

## **SCHEDULE 26**

### **PLANNING**

#### **1. DEFINITIONS**

In each part of this Schedule 26 (Planning) the following expressions (in addition to those specified in Schedule 1 (Definitions) shall, save where the context or the express provisions of this Contract otherwise requires or admits, have the following meanings:

**"Architectural Enhancement"** any required enhancement(s) to the Basic Design Proposal which requires an aggregate Capital Expenditure together in excess of £100,000

**"Challenge Period"** the period ending on the later of:

(a) the last day of the period prescribed by statute during which a third party may institute a challenge which could result in the quashing or modification of the relevant decision of the Planning Authority; and

(b) where such a challenge is initiated within the period in (a) above, the final determination or withdrawal of that challenge plus five (5) Business Days

**"Deemed Refusal"** any failure to determine a Planning Application by the Planning Authority within the statutory period or as otherwise agreed in writing between the Contractor and by the Planning Authority which would entitle the Contractor to appeal against the deemed refusal of that Planning Application or any other period which the Contractor and the Planning Authority may agree shall constitute the period for determination of the Planning Application for the purposes of any appeal by the Contractor

**"Judicial Review"** proceedings brought under Part 54 of the Civil Procedure Rules or by any Party other than the

**Challenge"**

Contractor under Section 288 of the Planning Act in respect of the Planning Permission

**"Leading Counsel"**

counsel experienced in town and country planning matters and practising at the town and country planning bar who:

- (a) shall be agreed upon by the Parties or, in default of agreement shall be of 15 years' call and identified by the Chairman of the Planning and Environmental Bar Association or his deputy; and
- (b) accepts instructions to provide an opinion pursuant to paragraph 2 (Planning Consents)

**"Off-Site Expenditure"**

any costs or expenses, relating to land outside the Site incurred in order to comply with or fulfil any requirement or obligation or condition of any Planning Permission, associated Planning Agreement, or associated agreement with any highway authority, having a value in excess of £100,000

**"Off-Site Works"**

any works, relating to land outside the Site in order to comply with or fulfil any requirement or obligation or condition of any Planning Permission, associated Planning Agreement, or associated agreement with any highway authority

**"Planning Agreement"**

- (a) Section 106 of the Town and Country Planning Act 1990;
- (b) Section 38 or 278 Highways Act 1980;
- (c) Section 104 Water Industry Act 1991 or any other provision of a similar intent within the meaning of the Water Act 1989, with an appropriate authority for the supply of water or the drainage of foul water from the Site;

<b>"Planning Delay"</b>	has the meaning given to it in paragraph 3.6.1;
<b>"Planning Permission Longstop Date"</b>	in respect of the Facility, the date as set out in Schedule 8 (Key Dates)
<b>Satisfactory Planning Permission</b>	<p>a Planning Permission with the Challenge Period expired (and with any Proceedings having finally been determined such that the Planning Permission has been upheld and may be implemented) for the Facility, together with any related Planning Agreement or agreement with any Relevant Authority which is a permission for the description of the development which is the subject of the agreed Planning Application for the Facility and does not impose on the Contractor by way of condition or other obligation any of the following requirements:</p> <ul style="list-style-type: none"> <li>(a) a requirement to obtain the agreement of a third party other than an Affiliate in respect of land outside the Facility other than: <ul style="list-style-type: none"> <li>(i) statutory undertakers in respect of any utility; and</li> <li>(ii) a highway authority;</li> </ul> </li> <li>(b) a requirement to carry out Off-Site Works or incur Off-Site Expenditure;</li> <li>(c) a requirement which renders the Contractor unable to deliver or perform all or any of the Services as are to be provided at the Facility in accordance with the Output Specification or Service Delivery Plans or which significantly affects the ability of the Contractor to meet the volumes of Third Party Waste in any scenario targeted in Schedule 19 Appendix 1 within the Base Case at the Facility because it has one or more</li> </ul>

of the following effects:

- (i) prevents the Facility from operating in accordance with the Output Specification and the Service Delivery Plans;
- (ii) restricts the number of waste carrying vehicle movements to and from the Site to less than the minimum inward movements of waste carrying vehicles per day as set out in the Service Delivery Plans or Base Case;
- (iii) requires that any Contract Waste or Third Party Waste (or any by-products of either) will be delivered to or transported from the Facility otherwise than by road going vehicles alone;
- (iv) restricts the hours of delivery of Contract Waste or Third Party Waste to the Site, restricts the hours of operation of the Facility or limits heavy goods vehicles from entering or exiting the Site other than in each case as set out in the Service Delivery Plans;
- (v) causes the Contractor to be in breach of the Environmental Permit;
- (vi) limits the life of the Planning Permission granted for the Facility to less than the period from the date that the Planning Permission is granted until the original

Expiry Date;

- (vii) restricts tonnage levels of Contract Waste or Third Party Waste to be received and/or processed at the Site other than as set out in the Service Delivery Plan or the Base Case;
- (viii) restricts access to the public other than as set out in the Service Delivery Plans;
- (ix) restricts or prevents the recovery of Products or energy from the Facility which would prevent the Contractor from achieving the diversion and/or recycling rates set out in the Contract or the Third Party Income assumed in the Base Case;
- (x) imposes limits in respect of noise exceeding the tolerances set out in the Service Delivery Plans; or
- (xi) imposes any restriction on the use of the Site as a waste transfer station,

and an "Unsatisfactory Planning Permission" is one which is not a Satisfactory Planning Permission.

## **2. PLANNING CONSENTS**

### **2.1 Contractor to obtain Planning Permission**

- 2.1.1 The Contractor undertakes to the Authority that (subject to the provisions of this paragraph 2 (Planning Consents)):

- 2.1.1.1 it shall use All Reasonable Endeavours to obtain a Satisfactory Planning Permission to enable it to undertake the Works and to deliver the Services at the Facility;
  - 2.1.1.2 the Contractor shall in pursuing any relevant Planning Permission use reasonable endeavours to follow and meet the Key Dates (Schedule 8) in respect of the Site in question.
- 2.1.2 The Contractor shall bear the costs of obtaining and of implementing and complying with the provisions and conditions of all Planning Permissions (other than any costs relating to Proceedings in the name of the Contractor which exceed the Appeal Contingency and in respect of which the Authority has given prior written consent that such costs may be incurred in accordance with paragraph 2.4 (Proceedings) below).
- 2.1.3 The Contractor shall provide to the Authority on a quarterly basis a written summary of:
  - 2.1.3.1 the steps taken by the Contractor in the preceding quarter in compliance with its obligations under this paragraph 2.1; and
  - 2.1.3.2 a written summary of those steps which it anticipates taking in the following quarter in order to comply with its obligations under this paragraph 2.1.
- 2.1.4 Without limiting the Contractor's obligations under this paragraph 2.1 the Authority may within five (5) Business Days after receipt of such summary notify the Contractor of any further measures which it believes the Contractor should take in order to comply with its obligations under this paragraph 2.1. If the Contractor disagrees, it may refer the matter to the Dispute Resolution Procedure.
- 2.1.5 Upon receipt of a notice issued under paragraph 2.1.4 (or where the matter has been referred to the Dispute Resolution Procedure, on determination or agreement of the dispute) the Contractor shall take the measures set out in the notice given under paragraph 2.1.4 (or, if relevant, the measures that have been determined or agreed under the Dispute Resolution Procedure) as soon as reasonably practicable and in any event within ten (10) Business Days of receipt of the notice.
- 2.1.6 Without prejudice to the Contractor's obligations under paragraph 2 (Planning Consents) the Authority shall at the reasonable written request of the Contractor provide written confirmation (on not more than a monthly basis) as to whether the Authority believes that, in its opinion the

Contractor has up to the date of the Contractor's request fully complied with its obligations under paragraphs 2.1.1 to 2.1.5 to use All Reasonable Endeavours to obtain a Satisfactory Planning Permission and to rectify any failures to do so, such confirmation to provide reasonable detail as to the grounds for the Authority's opinion. The Contractor shall, on not less than a weekly basis, provide the Authority with supporting information (including any relevant correspondence with the Planning Authority and / or any minutes of such meetings and minutes of any material communications with the Planning Authority) regarding the steps which it has taken in order to obtain a Satisfactory Planning Permission and the Authority's confirmation shall be solely based on such information.

