

ABERDEEN CITY COUNCIL

COMMITTEE	Council
DATE	16 December 2015
DIRECTOR	Pete Leonard
TITLE OF REPORT	Inter-Authority Agreement on Energy from Waste
REPORT NUMBER	CHI/15/337
CHECKLIST COMPLETED	Yes

1. PURPOSE OF REPORT

The purpose to this report is to update members on the progress of the Joint Authority Energy from Waste Project with Aberdeenshire and the Moray Councils and to seek approval to enter into a first stage Inter-Authority Agreement relating to initial project and procurement development work.

2. RECOMMENDATIONS

It is recommended that Council:

1. approves the terms of the Stage 1 Inter Authority Agreement (IAA) included at Appendix A and authorises the Head of Legal and Democratic Services to enter into this agreement on behalf of the Council.
2. appoints the Corporate Director for Communities, Housing and Infrastructure or substitute as the Council's representative on the Project Board and the Waste and Recycling Manager as the Council's representative on the Project Team and delegate to them the necessary powers required to agree or approve decisions which are designated as Project Board and Project Team decisions on Part 1 of the IAA schedule.
3. appoints up to 3 council members to sit on the Energy from Waste Elected Members Engagement Group.
4. notes that the anticipated expenditure of approx. £180K to fund the Council's contribution to Stage 1 of the IAA will be met from Capital Plan Project 810C.

3. FINANCIAL IMPLICATIONS

The Financial Implications of the need to find an alternative to landfilling our residual waste post-2020 have been considered in an Energy from Waste Business in 2013. The Business Case has been reviewed this year and presented to Zero Waste Management Sub-committee on 1 December 2015. The review concluded that a Joint Energy from Waste (EfW) facility built in Aberdeen represents the best value solution for the long term management of

residual waste; the Sub-committee agreed with this conclusion. The estimated financial commitment arising from this report will be met from existing approved budgets (Capital Project HE 810C – Energy from Waste Land Purchase and Procurement). More detail on the financial implications of the proposed joint project is presented below.

4. OTHER IMPLICATIONS

Legal. Specialist legal support will be provided by DWF LLP to ensure the Joint EfW Project is undertaken in accordance with best practice and minimizes risk to the Councils.

Resource. Management of the development of a Joint EfW solution will initially be undertaken by internal staff as part of their substantive duties, specialist support will be provided (from within allocated budgets) for legal, financial and technical matters. More detail of this is included in the governance section below.

Personnel. As above.

Sustainability and environmental. The Joint EfW Project is part of the wider Zero Waste Project and will deliver substantial advances in sustainability and environmental performance. The EfW element will reduce the Council's carbon impact by diverting waste from landfill and producing low carbon energy that displaces fossil fuels.

5. BACKGROUND/MAIN ISSUES

5.1 The Waste (Scotland) Regulations 2012 place a ban on organic waste going to landfill post 2020 and as such the Council will need to find an alternative waste treatment facility for its waste after this date.

5.2 Following an instruction from the Zero Waste Management Sub-committee in 2013, Aberdeen City Council officers approached public authorities in the north of Scotland to determine if joint working would be possible. Both Aberdeenshire and the Moray Councils indicated willingness to consider this option. Each council has jointly and separately concluded that of the practical solutions available, the local and regional interests will best be served by collaboration on a joint EfW facility, to be built in Aberdeen.

5.3 Updates to the Zero Waste Management Sub-Committee throughout 2015 have reported the progress officers have made on a potential joint venture with Aberdeenshire and the Moray Councils to provide a long term waste treatment solution located in Aberdeen City. Initial agreement was reached for Aberdeen City Council to incur all preliminary costs in progressing the project until such time as an Inter Authority Agreement is signed, at which point these costs and future costs will be shared across the three partner authorities at a rate to be determined as set out in the agreement.

5.4 In order to take the project forward, the basis for how the Councils intend to collaborate, and a definition of what the project will deliver is essential, and will be set out in a formal, binding inter-authority agreement.

6. PROGRESS TO DATE

6.1 There have been numerous joint meetings between the 3 authorities over the last 6 months involving on technical, legal and financial aspects of the project.

6.2 Planning and Legal advisors have been appointed by Aberdeen City Council to progress the planning application and provide legal advice to support the governance arrangements and IAA. Work is progressing on appointing technical and financial advisors.

7. PROJECT OUTLINE

7.1 Appendix 1 provides an outline of the project timetable and key milestones for each of the 4 stages. The purpose of splitting the project into stages provides clear cut-off points and will potentially require different governance arrangements which will be covered by a separate IAA. It is recognised that stages 3 and 4 could be covered by one IAA. In general the 4 stages are described below:

Stage 1 covers the preparatory work that has been done on the joint project to date (costs met by Aberdeen City Council pending formal agreement on cost sharing); the work that remains to be done to develop the Stage 2 IAA, and preparations to start the procurement process (OJEU notice). This work is expected to conclude by mid-2016.

Stage 2 will start following stage 2 IAA approval. This stage includes issuing the OJEU notice (advance notice to prospective suppliers) establishment of the project delivery team and the procurement process itself, up to the receipt of tenders and tender evaluation. It is expected to last approximately 3 years

Stage 3 will follow tender evaluation and award of contract, to deliver the proposed EfW facility. This stage will cover contract management and supervision during construction and commissioning, up to hand-over of the operational facility. This stage will last approximately 2 years

Stage 4 is the operational stage, and is expected to last for a minimum of 25 years.

