- 12.1 No Party to this Agreement may assign or transfer any part of its rights or obligations under this Agreement, save as provided in Clauses 12.2 to 12.4 (inclusive) below.
- 12.2 Each of the Facility Agent and the Security Trustee may assign or transfer its rights and obligations under this Agreement to a successor facility agent or security trustee (as appropriate) in accordance with the Senior Financing Agreements without the consent of the Councils.
- 12.3 Any of the Senior Finance Parties and/or Senior Secured Parties may assign or transfer its rights under the Senior Financing Agreements in accordance with the terms of the Senior Financing Agreements.

12.4 The Councils shall assign, novate or otherwise transfer their rights and/or obligations under this Agreement to any public body to which the Councils assign, novate or otherwise transfer their rights and/or obligations under the Contract in accordance with Clause 99.1 (Restrictions on the Councils) of the Contract.

12.5 If Clause 12.2 above applies then the Councils shall enter into a direct agreement with the new facility agent or security trustee (as relevant) on substantially the same terms as this Agreement.

13 THIRD PARTY RIGHTS

A person who is not a Party to this Agreement shall have no rights under the Contract (Rights of Third Parties) Act 1999 to enforce any term of this Agreement.

14 ENTIRE AGREEMENT

Except where expressly provided in this Agreement, this Agreement constitutes the entire Agreement between the Parties in connection with its subject matter and supersedes all prior representations, communications, negotiations and understandings concerning the subject matter of this Agreement.

15 COUNTERPARTS

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

16 WAIVER

16.1 Waiver to be Written

No term or provision of this Agreement shall be considered as waived by any Party unless a waiver is given in writing by that Party.

16.2 Extent of Waiver

No waiver under Clause 16.1 shall be a waiver of a past or future default or breach, nor shall it amend, delete or add to the terms, conditions or provisions of this Agreement unless (and then only to the extent) expressly stated in that waiver.

17 SEVERABILITY

If any term, condition or provision of this Agreement shall be held to be invalid, unlawful or unenforceable to any extent, such term, condition or provision shall not affect the validity, legality and enforceability of the other provisions of or any other documents referred to in this Agreement.

18 NOTICES

18.1 Form and Service of Notices

All notices under this Agreement shall be in writing and all certificates, notices or written instructions to be given under the terms of this Agreement shall be served by sending the same by first class post, facsimile or by hand, or leaving the same at:

Councils

To the Chief Executive, Rotherham Borough Council (as Lead Authority), Riverside House, Main Street, Rotherham S60 1AE. Tel: (01709) 382121, Fax: (01709) 823598.

Facility Agent

Lloyds TSB Bank plc, Wholesale Loans Agency, 3rd Floor, 10 Gresham Street, London, EC2V 7AE, for the attention of Martin Clancy: Manager Tel: 020 7158 8671, Fax: 020 7158 3198 or Andrew Butt: Manager Tel: 020 7158 1460, Fax: 020 7158 3198.

Security Trustee

Lloyds TSB Bank plc, Wholesale Loans Agency, 3rd Floor, 10 Gresham Street, London, EC2V 7AE, for the attention of Martin Clancy: Manager Tel: 020 7158 8671, Fax: 020 7158 3198 or Andrew Butt: Manager Tel: 020 7158 1460, Fax: 020 7158 3198.

Contractor

For the attention of the Company Secretary, 3SE (Barnsley, Doncaster & Rotherham) Limited, Dunedin House, Auckland Park, Mount Farm, Milton Keynes, Buckinghamshire MK1 1BU. Tel: +44 (0) 1908 650580, Fax: +44 (0) 1908 650651.

18.2 Change of Details

A Party to this Agreement may change its nominated address or facsimile number by prior notice to the other Parties.