2.1.7 Where the Authority confirms in writing that in its opinion the Contractor has not complied with its obligations in paragraph 2.1.1 at any time ("**ARE Failure**"), the Authority shall give reasons for such opinion, including reasonable details of the ARE Failure and:

2.1.7.1 the Contractor shall provide to the Authority a written summary of steps that it has taken (or that it intends to take) in order to rectify an ARE Failure ("**ARE Rectification Notice**"), together with any supporting information in accordance with the requirements under paragraph 2.1.6;

2.1.7.2 the Authority shall, as soon as reasonably practicable and, in any event, within fifteen (15) Business Days of receipt of an ARE Rectification Notice, provide written confirmation as to whether, in the Authority's opinion (acting reasonably) and based (i) upon the ARE Rectification Notice and the supporting information provided therewith and (ii) any other information which the Authority (in its capacity as a Waste Disposal Authority) ought reasonably to have been aware of, the Contractor has or has not rectified the ARE Failure; and

2.1.7.3 if the Authority confirms in writing that in their opinion the ARE Failure has not been rectified, then the Contractor shall be entitled to provide a further ARE Rectification Notice and the provisions of this paragraph 2.1.7 shall apply.

2.1.8 Where:

2.1.8.1 the Authority confirms in writing that in its opinion the Contractor has complied with its obligations in paragraph 2.1.1 to use All Reasonable Endeavours up to the date of the Contractor's request;



2.1.8.2 the Authority confirms that the ARE Failure has been rectified pursuant to paragraph 2.1.7 or it has been determined that the ARE Failure has been rectified; or

2.1.8.3 the Contractor has made a request pursuant to paragraph 2.1.6 and the Authority has failed to respond to such request in accordance with paragraph 2.1.6 within twenty (20) Business Days,

the Contractor shall (other than in respect of any prior failure to use All Reasonable Endeavours previously notified by the Authority to the Contractor to which this paragraph 2.1.8 did not apply) be considered to have used All Reasonable Endeavours up and until the date of the Contractor's request pursuant to paragraphs 2.1.6 or 2.2A only (as the case may be) or the date of confirmation pursuant to paragraph 2.1.8.2 if applicable.

2.1.8A In the event that any information subsequently comes to the attention of the Authority and, based on this information, the Authority confirms in writing that in its opinion the Contractor has failed to use All Reasonable Endeavours prior to the date of the Contractor's request pursuant to this paragraph 2.1.8 then any such written confirmation provided by the Authority pursuant to paragraphs 2.1.8.1 or 2.1.8.2 or failure to provide written confirmation pursuant to paragraph 2.1.8.3 shall be disregarded and the provisions of paragraph 2.1.7 shall apply.

2.1.9 The period afforded to the Contractor to remedy a failure to use All Reasonable Endeavours pursuant to paragraphs 2.1.5 and 2.1.7 shall not entitle the Contractor to an extension to the Planned Readiness Date, Planned Services Commencement Date nor any longstop date and shall not be a Relief Event, Compensation Event or an Excusing Cause.

2.1.10 The Contractor shall be obliged to reimburse the Authority in respect of its costs in complying with the provisions of paragraph 2.1 of this Schedule 26 (Planning) and paragraph 3 of Schedule 27 (Approach to Permit Risk) quarterly in arrears. For the purposes of this paragraph 2.1.10 and paragraph 3 of Schedule 27 (Approach to Permit Risk), the Authority's costs shall be deemed to be:

2.1.10.1 £50,000 (excluding VAT) per quarter (with the period of compensation deemed to start from 1st December 2011) until the earlier of the date either a Satisfactory Planning Permission or Satisfactory Permit is obtained or termination pursuant to



paragraph 3.2 or 3.5 of this Schedule 26 or paragraph 11.2 of Schedule 27 (Approach to Permit Risk); and

- 2.1.10.2 thereafter £25,000 (excluding VAT) until the earlier of the date both a Satisfactory Planning Permission and Satisfactory Permit are obtained or termination pursuant to paragraph 3.2 or 3.5 of this Schedule 26 or paragraph 11.2 of Schedule 27 (Approach to Permit Risk),

such £50,000 and £25,000 amounts to be pro-rated accordingly by reference to when a Satisfactory Planning Permission or Satisfactory Permit is obtained.

## **2.2 Meaning of All Reasonable Endeavours**

For the purposes of paragraph 2.1 (Planning Consents), of this Schedule 0 (Planning) "All Reasonable Endeavours" means that the Contractor shall:

- 2.2.1 in relation to the preparation, submission and process of any Planning Application made in the name of the Contractor incur such expenditure and do all the things reasonably necessary (including the commencement and prosecution or defence of Proceedings in accordance with and subject to the provisions hereof) and in doing so shall exercise all proper care and skill to secure or procure the grant of a Satisfactory Planning Permission;
- 2.2.2 prepare all documentation and supporting information in accordance with the relevant central, regional and local planning guidance documents and good planning practice;
- 2.2.3 respond to all other queries of the Planning Authority or statutory consultees promptly;
- 2.2.4 (subject to paragraph 2.6 (Appeal Contingency)) meet the costs of any Proceedings such costs to include the cost of instructing Leading Counsel (including for the purposes of deciding whether to initiate or pursue Proceedings) and securing the services of any expert witnesses considered necessary for the purpose of such Proceedings;
- 2.2.5 provide forthwith copies to the Authority of all instructions (including enclosures) given to Leading Counsel and opinions received from Leading Counsel relating to such Proceedings in respect of any Planning Permission sought. The Authority's Representative shall be entitled to attend any conference with Leading Counsel and the Contractor shall

endeavour when arranging such conference to agree a convenient time for attendance by the Authority's Representative; and

- 2.2.6 in relation to any Judicial Review Challenge, provide to the Authority all such assistance as it reasonably requires to the extent that the provision of such reasonable assistance does not cause the Contractor to incur any material expense (on each individual occasion or in the aggregate).

The Authority may require the Contractor to join as an interested party in any Judicial Review Challenge provided it meets the Contractor's reasonable costs of doing so.

- 2.2A Further, and subject to paragraph 2.1.8A, the Authority confirms that in its opinion it is satisfied that the Contractor has complied with its obligations under paragraph 2.1.1 in the period prior to the Restatement Date.

### 2.3 **Obligations of the Contractor**

The Contractor shall:

- 2.3.1 not cause or permit any Affiliate, associated or Holding Company of the Contractor or any entity or any third party over which it has control to object or procure any objection to any Planning Application; and
- 2.3.2 not vary any Planning Application without the prior written consent of the Authority's Representative (which consent shall not be unreasonably withheld or delayed) and where the Contractor with such consent varies any Planning Application the Contractor shall inform the Authority's Representative of the variance to the Planning Application and (where appropriate and/or applicable) provide to the Authority's Representative any documents or letters relating to such variance.

### 2.4 **Proceedings**

- 2.4.1 If in respect of the Facility, the relevant Planning Authority:
- 2.4.1.1 resolves to or is minded to grant permission for a Planning Application and that Planning Application is called-in by the Secretary of State under section 77 of the Planning Act; or
- 2.4.1.2 refuses to grant Planning Permission for a Planning Application (including any refusal on any re-determination of a Planning Application following the quashing of a decision to grant permission for such Planning Application) and this shall include the refusal of the Secretary of State to grant permission on

appeal under section 77 of the Planning Act or there is a Deemed Refusal; or

2.4.1.3 grants permission for a Planning Application which is not a Satisfactory Planning Permission in circumstances where the Authority and the Contractor agree (or are unable to agree and it is determined pursuant to Schedule 22 (Dispute Resolution Procedure)) that Proceedings may secure a Satisfactory Planning Permission; or

2.4.1.4 grants permission for a Planning Application in respect of which any condition or requirement is imposed which is unreasonable in the Contractor's reasonable opinion,

the Contractor shall take the opinion of Leading Counsel as to the merits of pursuing any Proceedings.