8. PROJECT GOVERNANCE

8.1 The project is highly technical and specialised in nature and is further complicated by ensuring that each of the 3 partner authorities interests are taken into account but also balancing the need to have effective and timeous decision making and appropriate levels of accountability on what is a large capital project requiring significant investment from the partnering councils. A governance structure that addresses these complexities is shown in Appendix 2.

8.2 It is considered that the project needs to have a part-time project director to oversee the project and who will be accountable to the Project Board. This will be appointed during Stage 1.

8.3 Key decisions have to be referred to partner Council committees however to ensure that decisions on both the day to day management of the project and those necessary to frame agreements for council approval at each

stage of the project are dealt with timeously these decisions are referred to the appropriate level as identified in Part 1 of the IAA schedule.

9. STAGE 1 - IAA

9.1 A copy of the IAA is in Appendix 3 to this report and the key elements can be summarised as follows:

- The agreement will cover the pre-procurement period of the project. This will be from the date of signing the IAA up to either the publication of the OJEU notice or the project's termination/abandonment – whichever is earlier.
- The 3 Councils are committed to work in partnership towards the aim of delivering an Energy from Waste Plant in Aberdeen City.
- Each Council will delegate authority to its authorised representative on the Project Board (the Corporate Director for Communities, Housing and Infrastructure and his substitute) to agree or approve decisions which are designated as Project Board decisions on part 1 of the IAA schedule.
- The Project Budget is the budget to be approved by each of the Councils for the period from the signing on this first IAA until the publication of the OJEU contract notice for the project. Any requirement for a budget in excess of this will be referred back to the Councils for approval.
- Any Council can withdraw from the project at any time up to the signing of the Stage 2 IAA without additional penalty subject to paying their proportion of the full project budget costs committed to in clause 8 of the IAA.
- The Councils can unanimously decide to abandon the project at any time prior to signing the Stage 2 IAA.
- The agreement contains a long-stop date of the 1st November 2016 and stipulates that if the Stage 2 IAA hasn't been signed by each council by this date then instructions will be sought from each council as to whether or not they wish to abandon the project.
- To provide a consultation mechanism for project decisions an elected member engagement group from the 3 authorities is to be set up which will meet quarterly. (details are contained in clause 7 of the IAA)

10. FINANCIAL MODEL

10.1 The estimated cost of Stage 1 is £468K. These costs for the first stage are primarily to fund the development of the planning application, cost of external advisors and the project director to enable development of the next stage of the IAA and procurement process.

10.2 It has been agreed in principle by Heads of Finance that for this stage, these costs should be split according to the tonnage of waste each authority

would send to the proposed plant, and that the latest audited tonnage figures (for 2014/15) should be used to determine cost shares.

10.3 On this basis, the shares / splits proposed for stage 1 are as follows:

Aberdeenshire	46.5%	up to £ 217K
Aberdeen City	38.4%	up to £ 180K
The Moray Council	15.1%	up to £ 70K

10.4 The Aberdeen City Council share will be met from Capital Project 810C – Energy from Waste Land Purchase and Procurement.

11. FUTURE COSTS

11.1 The estimated cost of Stage 2 is £2.5 million in total. Using the same proportionate split the indicative costs at this stage are as follows:

Table 1. Estimated Procurement Costs

		2016/17	2017/18	2018/19	Total
	Share	£,000	£,000	£,000	£,000
Aberdeenshire	46.5%	382	446	321	1,149
Aberdeen City	38.4%	316	369	266	951
Moray	15.1%	124	145	104	373

11.2 The cost estimate will be refined and the most recent audited tonnage used to determine the actual cost to each authority.

11.3 Stage 3 project support costs are estimated to total £1.2 million. It is assumed that these will be rolled up into the costs of construction.

11.4 At this stage, high level indicative costs of construction (including Stage 3 costs) are estimated at around £180 million. More accurate costs will be determined during Stage 2 by market testing. Projected residual waste tonnages are Aberdeenshire 47.9%, Aberdeen City 37.9%, Moray 14.2%. On that basis Aberdeen City's share of construction costs would be approx. £68 million. Exactly how the project is financed will be dependent on how the project is delivered – an arm's length organisation, lead authority or shared ownership are options under consideration. The net revenue impact should be the same whatever the project delivery vehicle.

12. IMPACT

Improving Customer Experience – The proposed energy from waste facility has the ability to provide heat and power into houses and businesses in Aberdeen, especially benefiting households in fuel poverty where stable low cost heat supply will reduce proportion of income spent on heat and reduce anxiety around fluctuating energy costs.

Improving Staff Experience – no direct impact on staff as existing and proposed services will be provided by third parties.

Improving our use of Resources – an Energy from Waste business case demonstrates that this proposal is the long term best value option for the city. In addition, managing income from electricity and heat from the plant enables

the Council to be protected from projected long term increases in energy costs.

Corporate – the proposals are in line with the Council’s Waste Strategy.

Public – as indicated above, heat and power provision will benefit the public. The development will also result in the regeneration of a currently derelict brownfield site in an industrial area in the city. Concerns expressed over traffic impact will be quantified and mitigated through a traffic impact assessment. Likewise other concerns including health and environmental impact can be addressed.

12. MANAGEMENT OF RISK

Risk 1	Category (hazard, control or opportunity)	Cause (What could trigger a risk event?)	Impact (What would be the consequences if a risk event occurred?)
Councils cannot agree on second stage IAA and procurement does not process	Hazard	Inability for Councils to agree terms	Delay in delivery of EfW, higher costs of alternative delivery model (e.g. smaller EfW)
Controls (What do we already have in place which could reduce the likelihood and or consequences of a risk event?)	Risk Class (see guidance)	Further planned mitigating actions (What else could we implement in order to reduce the likelihood or consequences of a risk event?)	
Extensive work by officers to date to ensure alignment of policies and strategic direction. Financial cases for each authority demonstrates best value option.		Development of agreed delivery model and procurement strategy as early as possible, formation of Project Board to ensure senior officer engagement, formation of Joint Member stakeholder group will ensure all parties continued to be informed and aligned.	