18.3 Notices by Post

Notices given by post shall be effective upon the earlier of actual receipt and five (5) Business Days after mailing. Notices delivered by hand shall be effective upon delivery. Notices given by facsimile shall be deemed to have been received where there is confirmation of uninterrupted transmission by a transmission report and where there has been no telephonic communication by the recipient to the senders (to be confirmed in writing) that the facsimile has not been received in legible form:

18.3.1 within two (2) hours after sending, if sent on a Business Day between the hours of 9am and 4pm; or

18.3.2 by 11am on the next following Business Day, if sent after 4pm on a Business Day but before 9am on that next following Business Day.

19 LOCAL GOVERNMENT (CONTRACTS) ACT 1997

19.1 The Certification Requirements are intended to be satisfied by the Councils with respect to this Agreement before the end of the period within which the Certification Requirements must be satisfied for this Agreement to be a certified contract for the purposes of the Local Government (Contracts) Act 1997.

19.2 The Facility Agent, Security Trustee and the Contractor hereby consent to the issue by each Council of a certificate under section 3 of the Local Government (Contracts) Act 1997 in respect of this Agreement. In respect of the certificate issued by each Council, the two other Councils (as the case may be) hereby consent to the issue by the third Council of a certificate under section 3 of the Local Government (Contracts) Act 1997 in respect of this Agreement.

19.3 The Parties acknowledge that failure by the Councils to issue a certificate in accordance with Clause 19.2 shall, pursuant to Clause 8 (Local Government (Contracts) Act 1997) of the Contract, give rise to a right for the Contractor to terminate the Contract and an entitlement for the Contractor to be paid compensation by the Councils. No additional compensation shall be payable by the Councils pursuant to this Agreement in such circumstances.

- 19.4 The relevant discharge terms within the meaning of section 6 of the Local Government (Contracts) Act 1997 are set out in Schedule 16 (Relevant Discharge Terms) of the Contract. Where such terms apply and the Contractor is entitled to compensation pursuant to the Contract, the Parties acknowledge that no additional compensation shall be payable by the Councils pursuant to this Agreement.

20 DISPUTE RESOLUTION

- 20.1 Any dispute arising in relation to any aspect of this Agreement shall be resolved in accordance with this Clause 20.
- 20.2 If a dispute arises in relation to any aspect of this Agreement, the Parties shall consult in good faith in an attempt to come to an agreement in relation to the disputed matter.
- 20.3 Without prejudice to Clause 20.2, and subject to Clause 20.4 either of the Councils or the Facility Agent (or, if relevant, the Security Trustee) may give the other notice of its intention to refer the dispute to an Expert for determination (the "**Notice of Expert Determination**"). The Notice of Expert Determination shall include a brief statement of the issue to be referred and the redress sought.
- 20.4 If a dispute arises in relation to determination of any Accrued Rights Value in accordance with Clause 10 (Councils' Rights), either of the Councils or the Facility Agent (or, if relevant, the Security Trustee) may refer the dispute directly to the courts of England and Wales for final resolution. If such a reference is made the Parties shall not (unless they agree otherwise) be required to comply with the dispute resolution procedure set out in the remainder of this Clause 20.
- 20.5 The Councils and the Facility Agent (or, if relevant, the Security Trustee) shall attempt to agree the identity of the Expert within five (5) Business Days of the date of issue of the Notice of Expert Determination. In the event that the Councils and the Facility Agent (or, if relevant, the Security Trustee) cannot agree the identity of the Expert within such period, either of them may request the President for the time being of the Chartered Institute of Arbitrators to nominate a suitable individual, and such individual shall be the Expert for the purposes of this Clause 20. The Expert shall (unless otherwise agreed) be an independent individual with knowledge of and experience in waste management PFI projects. The Party giving the Notice of Expert Determination (the "**Referring Party**") shall send a copy of the Notice of Expert Determination to the Expert as soon as he has been appointed.