2.4.2 If Leading Counsel advises the Contractor that there is a reasonable prospect of success in pursuing any Proceedings in order to obtain a Satisfactory Planning Permission (or in order to remove any such unreasonable condition or requirement as referred to in paragraph 2.4.1.4) the Contractor shall seek the approval of the Authority to institute such Proceedings, which the Authority shall not unreasonably withhold or delay and if such approval is granted the Contractor shall pursue or defend the same until determination of such Proceedings (subject to the Planning Permission Longstop Date) unless subsequently in accordance with paragraph 2.4.5 the Authority directs that such Proceedings shall cease to be pursued.

2.4.3 At any reasonable time after the commencement of any Proceedings in relation to any Planning Permission, the Authority may require the Contractor to take (or the Contractor may take (subject to notifying the Authority of such intention)) the opinion of Leading Counsel as to the merits of continuing to pursue such Proceedings and to make such opinion available to the Authority.

2.4.4 In the event that Leading Counsel advises under paragraph 2.4.2 or subsequently under paragraph 2.4.3 that there is no reasonable prospect of success the Authority shall by serving written notice on the Contractor on or before a date twenty (20) Business Days from the receipt by the Authority of the advice of Leading Counsel either:

2.4.4.1 direct that the Contractor shall not pursue or shall cease to pursue the relevant Proceedings; or

2.4.4.2 direct that the Contractor institutes or continues the relevant Proceedings, and such a direction shall be treated as an approval to those Proceedings given pursuant to paragraph 2.4.2.

2.4.5 If the Authority (acting reasonably in all cases):

2.4.5.1 does not give such approval to any Proceedings; or

2.4.5.2 directs that the Contractor should cease to pursue such Proceedings,

the Contractor may still institute or continue to pursue (or procure the pursuit of) those Proceedings, subject to service of prior written notice of its intention to do so upon the Authority within twenty (20) Business Days of receipt of the Authority's notice under paragraph 2.4.4 and the Contractor will bear all the costs of instituting or continuing to pursue those Proceedings which it incurs from the point at which the Authority serves notice pursuant to paragraph 2.4.4 and paragraph 2.6 (Appeal Contingency) and paragraph 2.8 (Costs Awarded in Proceedings) will not apply to those costs.

2.4.6 The Contractor shall be entitled, in its absolute discretion, to cease to pursue any Proceedings which it institutes or continues pursuant to paragraph 2.4.5 (approval being withheld or a direction having been given to the contrary) and in respect of which it has undertaken to bear the costs pursuant to paragraph 2.4.5.

2.5 **Material Expenditure in Assisting the Authority in the case of Judicial Review Challenge**

2.5.1 If a third party makes a Judicial Review Challenge the Authority will (but following consultation with the Contractor and having due regard to any representations of the Contractor) at its sole discretion determine whether to defend any proceedings that result from a Judicial Review Challenge (the "**Judicial Review Proceedings**") and where the Authority determines that it will defend such Judicial Review Proceedings the Authority will (save as provided for in this paragraph) be responsible for all costs incurred.

2.5.2 Subject to paragraph 2.5.3 the Contractor shall in relation to a Judicial Review Challenge provide to the Authority on written request all such assistance as it reasonably requires and in doing so shall exercise all proper care and skill in accordance with its requirements of paragraph 2.2.

2.5.3 Where the provision of assistance pursuant to paragraph 2.5.2 will in the Contractor's opinion require the Contractor to incur material expense (on each individual occasion or in the aggregate) the Contractor shall in any event provide such assistance and the Authority shall reimburse the Contractor in an amount equal to those reasonable and proper expenses incurred in the provision of such assistance provided that:

2.5.3.1 the Contractor shall on receipt of each written request from the Authority pursuant to paragraph 2.5.2 and in advance of the provision of assistance (unless otherwise agreed in writing) pursuant to paragraph 2.5.3 notify the Authority that in its opinion paragraph 2.5.3 applies and shall provide to the Authority for its written approval (such approval not to be unreasonably withheld or delayed) a detailed estimate of the likely cost of the assistance including a detailed breakdown of the estimated cost of legal fees and all other professional fees and other disbursements (if any) together with details of all the legal and other professional advisers that the Contractor proposes to employ and shall at no time incur any costs above the said estimate and each element thereof or employ any additional or alternative legal or professional advisers without the further approval of the Authority (such approval not to be unreasonably withheld or delayed); and

2.5.3.2 the Authority may in writing:

(a) modify any request for assistance and the Contractor shall on receipt of such modification from the Authority and in advance

of the provision of the assistance requested under the modification (unless otherwise agreed in writing) follow the procedure in paragraph 2.5.3.1 in respect of the modified request; or

- (b) withdraw or terminate the requirement for reasonable assistance at any time with five (5) Business Days' notice but without prejudice to the Authority's obligation under this paragraph 2.5.3 to pay the Contractor's costs incurred up to and including the date of the withdrawal or termination.

2.5.4 Where the Authority is required to reimburse the Contractor pursuant to this paragraph 2.5 for costs incurred pursuant to paragraph 2.5.3 the Authority shall reimburse the Contractor pursuant to Clause 45.1 (Payment of the Unitary Charge) subject to the Contractor providing satisfactory evidence to the Authority that the costs were reasonably and properly incurred and the Contractor complied with the requirements of this paragraph 2.5.

## **2.6 Appeal Contingency**

The Contractor will bear all costs relating to and arising from any Proceedings (including for the avoidance of doubt the costs of obtaining any Leading Counsel's opinion under paragraph 2.4 (Proceedings)) up to the limit of the Appeal Contingency (taking account of any such costs of Proceedings previously incurred under this paragraph 2 and paragraph 3 and any costs of Permit Proceedings previously incurred under Schedule 27 (Approach to Permit Risk)) following which the Authority shall indemnify the Contractor for nine-tenths of all amounts reasonably, properly and prudently spent or contracted to be spent by the Contractor in excess of the Appeal Contingency in the proper and diligent conduct of the Proceedings provided that:

2.6.1 the Contractor shall within twenty (20) Business Days of the notification of a call-in or the decision to refuse Planning Permission or Deemed Refusal or the grant of a Planning Permission which the Authority or the Contractor reasonably believes may be the subject of Proceedings as the case may be, provide to the Authority for its approval (such approval not to be unreasonably withheld or delayed) a detailed estimate of the likely cost of such Proceedings including a detailed breakdown of the estimated costs of legal fees and all other professional fees and other disbursements together with details of all the legal and other professional advisers that the Contractor proposes to employ and shall at no time incur any costs above the said estimate or employ any additional or alternative legal or professional advisers without the further approval of the Authority (such approval not to be withheld or delayed); and



- 2.6.2 the Contractor shall use reasonable endeavours to ensure that the costs of the Proceedings are kept to the minimum extent prudent and reasonable at all times.

**2.7 Excess Costs above the Appeal Contingency**

- 2.7.1 Where the Authority is required to indemnify the Contractor pursuant to paragraph 2.6 (Appeal Contingency) for costs incurred over and above the amount of the Appeal Contingency ("**Excess Costs**"), the Authority shall reimburse the Contractor such Excess Costs together with any reasonable and proper financing costs subject to the Contractor providing satisfactory evidence to the Authority of such Excess Costs reasonably and properly incurred through any one of the following means (the choice of such means to be in the Authority's absolute discretion):

- (a) by way of an adjustment to the Unitary Charge for all or some part of the remainder of the Services Period;
- (b) by way of a lump sum payment made in one or more instalments together with an adjustment to the Unitary Charge; or
- (c) by way of a lump sum payment made in one or more instalments in respect of the whole amount,

such Excess Costs being calculated in accordance with the provisions of Schedule 21 (Change Protocol).

- 2.7.2 Should the Authority specify the means by which any Excess Costs are to be paid, and so request in writing the Contractor shall provide such breakdown of costs as is reasonably practicable for each of the specified methods of payment.

**2.8 Costs Awarded in Proceedings**

If the Authority has indemnified the Contractor for its costs in respect of any Proceedings pursuant to paragraph 2.7 (Excess Costs above the Appeal Contingency) any costs awarded to the Contractor in those Proceedings shall be paid to the Authority in full up to the amount it has paid equal to the Appeal Contingency and where those costs exceed an amount equal to the Appeal Contingency the balance shall be shared between the Contractor and the Authority pro rata the expenses they have incurred in respect of the Proceedings in excess of the Appeal Contingency. All payments to the Authority shall be by way of a lump



sum payment within twenty (20) Business Days of the Contractor receiving such costs to which they relate.