13. BACKGROUND PAPERS

- Appendix 1. High Level Project Plan
- Appendix 2. Governance Arrangements Stage 1
- Appendix 3. Stage 1 Inter-Authority Agreement

14. REPORT AUTHOR DETAILS

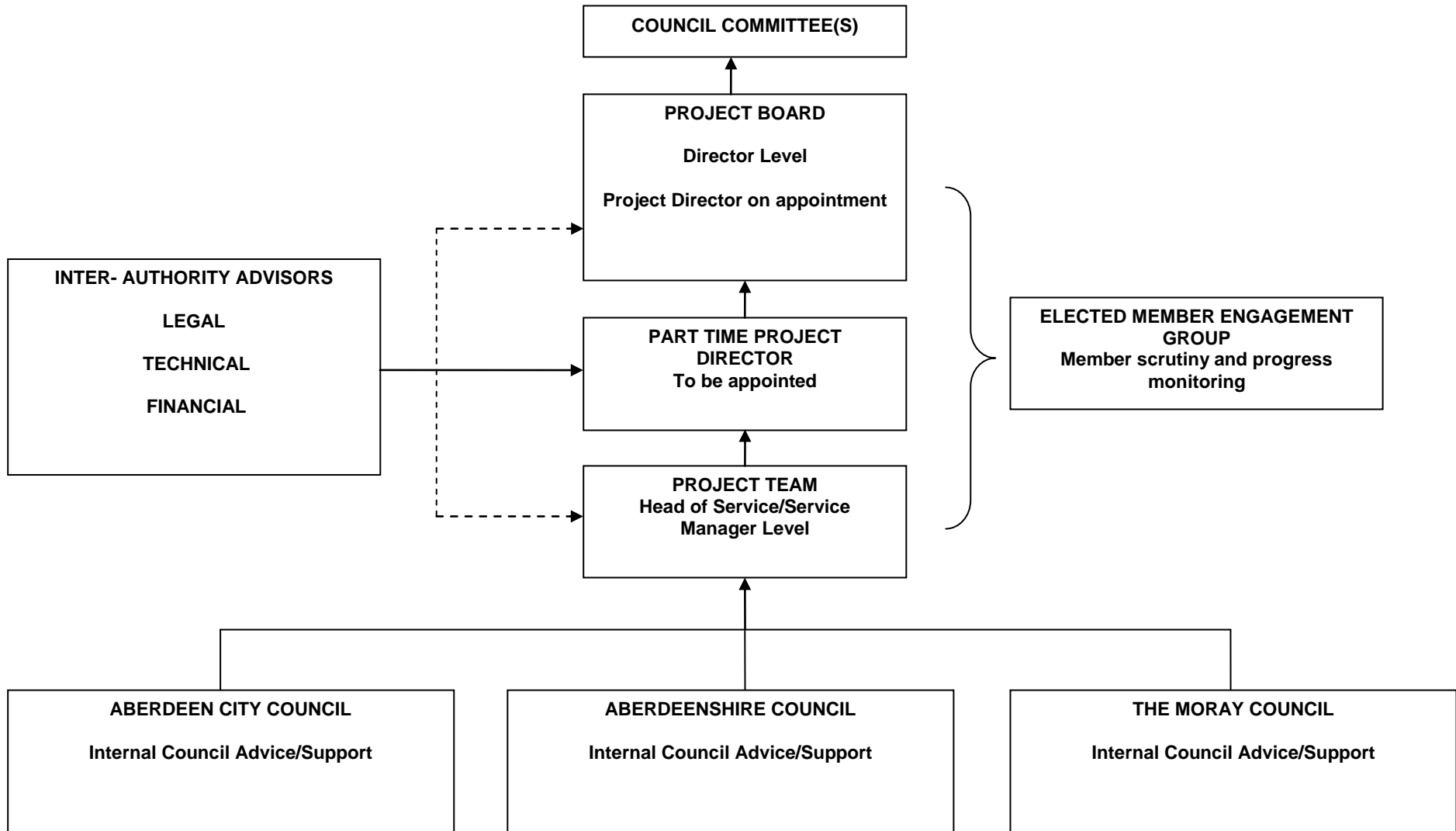
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APPENDIX 1

THE ABERDEEN CITY COUNCIL, ABERDEENSHIRE COUNCIL AND MORAY COUNCIL JOINT ENERGY FROM WASTE PROJECT – HIGH LEVEL PROJECT PLAN							
STAGE 1 DEVELOPMENT		STAGE 2 PROCUREMENT		STAGE 3 CONSTRUCTION		STAGE 4 OPERATIONAL	
Key Actions	Completion Date	Key Actions	Completion Date	Key Actions	Completion Date	Key Actions	Completion Date
Appoint legal advisors	Aug 2015	Issue OJEU Notice and PQQ	Jul 2016	Planning application lodged	Jan 2019	Commence Operations	Feb 2022 - 2047
Councils approve Stage 1 IAA and Stage 1 costs	Dec 2015	Tender process	Jul 2016 – Jan 2018	Planning Application Determination	Jul 2019		
Establish Project board and project team	Dec 2015	Tender return	Feb 2018				
Appoint Technical and Financial Advisors	Feb 2015	Councils approve preferred bidder	Jun 2018	Construction and Commissioning	Jan 2022		
Council approves Stage 2 IAA and Stage 2 Costs	May 2016	Council approves Stage 3 IAA and Financial close	Dec 2018				