- 20.6 Within five (5) Business Days of the service of the Notice of Expert Determination, or as soon thereafter as the Expert is appointed, the Referring Party shall serve its statement of case (the "**Referral Notice**") on the Expert and the other party (the "**Responding Party**"). The Referral Notice shall include a copy of this Agreement, details of the circumstances giving rise to the dispute as set out in the Notice of Expert Determination, the reasons why the Referring Party is entitled to the redress sought, and the evidence upon which it relies.
- 20.7 The Responding Party shall serve its statement of case (the "**Response**") on the Expert and the Referring Party within a period of time to be directed by the Expert. The Response shall include any arguments in response to the Referral Notice and any additional evidence on which the Responding Party relies.
- 20.8 The Expert shall have absolute discretion as to how to conduct resolution of the dispute, including whether a meeting is necessary. The Expert shall establish the procedure and timetable subject to any limitation within this Agreement. The Expert shall act fairly and impartially and may take the initiative in ascertaining the facts and the law. The Parties shall comply with any request or direction of the Expert in relation to resolution of the dispute.
- 20.9 The Expert shall provide to the Councils and the Facility Agent (or, if relevant, the Security Trustee) his written decision on the dispute within ten (10) Business Days after the date of receipt of the Referral Notice (or such other period as the parties may agree). The Expert shall state the reasons for his decision. Unless and until revised, cancelled or varied by the courts of England and Wales, the Expert's decision shall be binding on all Parties who shall forthwith give effect to the decision.
- 20.10 The Expert's costs shall be borne as the Expert shall specify or, in default, equally by the Councils and the Facility Agent (or, if relevant, the Security Trustee). Each Party shall bear its own costs arising out of the referral, including legal costs and the costs and expenses of any witnesses.
- 20.11 All information, data or documentation disclosed or delivered by a Party to the Expert in consequence of or in connection with his appointment as Expert shall be treated as confidential. The Expert shall not disclose to any person or company any such information, data or documentation and all such information, data or documentation shall remain the property of the party disclosing or delivering the same and all copies shall be returned to such party on completion of the Expert's work.

- 20.12 Either of the Councils or the Facility Agent (or, if relevant, the Security Trustee) may within ninety (90) days of receipt of the Expert's decision give notice to the other of its intention to refer the dispute to the courts of England and Wales for final determination.
- 20.13 The Parties shall continue to comply with, observe and perform all their obligations hereunder regardless of the nature of the dispute and notwithstanding the referral of the dispute for resolution under this Clause 20 and shall give effect forthwith to every decision of the Expert and the courts delivered under this Clause 20.

21 GOVERNING LAW

This Agreement and any non-contractual obligations arising out of or in connection with it shall be governed by and construed in all respects in accordance with the laws of England and Wales. Subject to Clause 20 (Dispute Resolution) the courts of England and Wales shall have exclusive jurisdiction to settle any disputes which may arise out of or in connection with this Agreement.

EXECUTED as a DEED by the Parties or their duly authorised representatives and delivered on the date of this Agreement.

THE COMMON SEAL OF)

BARNSELY METROPOLITAN)

BOROUGH COUNCIL)

Was affixed to this Deed)

In the presence of:)

.....

Authorised Signatory

THE COMMON SEAL OF)

DONCASTER)

BOROUGH COUNCIL)

Was affixed to this Deed)

In the presence of:)

.....

Authorised by the Assistant Director of Legal and Democratic Services

Number in seal register

THE COMMON SEAL OF)

ROTHERHAM)

BOROUGH COUNCIL)

Was affixed to this Deed)

In the presence of:)

.....

Authorised Signatory

Signed as a deed by

.....
(attorney's signature)

Lloyds TSB Bank plc

by its attorney in exercise of a power of
attorney in the presence of

.....
Signature of witness

Name

Address

.....

Signed as a deed by

.....

Lloyds TSB Bank plc

(attorney's signature)

by its attorney in exercise of a power of
attorney in the presence of

.....
Signature of witness

Name

Address

.....

Executed as a deed by)

3SE (BARNSELEY, DONCASTER)

& ROTHERHAM) LIMITED)

acting by its director/attorney)

Signature of director/attorney

.....

Signature of witness

.....

Name of witness

.....

Address of witness

.....

Occupation of witness

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