## **2.9 Aggregate Costs**

The Appeal Contingency is an aggregate limit available to cover the liability of the Contractor for costs relating to both Proceedings and Permit Proceedings. The Contractor's liability for these costs under both this Schedule 26 (Planning) and Schedule 27 (Approach to Permit Risk) shall not exceed an amount equal to the Appeal Contingency.

## **3. SATISFACTORY PLANNING PERMISSION**

### **3.1 Satisfactory Planning Permission**

3.1.1 Where by the Planning Permission Longstop Date for the Facility the Contractor obtains either:

3.1.1.1 a Satisfactory Planning Permission; or

3.1.1.2 an Unsatisfactory Planning Permission where the Authority has served an Authority Change Notice to enable the Contractor either:

(a) to comply with the Unsatisfactory Planning Permission without being in breach of this Contract; and/or

(b) to render compliance with the relevant part of the Unsatisfactory Planning Permission unnecessary; and/or

(c) to render the Unsatisfactory Planning Permission a Satisfactory Planning Permission,

it shall, subject to Clause 10.2 (Grant of Lease) and provided that a Satisfactory Permit has been obtained, proceed to implement the Satisfactory Planning Permission at the Site provided that, where the expiry of the Challenge Period is the only condition preventing a Planning Permission becoming a Satisfactory Planning Permission, the Authority may by written notice require the Contractor so to proceed without letting the relevant Challenge Period elapse in which case the provisions of paragraph 3.7 (Challenge Period) shall apply.

3.1.2 As soon as reasonably practicable and in any event within fifteen (15) Business Days after the issue of the Planning Permission for the Facility

the Contractor shall provide to the Authority a copy of the Planning Permission and will notify the Authority in writing whether or not the Contractor considers the Planning Permission to be a Satisfactory Planning Permission or is an Unsatisfactory Planning Permission.

3.1.3 If the Contractor considers that the Planning Permission will be (notwithstanding the expiry of the Challenge Period) an Unsatisfactory Planning Permission it shall provide within five (5) Business Days of the issue of the notice given pursuant to paragraph 3.1.2 to the Authority (or such longer period as the parties may in the circumstances and acting reasonably agree):

3.1.3.1 full details of the grounds for such opinion; and

3.1.3.2 an indication of what action could be taken (if any) by the Contractor or the Authority to enable the Contractor to comply with the Planning Permission without being in breach of this Contract which would be such as to render it a Satisfactory Planning Permission or render compliance with such Unsatisfactory Planning Permission unnecessary including without limitation:

(a) Proceedings; or

(b) the issue of an Authority Change Notice to vary the Works and/or Services.

3.1.4 If the Contractor fails to provide the notice pursuant to paragraph 3.1.2 within fifteen (15) Business Days after issue of the Planning Permission then on the expiry of the Challenge Period, the Planning Permission shall be deemed to be a Satisfactory Planning Permission.

3.1.5 If the Contractor notifies the Authority that the Planning Permission is a Satisfactory Planning Permission or such a Planning Permission is deemed to be a Satisfactory Planning Permission in accordance with paragraph 3.1.4 then the provisions of paragraph 3.1.1 apply.

3.1.6 If the Contractor notifies the Authority that the Planning Permission will be on expiry of the Challenge Period an Unsatisfactory Planning Permission the Authority shall, within ten (10) Business Days of receipt of the notice given pursuant to paragraph 3.1.3 notify the Contractor in writing whether or not the Authority accepts the Planning Permission is or will be an Unsatisfactory Planning Permission and whether they accept the action indicated by the Contractor in the notice served pursuant to paragraph

3.1.3 and in particular whether Proceedings will be likely to secure a Satisfactory Planning Permission having regard to the grounds given by the Contractor in the notice served pursuant to paragraph 3.1.3.

3.1.7 If the Authority does not accept within the time set out in paragraph 3.1.6 or is deemed to not accept because it has not notified the Contractor within the time set out in paragraph 3.1.6 that the Planning Permission will be on expiry of the Challenge Period an Unsatisfactory Planning Permission the matter may be referred by either Party for determination by an expert under Schedule 22 **Error! Reference source not found.** (Dispute Resolution) as to whether the Planning Permission is a Satisfactory Planning Permission or an Unsatisfactory Planning Permission.

3.1.8 If the Authority accepts in accordance with paragraph 3.1.6 or it is determined pursuant to paragraph 3.1.7 that the Planning Permission is an Unsatisfactory Planning Permission and the Parties agree that Proceedings will not be likely to secure a Satisfactory Planning Permission the Authority may:

3.1.8.1 within thirty (30) Business Days after it is accepted by the Authority pursuant to paragraph 3.1.6 or it is determined that a Planning Permission is an Unsatisfactory Planning Permission in accordance with this paragraph 3.1.8 issue an Authority Change Notice in respect of the Works and/or the Services or other actions required to enable the Contractor to comply with the terms of the Planning Permission which render it an Unsatisfactory Planning Permission without being in breach of this Contract or to render it a Satisfactory Planning Permission or render compliance with such Unsatisfactory Planning Permission unnecessary (in each case upon confirmation and final agreement of the consequential Authority Change Notice for the purposes of this paragraph 3 (Satisfactory Planning Permission) the Planning Permission shall be deemed to be a Satisfactory Planning Permission provided the Challenge Period has expired); or

3.1.8.2 require the Contractor to prepare a Revised Project Plan in which case the provisions of paragraph 3.3 (Revised Project Plan) shall apply and the provisions of paragraph 3.2 (Failure to Obtain Planning Permission) shall cease to apply.

3.1.9 If the Authority:

3.1.9.1 does not issue the Authority Change Notice within the time set out in paragraph 3.1.8.1; or

3.1.9.2 withdraws or is deemed to have withdrawn the Authority Change Notice issued pursuant to paragraph 3.1.8.1 in accordance with Schedule 21 (Change Protocol) respectively,

then the Contractor shall prepare a Revised Project Plan in which case the provisions of paragraph 3.3 (Revised Project Plan) shall apply and the provisions of paragraph 3.2 (Failure to Obtain Planning Permission) shall cease to apply.

3.1.10 If the Authority accepts or it is determined pursuant to paragraph 3.1.7 that the Planning Permission is an Unsatisfactory Planning Permission and the Parties agree or if the Parties are unable to agree and either Party wishes to have determined whether Proceedings may secure a Satisfactory Planning Permission the Parties shall seek the opinion of Leading Counsel pursuant to paragraph 2.2 (Meaning of All Reasonable Endeavours) and the provisions of paragraph 2.4 (Proceedings) and paragraph 2.6 (Appeal Contingency) shall apply and if Proceedings are not instituted or if instituted are withdrawn or determined leaving in place an Unsatisfactory Planning Permission the Authority may either issue an Authority Change Notice or require the Contractor to prepare a Revised Project Plan in accordance with the provisions of paragraph 3.1.8.

## **3.2 Failure to Obtain Planning Permission**

At the earlier of:

3.2.1 the date when the Parties reasonably conclude and agree that it will not be possible to obtain a Satisfactory Planning Permission for the Facility by the relevant Planning Permission Longstop Date; and

3.2.2 the relevant Planning Permission Longstop Date where at such date the Contractor has failed to obtain a Satisfactory Planning Permission; and

3.2.3 unless the Parties agree otherwise, the date at which Leading Counsel advises under paragraph 2.4.4 that there is no reasonable prospect of success in pursuing or continuing to pursue any Proceedings and obtaining a Satisfactory Planning Permission, save where the Authority directs or the Contractor chooses to initiate or continue to pursue those Proceedings under paragraph 2.4 (Proceedings) in which case paragraphs 3.2.1, 3.2.2 or 3.2.4 shall apply; and

3.2.4 unless the Parties agree otherwise, the date at which Proceedings have been finally determined (including any withdrawal of the same) and a Satisfactory Planning Permission has not been obtained,

then the Authority at its discretion shall be obliged by notice in writing to advise the Contractor:

3.2.4.1 that the Authority wishes to terminate the Contract under paragraph 3.5 (Termination as a Result of Planning Failure);  
or

3.2.4.2 that the Authority wishes the Contractor to propose a Revised Project Plan pursuant to paragraph 3.3 (Revised Project Plan) and paragraph 3.3 (Revised Project Plan) shall apply.