APPENDIX 2

GOVERNANCE ARRANGEMENTS - STAGE 1



Appendix 3 Inter-Authority Agreement

[Date]

(1) **ABERDEEN CITY COUNCIL**

(2) **ABERDEENSHIRE COUNCIL**

AND

(3) **THE MORAY COUNCIL**

**PRE-PROCUREMENT INTER-AUTHORITY AGREEMENT FOR THE PROCUREMENT OF AN
EFW FACILITY**

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BETWEEN:

- (1) **ABERDEEN CITY COUNCIL**, a local authority constituted under the Local Government etc (Scotland) Act 1994 and having its head office at Marischal College, Broad Street, Aberdeen, AB10 1AB ("**Aberdeen City**") which expression shall include their successors, permitted assignees and transferees;
- (2) **ABERDEENSHIRE COUNCIL**, a local authority constituted under the Local Government etc (Scotland) Act 1994 and having its head office at Woodhill House, Westburn Road, Aberdeen, AB16 5GB ("**Aberdeenshire**") which expression shall include their successors, permitted assignees and transferees; and
- (3) **THE MORAY COUNCIL**, a local authority constituted under the Local Government etc (Scotland) Act 1994 and having its head office at The Moray Council Office, High Street, Elgin, Moray, IV30 1BX ("**Moray**") which expression shall include their successors, permitted assignees and transferees.

(each a "**Council**" and together the "**Councils**").

WHEREAS:

- (A) The Councils wish to work in partnership to procure the appointment of a contractor to design, build and operate an Energy from Waste facility at the Site (as hereinafter defined) (the "**Project**") to assist the Councils in meeting their respective statutory obligations and targets arising out of the Waste (Scotland) Regulations 2012 and associated legislation and guidance;
- (B) Pursuant to this partnership, the Councils wish to formally create a joint working arrangement under section 56 of the Local Government (Scotland) Act 1973 for the pre-procurement stage of the Project and record the particulars (including, but without limitation to, the establishment of a board as the joint decision making body in relation to the procurement of the Project) of said working arrangements in this Inter-Authority Agreement (the "Pre-Procurement Inter-Authority Agreement").

THE PARTIES AGREE as follows:

DEFINITIONS AND INTERPRETATION

In this Agreement, the following expressions shall have the following meanings:-

- "Agreement" means this Agreement including the schedule;
- "Appointed Representative" shall have the meaning given to it in Clause 0;
- "Business Day" means a day (other than a Saturday or a Sunday) on which banks are open for domestic business in Aberdeen;
- "Code" shall have the meaning given to it in Clause 0;
- "Confidential" means information concerning any Council or the Project that ought to

Information”	be considered as confidential (however it is conveyed or on whatever media it is stored) which is not publically known and which is used in or otherwise relates to the Project or any Council’s business, affairs, finances, costs, developments, arrangements, governance, know-how, personnel and in each case regardless of whether such information is marked as “confidential”. Such information shall include (but without limitation to) all Intellectual Property Rights, information whose disclosure would or would be likely to, prejudice the commercial interests of any Council or the Project, and all personal data within the meaning of the Data Protection Act 1998;
“Contract”	means the contract to be entered into with the Contractor for the delivery of the Project;
“Contract Execution Date”	means the date upon which the Contract is executed by all parties thereto;
“Contractor”	means the entity selected by the Councils following the completion of the procurement process to deliver the Project;
“Council Decision”	means any matter which has been referred for determination (or is required to be determined including the matters listed in PART 1 of the Schedule) by the Councils in accordance with this Agreement;
“Councils’ Programme”	means the programme set out in PART 3 of the Schedule;
“Day-to-Day Decisions	means any day to day decisions which are not reserved to the Project Board or the Councils;
“Disclosing Council”	shall have the meaning given to it in Clause 0;
“Effective Date”	means the last date of execution of this Agreement;
“EFW Facility Elected Member Engagement Group”	has the meaning given to it in Clause 0;
“EFW Facility”	means the energy from waste facility and all supporting infrastructure (including plant and amenities) to be designed, constructed, tested and commissioned pursuant to the Contract;
“Environmental Information Regulations”	means the Environmental Information (Scotland) Regulations 2004 together with any guidance and/or codes of practice issued by the Scottish Information Commissioner or Scottish Ministers in relation to such regulations;

“External Advisers”	has the meaning given to it in Clause 0;
“Fees Regulations”	means the Freedom of Information (Fees for Required Disclosure) (Scotland) Regulations 2004;
“FOISA”	means the Freedom of Information (Scotland) Act 2002 and any subordinate legislation (as defined in Section 73 of the Freedom of Information (Scotland) Act 2002) made under the Freedom of Information (Scotland) Act 2002 from time to time together with any guidance and/or codes of practice issued by the Scottish Information Commissioner or relevant Scottish Ministers in relation to such Act;
“Information”	has the meaning given to it in Section 73 of the Freedom of Information (Scotland) Act 2002;
“Initiating Council”	has the meaning given to it in Clause 0;
“Intellectual Property Rights”	means any and all patents, rights to inventions, trade marks, business names and domain names, copyright and related rights, rights in design, rights in computer software, rights in databases, rights to use, and protect the confidentiality of, confidential information (including know-how) and all other intellectual property rights, in each case whether registered or unregistered and including all applications and rights to apply for and be granted, renewals or extensions of, and rights to claim priority from, such rights and all similar or equivalent rights or forms of protection which subsist or will subsist now or in the future in any part of the world;
“Inter-Authority Finance Lead”	has the meaning given to it in Clause 0;
“Inter-Authority Legal Lead”	has the meaning given to it in Clause 0;
“Inter-Authority Technical Lead”	has the meaning given to it in Clause 0;
“Lead Authority”	means the Council nominated by the other Councils to act as the lead authority for the Project (if applicable);
“Materials”	means all data, text, graphics, images and other materials and/or documents created, used or supplied by a Council to the other Council(s) in connection with the Project or this Agreement;
“Month”	means a calendar month;
“Nominated Group”	has the meaning given in Clause 0;

Representative

“OJEU Notice” means the notice placed in the Official Journal of the European Union advertising the procurement of the Project;

“OJEU Publication Date” means the date on which the OJEU Notice is published in the Official Journal of the European Union;

“Operational Inter-Authority Agreement” shall have the meaning given to it in Clause 0 of this Agreement;

“Pre-procurement Longstop Date” means **1 November 2016** or such other date as may be agreed by the Councils in writing;

“Procurement Inter-Authority Agreement” shall have the meaning given to it in Clause 0 of this Agreement;

“Project Budget” means the budget agreed by the Councils, for the period from the Effective Date until the OJEU Publication Date, which shall apply to the (one) development of the procurement strategy for the Project, (two) preparation of all project documentation and (three) all other steps required to prepare the Project for the advertisement in the Official Journal of the European Union as set out in **PART 2** of the Schedule to this Agreement (as may be amended in accordance with this Agreement from time to time);

“Project Board” means the board constituted and established by the Councils for the purpose of procuring the Project in accordance with this Agreement;

“Project Board Decision” means any matter which has been referred for determination (or is required to be determined by the Project Board including the matters listed in **PART 1** of the Schedule) in accordance with this Agreement;

“Project Costs” means the aggregate of the costs and expenses properly and reasonably incurred by each of the Councils in respect of the Project including without prejudice to the generality: (one) costs incurred by each of the Councils in connection with the Project prior to the Effective Date which are set out in **PART 2** of the Schedule; (two) payment for services carried out by the Project Director and the external advisors and (three) the costs of preparing the suite of project documentation prior to the publication of the OJEU Notice;

“Project Director” means such person as may appointed by the Project Board in accordance with Clause 0 (Governance) from time to time and who is responsible for the management of the procurement of the Project and leading the Project Team;

“Project” means such person as may appointed by the Project Board to assist

“Manager”		the Project Director in the procurement of the Project;
“Project Milestones”		means the actions identified and agreed by the Councils as key Project Milestones as set out in PART 1 of the Schedule (as may be amended by the Councils from time to time in accordance with this Agreement);
“Project”		has the meaning given to it in Recital (A);
“Project Officer”		means the person engaged from time to time to provide administrative support to the Project Team;
“Project Team”		means the team constituted and established by the Councils for the purpose of procuring and managing the Project, comprising the Project Director, Project Manager, Project Officer, Inter-Authority Legal Lead, Inter Authority Technical Lead and Inter-Authority Finance Lead;
“Project Team Decision”		means any matter (including the matters set out in PART 1 of the Schedule) which has been delegated by unanimous decision of the Project Board to the Project Team for their determination on behalf of the Councils;
“Proposed OJEU Date”		means the date upon which, according to the Councils’ Programme, the Councils intend to issue the OJEU Notice;
“Quarter”		means with effect from the Effective Date, the expiry of every three month period during each Year in which this Agreement remains in force pursuant to Clause 0;
“Receiving Council”		shall have the meaning given to it in Clause 1.13;
“Requesting Council”		shall have the meaning given to it in Clause 0;
“Request Information”	for	has the meaning set out in the FOISA or the Environmental Information Regulations as relevant (where the meaning set out for the term 'request' shall apply);
“Respondent Councils”		shall have the meaning given to it in Clause 1.13;
“Site”		means the area edged [red] on the Site Plan;
“Site Plan”		means the plan annexed and executed as relative hereto; and
“Year”		means a period of 12 consecutive months commencing on the Effective Date.

1.2 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 Part, recital or Annex is, except where expressly stated to the contrary, a reference to such Clause, sub-Clause, paragraph, Schedule Part, recital or Annex of and to this Agreement;
- 1.2.4 save where otherwise provided in this Agreement, any reference to this Agreement or to any other document shall include any permitted variation, amendment or supplement to this Agreement and/or such other 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 (including any EU instrument) as amended, replaced, consolidated or re-enacted;
- 1.2.6 references to any documents being 'in the agreed form' means such documents have been initialled by or on behalf of each of the Councils for the purposes of identification;
- 1.2.7 a reference to a person includes firms, partnerships and corporations and their successors and permitted assignees or transferees;
- 1.2.8 headings are for convenience of reference only;
- 1.2.9 words preceding "include", "includes", "including" and "included" shall be construed without limitation by the words which follow those words;
- 1.2.10 a reference to a time of day is a reference to the time in Scotland;
- 1.2.11 any obligation on a Council to do any act matter or thing includes, unless expressly stated otherwise, an obligation to procure that it is done; and
- 1.2.12 subject to any express provisions to the contrary, the obligations of any Council are to be performed at that Council's own cost and expense.

1.3 Schedules

The Schedule (including all of its parts thereto) to this Agreement forms part of this Agreement.

DURATION

This Agreement and the rights of obligations of the Councils set out in this Agreement shall commence on the Effective Date and, subject to Clause 0 (Consequences of Termination), shall remain in force until the date this Agreement is terminated in accordance with Clause 0 (Termination) of this Agreement.