### **3.3 Revised Project Plan**

3.3A.1 The Authority may, on or after the date on which it requests the Contractor to provide a Revised Project Plan pursuant to paragraphs 3.1.8.2 or 3.2.4.2 of this Schedule 26 (Planning) or paragraph 11.1.6 of Schedule 27 (Approach to Permit Risk), notify the Contractor that it does not require the continued participation of the Senior Lenders in the development and negotiation of the Revised Project Plan and where the Authority notifies the Contractor pursuant to this paragraph 3.3A.1, it shall pay to the Contractor an amount equal to the aggregate of limbs (a) and (b) of the definition of Base Senior Debt Termination Amount less any amounts receivable by the Contractor under limb (iii) of that definition (for the avoidance of doubt, limbs (i), (ii) and (iv) of such definition shall be disregarded for the purposes of calculating this payment) within 70 Business Days of the Authority's notice provided that:

3.3A.1.1 where the notice given by the Authority pursuant to this paragraph 3.3A.1 is provided on or before the Planning Permission Longstop Date, limb (a) of the definition of Base Senior Debt Termination Amount shall be no higher than £14,593,833 for the period up to the Planning Permission Longstop Date; and

3.3A.1.2 where the notice given by the Authority pursuant to this paragraph 3.3A.1 is provided after the Planning Permission Longstop Date, limb (a) of the definition shall be no higher than £14,593,833 for the period up to the Planning Permission Longstop Date,

and for the purposes of calculating the amount payable under limbs (a) and (b) and the amount receivable by the Contractor under limb (iii) of the definition of Base Senior Debt Termination Amount, the "Termination Date" shall be deemed to be the



date falling ten (10) Business Days after the date of the notice given by the Authority pursuant to this paragraph 3.3A.1. The Authority shall pay the amount calculated in accordance with this paragraph 3.3A.1 together with interest at the Senior Debt Rate and any other costs incurred pursuant to the Senior Financing Agreements between the deemed Termination Date and the date of payment , with such payment to be made within seventy (70) Business Days of the notice given by the Authority pursuant to this paragraph 3.3A.1.

3.3.1 If pursuant to paragraphs 3.1.8.2 or 3.2.4.2 of this Schedule 26 (Planning) or 10.10 of Schedule 27 (Approach to Permit Risk) the Contractor is requested to propose a revised project plan (the "**Revised Project Plan**") then the Contractor shall provide, in accordance with the provisions of this paragraph 3.3 (Revised Project Plan) a draft Revised Project Plan in writing to the Authority within three Months of being requested to do so. At the time the Authority requests the Contractor to provide a Revised Project Plan, the Authority shall confirm in writing to the Contractor whether in its reasonable opinion the Contractor has complied with its obligations in paragraph 2.1.1 of this Schedule 26 (Planning) or paragraph 3.1.1 of Schedule 27 (Approach to Permit Risk) (as applicable) to use All Reasonable Endeavours up to the date of the request for a Revised Project Plan. In the event that the Authority confirms that in its opinion the Contractor has not so complied, the Authority shall reimburse the Contractor's reasonable costs incurred in providing the Revised Project Plan. The Contractor shall provide the Authority with monthly updates of the costs incurred in producing and negotiating the Revised Project Plan.

3.3.2 In preparing the draft Revised Project Plan the Contractor shall be cognisant of procurement law, act in good faith and comply with Good Industry Practice with the objective of ensuring that it obtains best value for money for the Authority (taking into account all relevant circumstances including the requirement that the Contractor should be no worse off as a result of the implementation of the Revised Project Plan and that the Revised Project Plan ought to comply with all relevant Legislation) when procuring any works, services, supplies, materials or equipment required in relation to the revised Project (the "**Revised Project**").

3.3.3 The draft Revised Project Plan shall set out:

3.3.3.1 the proposed technical solution(s) for the Revised Project;

3.3.3.2 a project plan for the Revised Project covering the same or similar issues as the Service Delivery Plans insofar as such issues are relevant to the Revised Project;

3.3.3.3 the proposed length of time and programme for obtaining the Consents;

- 3.3.3.4 the Contractor's opinion regarding the likelihood of being able to obtain the relevant Consents;
- 3.3.3.5 the interest(s) in land required for the Revised Project;
- 3.3.3.6 the revised costs for the delivery of the Revised Project (the **"Revised Project Plan Costs"**);
- 3.3.3.7 the Contractor's opinion as to the changes in the risk profile required as a result of the Revised Project;
- 3.3.3.8 details of the relief required by the Contractor from its obligations under the Contract;
- 3.3.3.9 amendments required to the Contract and any Ancillary Documents;
- 3.3.3.10 any impact of the Revised Project on the provisions of the Works and/or Services other than those which are the subject of the Revised Project Plan;
- 3.3.3.11 proposed acceptance tests for certification of completeness for any required works;
- 3.3.3.12 any impact on any Key Dates as set out in Schedule 8 (Key Dates);
- 3.3.3.13 outline Works Delivery Plans and/or Service Delivery Plans or any amendments to the existing Service Delivery Plans as the case may be;
- 3.3.3.14 details of the insurance arrangements required to cover any risks associated with the Revised Project;
- 3.3.3.15 the Contractor's opinion as to the compliance with Legislation of the draft Revised Project Plan;
- 3.3.3.16 how value for money will be achieved;
- 3.3.3.17 how the Contractor intends to finance the Revised Project; and
- 3.3.3.18 details of how the Contractor will dispose of the Contract Waste during the carrying out of the Revised Project Plan and the costs of such disposal shall be included in the Revised Project Plan Costs.



- 3.3.4 The Contractor and the Authority shall during the period of six Months from the receipt by the Authority of the draft Revised Project Plan discuss and seek to agree each and every element of the draft Revised Project Plan including:
- 3.3.4.1 the provision of evidence that the Contractor has used reasonable endeavours (including (where practicable) the use of competitive quotes) to oblige its Sub-Contractors to minimise any increase in costs and maximise any reduction in costs;
  - 3.3.4.2 demonstrating how any Capital Expenditure to be incurred or avoided is being measured in a cost effective manner, including showing that when such expenditure is incurred, foreseeable Changes in Law at that time have been taken account of by the Contractor; and
  - 3.3.4.3 demonstrating that any expenditure that has been avoided, which was anticipated to be incurred to replace or maintain assets that have been affected by the Revised Project Plan, has been taken into account in the amount which in its opinion has resulted or is required under paragraph 3.3.3.6 (Revised Project Plan).
- 3.3.5 In any discussions which take place pursuant to paragraph 3.3.4 the Authority may:
- 3.3.5.1 suggest modifications to the draft Revised Project Plan provided that the Contractor shall not be obliged to take account of any such suggested modifications; or
  - 3.3.5.2 require the Contractor to seek and evaluate competitive tenders for the relevant capital works.
- 3.3.6 If the Contractor either accepts (such acceptance shall be at the sole discretion of the Contractor) any modifications suggested by the Authority or there are any amendments to the draft Revised Project Plan following any competitive tenders for the relevant capital works in each case as arise pursuant to paragraph 3.3.4 then the Contractor shall, as soon as reasonably practicable following either the acceptance by the Contractor of any modifications or following the completion of any competitive tender, notify the Authority of any consequential changes to the draft Revised Project Plan.

3.3.7 The Authority shall by notice in writing from the Authority within six Months of receipt of the draft Revised Project Plan pursuant to paragraph 3.3.1 either:

3.3.7.1 accept the draft Revised Project Plan and the Parties shall proceed to implement the Revised Project Plan in accordance with paragraph 3.4 (Implementation of Revised Project Plan) and the Parties shall execute such legal documentation as proposed by paragraph 3.3.3.9 to give effect to the Revised Project including the amendments to the Unitary Charge to reflect the Revised Project Plan Costs; or

3.3.7.2 reject the Revised Project Plan provided that in the event the Authority does not serve a notice in accordance with this paragraph 3.3.7 then the Authority shall be deemed to have rejected the Revised Project Plan and in the case of rejection or deemed rejection the provisions of paragraph 3.5 (Termination as a Result of Planning Failure) shall apply.