INTER-AUTHORITY AGREEMENTS

Without prejudice to Clause 0 (Consequences of Termination), the Councils acknowledge and agree that this Agreement governs the joint working arrangements between the Councils during the period from the Effective Date until the day immediately prior to the OJEU Publication Date and that:

this Agreement shall cease to have effect from the OJEU Publication Date;

this Agreement shall be replaced by a second inter-authority agreement, executed on or prior to the OJEU Publication Date by the Councils, which agreement shall govern the joint working arrangements of the Councils during the period from the OJEU Publication Date until the day immediately prior to the Contract Execution Date (the “Procurement Inter-Authority Agreement”); and

On the Contract Execution Date, the Procurement Inter-Authority Agreement shall cease to have effect and shall be replaced by a third inter-authority agreement which shall govern the joint working arrangements between the Councils during the design, build and operation of the EfW Facility procured pursuant to the OJEU Notice (the “Operational Inter-Authority Agreement”).

KEY PRINCIPLES

Save as expressly provided in this Agreement or where otherwise agreed in writing, the Councils agree that they shall each adhere to the following principles for so long as this Agreement subsists:-

each Council shall work together with the other Councils in good faith and each will act reasonably in all matters pertaining to the Project and this Agreement;

each Council shall co-operate fully with the other Councils at all times and shall, except where there is just cause, not act in a manner which would prevent, or cause unnecessary delay to, the Councils’ achievement of the Project Milestones in accordance with the Councils’ Programme and this Agreement;

each Council shall be transparent in its dealings with each other Council and shall, without prejudice to Clause 0 (Confidentiality and Freedom of Information) endeavour to respect matters of confidentiality and political sensitivities of the other Councils;

each Council shall not act in a manner which would cause the other Councils to incur unnecessary expense in relation to the procurement of the Project;

each Council ensure that individuals with relevant expertise are appointed as members (including any replacements thereto) to the Project Team;

each Council shall not make any representations, give any warranties or incur any liabilities on behalf of another Council;

subject always to the right to withdraw in accordance with Clause 10, the Councils agree that they shall each:

use all reasonable endeavours to agree the terms of the Procurement Inter-Authority Agreement (and, thereafter, the Operational Inter-Authority Agreement) by no later than the date set out in the Project Programme;

take all steps to agree the Project Milestones on or before their relevant deadlines specified in **PART 1** to enable the Procurement Inter-Authority Agreement to be drafted and agreed in a timeous manner; and

use all reasonable endeavours to procure that the Procurement Inter-Authority Agreement is executed by duly authorised signatories by no later than the Proposed OJEU Date;

each Council shall use its reasonable endeavours to act in the best interests of the Project at all times; and

each Council shall not seek to be recompensed by the other Councils for expenditure and Project Costs (properly and reasonably incurred) which is outwith the Project Budget without having first obtained approval from the Project Board or the other Councils (where the approval of the other Councils is required) prior to the incurrence of said expenditure.

Without prejudice to Clause 0 above, the Councils acknowledge and agree that each Council shall work in partnership with every other Council to this Agreement to achieve the Project Milestones in accordance with this Agreement.

Each Council hereby warrants to each of the other Councils that it has obtained all necessary authorities to authorise the creation of the joint working arrangements contemplated by this Agreement including delegating to its Appointed Representative the authority to agree or approve decisions which are designated as Project Board Decisions in **PART 1** of the Schedule and to amend the Project Budget as may be necessary within the limits of the overall Project Budget.

The Councils agree that the procurement of external advisors shall be conducted using open tendering or through a suitable framework agreement if appropriate.

GOVERNANCE

The Councils shall establish a Project Board whose members comprise of one Director (or Head of Service) from each of the Councils (each an "Appointed Representative") no later than the Effective Date. The Councils agree that any person temporarily acting up as and fulfilling the role of a director (or Head of Service) who is an Appointed Representative may also fulfil the role of Appointed Representative provided that they are duly authorised by the relevant Council.

An Appointed Representative from each Council shall be present at each meeting of the Project Board.

Without prejudice to Clause 0 below, the Project Board shall meet every Month or such other period as may be agreed by the Project Board (provided that such meetings shall be no less than every Quarter) at a time (and location in the case of face-to-face meetings) agreed by the Project Board. The Project Board shall be entitled to hold additional meetings where they consider it necessary for the progression of the Project and any meeting may take place by video or telephone conference call.

The Project Board shall be supported in its functions by a Project Team which shall include the following members:-

the Project Director;

the Project Manager;

the Project Officer;

a nominated financial adviser (being a person employed by one of the Councils) who shall advise the Project Team on financial matters ("**Inter-Authority Finance Lead**");

a nominated legal adviser (being a person employed by one of the Councils) who shall advise the Project Team on legal issues ("**Inter-Authority Legal Lead**");

a nominated technical adviser (being a person employed by one of the Councils) who shall advise the Project Team on technical matters ("**Inter-Authority Technical Lead**"); and

such other adviser or advisers (being a person(s) employed by any of the Councils) as the Project Board may determine is/are necessary to supplement the Project Team from time to time.

External legal advisers, financial advisers and technical advisers, appointed by the Councils to advise the Councils in connection with the Project ("**External Advisers**") shall support the Project Team.

All members of the Project Team have been or shall be appointed by the Project Board.

Subject to the overall limit set out in the Project Budget, the Project Board shall be entitled to engage the services of any specialist, consultant or expert during the term of this Agreement for the provision of advice where the Project Board considers that such engagement is necessary for the progression of the Project.

The Project Board may adjust the Project Budget within the overall limit of the Project Budget to incorporate any additional cost associated with the engagement of such specialist, consultant or expert (if required). Any requirement for additional budget in excess of the overall limit of the Project Budget will be referred back to the Councils for determination as a Council Decision.

The Project Board shall have the authority on behalf of the Councils to appoint the Project Director who shall owe a duty of care to each of the Councils in connection with the procurement of the Project. The Project Director shall be initially appointed on a part time basis. The Project Board, may engage the Project Director for such additional hours as the Project Board considers is in the best interests of the Project (and subject to the overall limit, shall adjust the Project Budget accordingly).

The Councils agree that the Project Director shall act as chairperson of the Project Board but shall not be entitled to take part in the determination of any Project Board Decision. The Project Director, in performing his role as chairperson, shall, as a minimum, (with the assistance of the Project Manager and Project Officer):-

contact each Appointed Representative and confirm availability for Project Board meetings;

draft an agenda (and all accompanying documentation) for each such Project Board meeting, specifying in reasonable detail the matters to be raised at the meeting which shall include:-

any Project Board Decisions requiring to be taken at that meeting;

any Project Board Decisions which remain outstanding from previous meetings;

review of the progress of the preparation of the project documentation pursuant to the issue of the OJEU Notice;

review of the progress of the preparation of the Procurement Inter-Authority Agreement;

confirmation of matters which each Project Board member shall action prior to subsequent meetings; and

such other matters which the Project Director considers necessary for the progression of the Project.

draft a note or report setting out the Project Director's recommendations (if any) on the course or outcome to be taken by the Project Board in respect of each Project Board Decision referred to in the agenda;

notify the Appointed Representative of arrangements for Project Board meetings reasonably in advance of the meeting;

provide all Appointed Representatives copies of all agendas and reports in good time for the Project Board meeting; and

attend and chair all Project Board meetings.

Each of the Councils agree that they shall make available such of their officers as may be necessary for the purposes of the Project and the governance arrangements described in this Agreement and shall each procure that it shall establish a management and governance structure within its own Council which is sufficiently robust and has the requisite authority to enable its representatives on the Project Board and Project Team to legitimately take Project Board Decisions and Project Team Decisions.

The Project Director and the Project Team shall act under the direction of the Project Board.

The Councils agree that no later than 5 Business Days following the last day of each Month (or such other period as may be agreed by the Project Board), the Project Team shall be required to provide the Project Board (which shall provide all reasonable information and assistance to the Project Team during its preparation) with a report which shall include, without limitation to, the following items:-

status of the Councils' Programme;

status of the achievement of the Project Milestones;

statement of expenditure of the Project Budget;

a summary of any Project Team Decisions, Project Board Decisions and/or Council Decisions;

a summary of any Project Team Decisions, Project Board Decisions and Council Decisions which remain outstanding at the date of issue of such report;

review of the progress of the preparation of the Procurement Inter-Authority Agreement;

review of the progress of the preparation of the project documentation pursuant to the issue of the OJEU Notice; and

such other matters which the Project Team and/or the Project Board consider necessary for the progression of the Project from time to time.

DECISION MAKING AND AUTHORITY

The Project Director shall have sufficient authority to make Day-to-Day Decisions and shall liaise on a regular basis with the Project Team and the Project Board.

Where the Project Board is required to make a Project Board Decision, such decision shall not be implemented unless it has the unanimous approval of all Appointed Representatives. All Council Decisions shall require the approval of all of the Councils.

Where any matter is to be determined as a Council Decision under this Agreement, the Project Board shall provide the Councils with a recommendation prior to such Council Decision being taken.

The Councils have identified and categorised a number of key decisions and other actions (listed in **PART 1** of the Schedule) which are required to be agreed and, thereafter, implemented in accordance with the Councils' Programme in accordance with **PART 1** of the Schedule to this Agreement by the Councils, the Project Board and the Project Team as indicated in **PART 1** of the Schedule.

The Councils shall procure that the Project Board makes arrangements for the key decisions indicated as being Project Team Decisions in **PART 1** of the Schedule to be taken by the Project Team.

EFW FACILITY ELECTED MEMBER ENGAGEMENT GROUP

The Councils shall create and establish an elected member engagement group for the purposes of promoting and optimising co-operation between the Councils in connection with the Project (the "EFW Facility Elected Member Engagement Group") no later than two months after the Effective Date.¹ The EFW Facility Elected Member Engagement Group shall act as advisory consultative body to the Project.

The EFW Facility Elected Member Engagement Group shall comprise of at least two and not more than three nominated elected representatives (each a "Nominated Group Representative") from each Council. Where for any reason any Nominated Representative is unable to fulfil its role as a member of the EFW Facility Elected Member Engagement Group (including, for the avoidance of doubt, attending any meeting under Clause 0 below), each Council shall use reasonable endeavours to procure that a fellow elected representative assumes and fulfils

¹ Councils to confirm timescales

their role as a member of the EFW Facility Elected Member Engagement Group until such time the Nominated Representative is able to re-assume its duties as member.

The EFW Facility Elected Member Engagement Group shall meet every Quarter or such other period as may be agreed by the EFW Facility Elected Member Engagement Group at such time (and location in the case of face-to-face meetings) as may be agreed. The EFW Facility Elected Member Engagement Group shall nominate one member of the EFW Facility Elected Member Engagement Group, during their first Quarterly meeting, to act as chairperson. Where for any reason the chairperson is unable to chair any meeting, the participating members must appoint one of themselves to chair such meeting.