#### **3.4 Implementation of the Revised Project Plan**

3.4.1 In the event that the Authority accepts the Revised Project Plan the Contractor shall, following receipt of written approval from the existing Senior Lenders (where the Revised Project Plan provides for the continued involvement of the existing Senior Lenders) implement the provisions of such Revised Project Plan in accordance with its terms.

3.4.2 Unless (a) the Revised Project Plan provides for the continued involvement of the existing Senior Lenders and is so approved by the existing Senior Lenders; or (b) the Authority has provided notice pursuant to paragraph 3.3A.1 that it does not require the continued participation of the Senior Lenders in the development and negotiation of the Revised Project Plan in which case paragraph 3.3A.1 shall apply, the Authority shall pay to the Contractor an amount equal to the aggregate of limbs (a) and (b) of the definition of Base Senior Debt Termination Amount less any amounts receivable by the Contractor under limb (iii) of that definition (for the avoidance of doubt, limbs (i), (ii) and (iv) of such definition shall be disregarded for the purposes of calculating this payment) within 70 Business Days of acceptance of the Revised Project Plan pursuant to paragraph 3.3.7.1:

3.4.2.1 where the Revised Project Plan is accepted by the Authority on or before the Planning Permission Longstop Date, limb (a) of

the definition shall be no higher than £14,593,833 for the period up to the Planning Permission Longstop Date; and

- 3.4.2.2 where the Revised Project Plan is accepted by the Authority after the Planning Permission Longstop Date, limb (a) of the definition shall be no higher than £14,593,833 for the period up to the Planning Permission Longstop Date,

and for the purposes of calculating the amount payable under limbs (a) and (b) and the amount receivable by the Contractor under limb (iii) of the definition of Base Senior Debt Termination Amount, the "Termination Date" shall be deemed to be the date falling ten (10) Business Days after the date of acceptance of the Revised Project Plan pursuant to paragraph 3.3.7. The Authority shall pay the amount calculated in accordance with this paragraph 3.4.2 together with interest at the Senior Debt Rate and any other costs incurred pursuant to the Senior Financing Agreements between the deemed Termination Date and the date of payment, with such payment to be made within seventy (70) Business Days of the Authority's acceptance of the Revised Project Plan.

### **3.5 Termination as a Result of Planning Failure**

#### **3.5.1 If:**

- 3.5.1.1 the provisions of this paragraph 3.5 (Termination as a Result of Planning Failure) apply pursuant to paragraph 3.2.4.1; or
- 3.5.1.2 the Authority rejects or is deemed to have rejected the Revised Project Plan pursuant to paragraph 3.3.7.2,

then the Contractor, or the Authority may serve written notice on the other Party specifying such Party's wish to terminate the Contract. In the event of such notice of termination served pursuant to this paragraph 3.5 (Termination as a Result of Planning Failure) the Contract Period shall terminate 30 Business Days from the date of such notice of termination and (provided that the Contractor has complied with its obligations under paragraph 2.2 (Meaning of All Reasonable Endeavours) to use All Reasonable Endeavours to obtain Satisfactory Planning Permission) the Authority shall pay the Contractor the Force Majeure Termination Sum in accordance with Part 5 of Schedule 17 (Compensation on Termination) subject to the provisions of paragraph 3.5A below.

- 3.5.2 If it is agreed or determined that there has been a failure by the Contractor to use All Reasonable Endeavours the provisions of Schedule 17

(Compensation of Termination) shall not apply and the Authority shall not be liable to the Contractor for any compensation on termination.

### **3.5A Costs Post Planning Longstop Date**

3.5A.1 Where the Authority has instructed the Contractor to prepare a Revised Project Plan in accordance with paragraphs 3.1.8.2 or 3.2.2 of this Schedule 26 (Planning) or paragraph 11.1.6 of Schedule 27 (Approach to Permit Risk), and a Force Majeure Termination occurs as a result of the operation of paragraph 3.5.1 of this Schedule 26 (Planning) after the Planning Permission Longstop Date then the caps set out in paragraph 1.7 of Part 5 of Schedule 17 (Compensation on Termination) shall apply for the period up to the Planning Permission Longstop Date only and the Force Majeure Termination Sum shall include any additional costs (including financing costs) incurred by the Contractor over and above such caps insofar as they relate to the preparation and/or implementation of the Revised Project Plan and the Contractor's ongoing costs of operation for the period from the Planning Permission Longstop Date to the Termination Date.

### **3.6 Delays and Extensions of Time**

3.6.1 Failure by the Contractor to commence the Works anticipated in the Construction Programme to take place from the Planned Works Commencement Date due to:

3.6.1.1 the Contractor having not obtained a Satisfactory Planning Permission for the Facility, having used All Reasonable Endeavours to do so; or

3.6.1.2 the Contractor having obtained a Satisfactory Planning Permission but later than the planned date for obtaining the Planning Permission as set out Schedule 8 (Key Dates),

shall be a "**Planning Delay**".

3.6.1A Where following a Planning Delay, the Contractor obtains a Satisfactory Planning Permission, the provisions of Annex 1 (Sharing of Planning Delay Costs) to this Schedule 26 shall apply to determine the manner in which the Parties shall share the additional costs and lost revenue arising from the Planning Delay (provided always that no relief or compensation shall apply in respect of the periods afforded to remedy failures as referred to at paragraph 2.1.9, including any delays arising out of failures to use All Reasonable Endeavours which were subsequently remedied):

3.6.2 The occurrence of a Planning Delay shall be a Relief Event and the provisions of Clause 40 (Relief Events) shall apply accordingly.

3.6.3 Compliance with this paragraph 3 shall be deemed to satisfy the provision of information requirements of Clauses 40.2 and 40.6 (Delays due to a Relief Event) where the Contractor is claiming relief pursuant to limb (j) of the definition of a Relief Event and the Contractor shall not additionally be required to comply with Clauses 40.2 and 40.6 (Delays due to a Relief Event) in respect of any such claim.

3.6.4 Notwithstanding paragraph 3.6.1 the Contractor shall continue to comply with its obligations to use All Reasonable Endeavours to obtain the relevant Satisfactory Planning Permission (unless those obligations shall cease to apply in accordance with paragraphs 3.3 (Revised Project Plan) or 3.5 (Termination of Contract as a Result of Planning Failure)) and if the Contractor shall have obtained a Planning Permission (which upon expiry of the Challenge Period would be a Satisfactory Planning Permission) (including where paragraph 3.6.1.2 applies) the Contractor shall promptly so notify the Authority and within ten (10) Business Days:

3.6.4.1 demonstrate to the Authority the delay (if any) in mobilisation and commencement of the construction of the Facility by reference to Schedule 8 (Key Dates); and

3.6.4.2 propose to the Authority:

(a) a revised Planned Works Commencement Date; and

(b) a revised Planned Services Commencement Date,

for the Facility (together "**Revised Project Dates**").

3.6.5 The Authority and the Contractor shall seek to agree the Revised Project Dates as soon as possible and in doing so shall:

3.6.5.1 agree the Revised Project Dates which are fair and reasonable in the circumstances having regard to the extent of the delay;

3.6.5.2 disregard any delay caused by a breach, neglect or default of the Contractor; and

3.6.5.3 take account of the extent to which the Contractor should be able, by acting in accordance with Good Industry Practice (and without being required to expend any sums), to mitigate the consequences of delay.



3.6.6 In default of delivery of the Revised Project Dates in accordance with paragraph 3.6.4 or default of agreement of the Revised Project Dates within ten (10) Business Days of delivery of such proposed Revised Project Dates, the Revised Project Dates shall be determined at the instance of either Party in accordance with Schedule 22 (Dispute Resolution).

3.6.7 Once agreed or determined the Construction Programme and Schedule 8 (Key Dates) shall be amended to reflect the Revised Project Dates.

### **3.7 Challenge Period and Judicial Review**

3.7.1 Where the Authority directs the Contractor to proceed to implement a Planning Permission without allowing the Challenge Period to elapse in respect of any relevant decision pursuant to paragraph 3.1 (Satisfactory Planning Permission) and a challenge is instituted within the Challenge Period the Authority shall indemnify and keep indemnified the Contractor for all costs, losses, expenses and liabilities reasonably and properly incurred up to the point at which the challenge is finally determined and the Contractor shall mitigate such costs, losses, expenses and liabilities provided that any indemnification of any costs, losses, expenses or liabilities shall be calculated on the basis that the Contractor should be in no better or no worse position than it would have been in had such costs, losses, expenses or liabilities not arisen.

3.7.2 In the event that a Judicial Review Challenge is instituted in respect of a Planning Permission during the Challenge Period then any Planning Permission which would otherwise be deemed to be a Satisfactory Planning Permission shall, if the Authority and the Contractor agree to the same taking into account any Judicial Review Challenge considered to be frivolous or vexatious by them, be deemed to be and to have always been an Unsatisfactory Planning Permission until such time as the Judicial Review Challenge is dismissed, withdrawn, quashed or defeated.

3.8 Nothing contained or implied in this Contract shall prejudice or affect the Authority's rights, powers, duties and obligations in the exercise of its functions as a Planning Authority.

### **3.9 Architectural Enhancements**

3.9.1 Without having obtained the prior written consent of the Authority and notwithstanding paragraph 3.9.5, the Contractor shall not offer to a Relevant Authority to vary the Basic Design Proposal or add to it in any material way or comply with or acquiesce to the imposition of any

Architectural Enhancement or matter which would render a Planning Permission or Environmental Permit an Unsatisfactory Planning Permission or Unsatisfactory Permit (as the case may be).

3.9.2 If the Contractor becomes aware that an Architectural Enhancement is likely to be imposed upon the Contractor which will cause the Contractor to incur (without double counting) costs over £100,000 ("**Architectural Enhancement Costs**") at any time before proceeding to submit or re-submit a Planning Application or implement conditions attached to the Planning Permission or obligations contained in a Planning Agreement then the following provisions of this paragraph 3.9 shall apply.

3.9.3 Without limiting in any way the application of the provisions of paragraph 3.9.4, as soon as reasonably practicable and in any event within ten (10) Business Days of becoming aware that the Architectural Enhancement is likely to be imposed compliance with which would cause the Contractor to incur Architectural Enhancement Costs the Contractor shall notify the Authority in writing giving all details then available of the nature of the Architectural Enhancement and as soon as reasonably practicable and in any event within twenty (20) Business Days of receipt by the Authority of the notice pursuant to this paragraph 3.9.3, the Contractor shall give to the Authority:

3.9.3.1 details of the divergence from the Basic Design Proposal;

3.9.3.2 a provisional (non-binding) estimate of the Architectural Enhancement Costs;

3.9.3.3 an indication of the steps which the Contractor proposes to take and has taken in respect of the Architectural Enhancement;

3.9.3.4 a provisional (non-binding) indication as to whether the Contractor is able to fund such Architectural Enhancement Costs itself such that reimbursements under paragraph 3.9 may be by way of adjustment to the Unitary Charge; and

3.9.3.5 the Service Delivery Plans to mitigate the impact of the Architectural Enhancement.

3.9.4 In the event that (whether or not previously identified by the Contractor pursuant to paragraph 3.9.3 above) an Architectural Enhancement is required or imposed by any Planning Permission (or associated Planning Agreement) after submission of the Planning Application then the Contractor shall:



- 3.9.4.1 within five (5) Business Days of the grant of the Planning Permission concerned (or if appropriate the notification of the Architectural Enhancement by other means) notify the Authority in writing of the nature of the Architectural Enhancement giving full details and as soon as reasonably practicable and in any event within fifteen (15) Business Days of the grant of the Planning Permission concerned (or if appropriate the notification of the Architectural Enhancement by other means) provide to the Authority the information referred to in paragraph 3.9.3 (whether by way of confirmation of previously provided information or otherwise);
- 3.9.4.2 within fifteen (15) Business Days of receipt of the information by the Authority pursuant to paragraph 3.9.4.1 above (or such other longer period as may be reasonable having regard to the nature and extent of the Architectural Enhancement proposed) give full details of the Architectural Enhancement Costs (including any costs of financing them) to be claimed by the Contractor;
- 3.9.4.3 demonstrate in accordance with Part 6 of Schedule 21 (Change Protocol) that:
- (a) the Architectural Enhancement is a divergence from the Basic Design Proposal for the Facility;
  - (b) the Basic Design Proposal was of a standard that a reasonably experienced Contractor would have provided for designing a similar facility for construction at the same Site and taking into account all relevant planning policies;
  - (c) the Architectural Enhancement will cause the Contractor to incur the Architectural Enhancement Costs claimed; and
  - (d) it has used reasonable endeavours to minimise the Architectural Enhancement Costs and any financing costs; and
  - (e) within five Business Days of a request in writing by the Authority, to provide to the Authority a detailed cost breakdown of the Architectural Enhancement Costs claimed and, where the Authority specifically identifies the need for such information as part of its request under this paragraph 3.9, the Contractor shall provide such

breakdown of costs as is reasonably practicable for each of the specified methods of payment set out in paragraph 3.9.

3.9.5 In the event that an Architectural Enhancement is required or imposed by any Planning Permission (or associated Planning Agreement) and the Architectural Enhancement Costs are demonstrated by the Contractor, the Authority shall, without unreasonable delay and in any event within fifteen (15) Business Days from receipt of the details provided pursuant to paragraph 3.9.4.3(d), select one of the following options by written notice to the Contractor:

3.9.5.1 accept the Architectural Enhancement in which event the Architectural Enhancement Costs shall be borne by the Authority in accordance with paragraph 3.9.6 (Reimbursement of Architectural Enhancement Costs); or

3.9.5.2 in accordance with paragraph 2.4 (Proceedings) require the Contractor to seek the opinion of Leading Counsel as to the merits of pursuing any Proceedings and the provisions of paragraph 2.5 shall apply provided that if Leading Counsel advises that there is no reasonable prospect of success in pursuing Proceedings to remove the Architectural Enhancement then the Authority shall as soon as reasonably practicable thereafter and in any event within fifteen (15) Business Days from receipt of Leading Counsel's opinion pursuant to paragraph 3.9.5.2, by notice in writing select one of the options set out in paragraph 3.9.5.1 or 3.9.5.3.

3.9.5.3 refuse the Architectural Enhancement in which event paragraph 3.2 (Failure to obtain Planning Permission) shall apply.

#### **Reimbursement of architectural enhancement costs**

3.9.6 In the event that the Authority has accepted the Architectural Enhancement Costs under paragraph 3.9.5.1 then the Authority shall reimburse the Contractor the Architectural Enhancement Costs demonstrated to its reasonable satisfaction to have been incurred through any one of the following means (the choice of such means to be in the Authority's absolute discretion):

3.9.6.1 by way of an adjustment to the Unitary Charge for all or part of the remainder of the Contract Period;

3.9.6.2 by way of lump sum payment made in one or more instalments;

3.9.6.3 an adjustment to the Expiry Date to allow the Contractor to recoup the Architectural Enhancement Costs through the Unitary Charge;  
or

3.9.6.4 a combination of one or more of the means set out in paragraphs 3.9.6.1 to 3.9.6.3 above,

such Architectural Enhancement Costs and any costs of financing them (in the event that the Authority does not reimburse them as and when they are incurred) being calculated as if such matter was an Authority Change under Clause 43 (Authority and Contractor Changes) and applied in accordance with the provisions of Schedule 19 (Revision of Base Case and Custody) provided that in the event that the aggregate Architectural Enhancement Costs in respect of a Facility shall exceed 10% of the Contractor's overall capital costs for the Project then the Authority shall pay such Architectural Enhancement Costs in accordance with paragraph 3.9.6.2 as and when such Architectural Enhancement Costs are incurred by the Contractor.

#### **Dispute resolution**

3.9.7 In the event that the Parties fail to agree any matters in relation to this paragraph 3.9 (Architectural Enhancements) the provisions of Schedule 22 (Dispute Resolution) shall apply.

## ANNEX 1

### Planning and/or Permit Delay Costs

#### 1. Planning Delay Bullet

- 1.1 As soon as practicable after, and in any event within thirty (30) Business Days of the commencement of the Challenge Period in respect of the last to occur of a Planning Permission being granted and an Environmental Permit being granted where, at the end of such Challenge Period, there will be a Planning Delay and / or Permit Delay (as defined in Schedule 27 (Approach to Permit Risk)), the Contractor shall produce a draft revised Base Case in accordance with the provisions of Schedule 19 (Revision of Base Case and Custody) (the **Revised Draft Base Case**).

#### 1.2 Revised Draft Base Case

(a) The Revised Draft Base Case shall:

- (i) incorporate all of the increased costs arising from the Planning Delay and/or Permit Delay (as applicable) set out in paragraphs 1.4 (a) to (f) of this Annex 1; and
- (ii) calculate the sum required to be paid to the Contractor to ensure the Contractor is in no better and no worse position (as defined in paragraph 5.3 of Schedule 19 (Revision of Base Case and Custody)) than it would have been had the Planning Delay and/or Permit Delay (as applicable) not occurred (the **Planning Delay Bullet**) provided that such calculation shall not take into account any costs and losses incurred or to be incurred by the Contractor which are not recoverable under paragraph 1.4 below and the Parties agree that any impact such costs and losses would have on the Base Case if they were taken into account shall be disregarded.

- 1.3 Without prejudice to the Authority's options under paragraph 1.5 of this Annex 1, the Revised Draft Base Case produced by the Contractor pursuant to paragraph 1.1 shall also, as a separate scenario, show the amount by which the Base Prices per Tonne set out in Appendix 1 to Schedule 4 (Payment Mechanism) would need to increase in order to reimburse the Planning Delay Bullet to the Contractor without the Authority having to make any lump sum payment.

- 1.4 In respect of each of the categories of cost set out in this paragraph 1.4, the Contractor shall only include the costs set out in those paragraphs arising from the Planning Delay and/or Permit Delay (as applicable) in its production of the Revised Draft Base Case and there shall be no double counting of any costs or categories of cost under this paragraph 1.4:

- (a) An adjustment to the Price (as defined in the Construction Sub-Contract) in accordance with the following indexation mechanism:
  - (i) 1.73% of capex in accordance with the Inconell index;
  - (ii) 3.47% of capex in accordance with the CRUspi Europe index;
  - (iii) 10.40% of capex in accordance with the ILON2 - Salary index for private sector in Denmark;
  - (iv) 19.07% of capex in accordance with the PRIS10 - Price index for domestic trade of goods in Denmark;
  - (v) 29.22% of capex in accordance with the BEAMA;
  - (vi) 23.88% of capex in accordance with BCIS Tender Price Index;
  - (vii) 1.28% of capex in accordance with Spanish RPI; and
  - (viii) 10.96% of capex in accordance with UK RPI;
- (b) costs arising from any General Change in Law between the Planned Services Commencement Date (as originally defined at the Commencement Date) and the current Planned Services Commencement Date (as determined pursuant to paragraph 3.1.5 of this Schedule 26) which requires Capital Expenditure;
- (c) Costs associated with terminating, extending or entering into construction forward exchange contracts and Construction Sub-Contract bonding costs;
- (d) Financing Costs and Agency Fees (each as defined in the Common Terms Agreement);
- (e) Insurance costs associated with the Planning Delay and/or Permit Delay (as applicable); and
- (f) the costs, to be incurred by the Contractor, of (i) the continued employment of staff; (ii) employing additional staff; (iii) reasonable professional fees to administer the Contract; (iv) any indexation of operating costs in accordance with the terms of the Operating Sub-Contract and the Management Services Agreements (as defined in the Common Terms Agreement); (v) any indexation at RPIx in respect of limbs (d), (e) and (g) of the definition of Operating Costs (as defined in the Common Terms Agreement); and (vi) any indexation at RPIx of the Life-Cycle Payment Profile (as defined in the Operating Sub-Contract), in each case required due to the extension of the Expiry Date.

## **1.5 Mitigation**

The Contractor shall take all reasonable steps (without being required to expend material additional external costs (excluding any costs arising under the Management Services Agreement)), acting in accordance with Good Industry Practice, to mitigate the consequences of Planning Delay and/or Permit Delay (as applicable) and providing all information reasonably required by the Authority to substantiate the sums claimed.

1.6 Subject to paragraph 2.1 (Funding Shortfall), within twenty (20) Business Days of receipt of the Revised Draft Base Case under paragraph 1.1 the Authority shall notify the Contractor in writing whether it intends to:

- (a) pay the Planning Delay Bullet in full to the Contractor on the Service Commencement Date (Option 1); or
- (b) not make any lump sum payment to the Contractor but instead pay the increased Base Prices per Tonne described in paragraph 1.3 above (Option 2); or
- (c) pay part of the Planning Delay Bullet on the Service Commencement Date together with increased Base Prices per Tonne (Option 3).

1.7 If the Authority fails to notify the Contractor pursuant to paragraph 1.5 then Option 2 shall apply.

1.8 Following receipt of the Authority's notification under paragraph 1.5 (or if the Authority fails to notify the Contractor and paragraph 1.6 applies) the Contractor shall finalise the revision to the Base Case to reflect whether Option 1, Option 2 or Option 3 is to apply and provide it to the Authority for approval in accordance with the provisions of Schedule 19 (Revisions of Base Case and Custody) within ten (10) Business Days.

1.9 If Option 2 or Option 3 applies, Appendix 1 (Base Price per Tonne) to Schedule 4 (Payment Mechanism) shall also be amended to reflect the increased Base Price per Tonne payable by the Authority.

## **2. Funding Shortfall**

2.1 Where the Contractor notifies the Authority that projected costs under paragraph 1.4 of this Annex 1 will exceed the Planning Delay Headroom Amounts (as defined in the Common Terms Agreement) (a **Planning Delay Shortfall**) this shall be deemed to be an Authority Change which cannot be withdrawn and the provisions of Schedule 21 (Change Protocol) shall apply to determine how such Planning Delay Shortfall is to be funded.

## **3. Equity Facilities Extension**



- 3.1 Where the Contractor and the Authority, acting reasonably, agree that there is likely to be a Planning Delay pursuant to paragraph 3.6 of Schedule 26 (Planning) and / or a Permit Delay pursuant to paragraph 13.1.1 of Schedule 27 (Approach to Permit Risk), the Authority may require the Contractor to request the consent of the Senior Lenders to amend the Equity Facilities Final Repayment Date (as defined in the Common Terms Agreement) such that the respective terms of the Equity Facilities (as defined in the Common Terms Agreement) are extended to cover the period of the Planning Delay and / or Permit Delay (and, as a consequence, the making by the Shareholders (as defined in the Common Terms Agreement) of the Shareholder Contribution (as defined in the Common Terms Agreement) will be delayed until the Planned Services Commencement Date).
- 3.2 Where the Authority makes a request pursuant to paragraph 3.1, the Contractor shall also, without having to incur material expenditure, prepare a written report addressed to the Authority on the financial impact (both actual and contingent) to (i) the Contractor and (ii) the Authority of any additional Financing Costs (as defined in the Common Terms Agreement) (and costs of carrying out the amendment) which may be applicable in the event that the Contractor, Authority and Senior Lenders agree to amend the Equity Facilities Final Repayment Date.
- 3.3 If the Contractor is unable to agree an amendment to the Equity Facilities Final Repayment Date, the Contractor and the Authority will discuss alternative measures to mitigate the impact of the Planning Delay and / or Permit Delay in good faith with a view (subject always to the consent of the Senior Lenders) to the implementation of such measures provided always that any such implementation shall leave the Contractor in a no better and no worse position (as defined in paragraph 5.3 of Schedule 19 (Revision of Base Case and Custody)).
- 3.2 Where an extension to the Equity Facilities Final Repayment Date or any alternative measures are agreed, the Revised Draft Base Case produced in accordance with paragraph 1.2 of this Annex 1 shall incorporate the cost and timing consequences of such extension.