The chairperson of the EFW Facility Elected Member Engagement Group shall be responsible for drafting an agenda for each Quarterly meeting of the EFW Facility Elected Member Engagement Group. During his preparation of the agenda, the chairperson shall be required to seek input from each of the members of the EFW Facility Elected Member Engagement Group and the Project Director in advance of any such meetings as to any items they consider ought to be discussed during such meeting. The chairperson shall be responsible, during each such Quarterly meeting, for encouraging open discussion and dialogue on each point of the agenda and shall seek agreement from the members (including himself) as to what course they consider the Project Board should adopt. The chairperson shall, thereafter, relay all such considerations following such meeting to the Project Director who shall advise the Project Team and the Project Board.

Any consideration provided by EFW Facility Elected Member Engagement Group pursuant to Clause 0 shall constitute a matter for consideration during the determination of any Council Decision, Project Board Decision and/or Project Team Decision and shall not be binding on the Project Board, the Project Team or the Councils.

PROJECT BUDGET AND COSTS²

Subject to each Council complying with Clause 0, the Project Costs, for the period from the Effective Date until the OJEU Publication Date, shall be borne by the Councils according to the percentages set out in the following table:-

NAME OF COUNCIL	PROPORTION OF PROCUREMENT COSTS FOR WHICH EACH COUNCIL IS LIABLE (%)
Aberdeen City	38.4%
Aberdeenshire	46.5%
Moray	15.1%

Each Council shall be required to pay, in accordance with this Clause 0, their proportion (as calculated in accordance with Clause 0 above) of any Project Costs properly and reasonably incurred by any Council prior to the Effective Date.

² Councils to confirm whether the proportion of Project Costs is to be allocated according to tonnage.

Each Council shall pay the amount(s) allocated to it in accordance with the forecast set out in the Project Budget. The first instalment of the Project Budget shall be payable by each Council (with regard to their requisite share specified in the table above) no later than 3 months after the Effective Date.³

The Project Team shall provide the Project Board with a statement, on a Quarterly⁴ basis, showing the expenditure and costs during that Quarter together with a variance analysis and commentary between the forecast Project Budget and the actual Project Costs incurred to that particular date. The Project Board shall provide the Project Team with all reasonable information and assistance during the preparation of such statement.

The Project Board shall review the forecast Project Budget and shall assess such Project Budget against the actual Project Costs on a not less than quarterly basis. If it becomes evident that the total Project Costs will exceed the overall limit of the Project Budget, the Project Board shall be required to refer the matter to the Councils for determination as a Council Decision. The Councils shall assess whether the Project Budget remains fit for purpose and, where the Councils are satisfied that additional funding is necessary, shall make the necessary allocation of additional funds.

The Project Board shall be required, upon the termination of this Agreement, to produce a final statement of the remaining balance of the Project Budget and shall arrange for all funds, if any, to be returned (according to the proportion applicable at that time) to each Council within 28 days of issuing said statement.

If a Council (the “**Initiating Council**”) (a) carries out any work or incurs any cost or expenses, or (b) requests the Project Team (or any member of it) to carry out any work relating to the Project, or (c) requests the Project Team (or any member of it) to incur any cost or expense that, in the reasonable opinion of the Project Director, is not an efficient use of time and/or resources, the matter shall be referred to the Project Board for determination (as a Project Team Decision) as to whether such work, cost or expense shall form part of the Project Budget and/or the Project Costs or whether such work, cost or expense should borne by the Initiating Council.

Any dispute as to the allocation of the Project Costs shall be resolved in accordance with Clause 0 (Dispute Resolution Procedure) of this Agreement.

PRINCIPLES OF DESIGN, BUILD AND OPERATIONAL COSTS AND REVENUE INCOME APPORTIONMENT

The Councils shall agree the principles for the apportionment of the design, build and operational costs and revenue income to be documented in the Procurement Inter-Authority Agreement and the Operational Inter-Authority Agreement prior to the Contract Execution Date. The key decisions to be taken are set out in **PART 1** of the Schedule.

³ Councils to confirm which Council will assume responsibility for payment of invoices – which Council will receive the monies?.

WITHDRAWAL DURING THE PROCUREMENT PROCESS

Each Council acknowledges and agrees that its withdrawal from the Project (and thereby this Agreement) may result in the remaining Councils either incurring additional costs for the remainder of the procurement, or abortive costs having been required to abandon the procurement.

A Council shall be entitled to withdraw from the Project at any time prior to the execution of the Procurement Inter-Authority Agreement upon providing written notice, in accordance with Clause 0 (Notices), to each of the other remaining Councils under this Agreement and the Project Board (marked for the attention of the Project Director). Such notice under this Clause shall state the following:-

the date upon which the withdrawal is to be effective; and

the reasons for its withdrawal from the Project.

Without prejudice to Clauses 0 (Council Liabilities), 0 (Termination) and 0 (Consequences of Termination) of this Agreement, where a Council has withdrawn from the Project:-

the withdrawing Council shall not recover any contributions made by it in connection with the Project prior to the date of its intimation of withdrawal;

the withdrawing Council shall be required to pay their proportion (as calculated in accordance with Clause 8) of the total costs set out in the Project Budget (as at the date of the withdrawing Council's withdrawal) to be incurred prior to the OJEU Publication Date;

the remaining Councils shall not be entitled to receive any compensation from the withdrawing Council for any additional costs, claims and expenses which the remaining Councils have incurred or will incur in connection with the withdrawing Council's withdrawal from the Project; and

save as otherwise agreed by the Councils, the withdrawing Council's rights and obligations in relation to the delivery and governance of the Project shall cease forthwith.

ABANDONMENT OF THE PROJECT

Without prejudice to Clause 0 below, the Councils shall be entitled to abandon the Project (provided that it is a unanimous decision) at any time prior to the execution of the Procurement Inter-Authority Agreement.

Where the Procurement Inter-Authority Agreement has not been executed by each of the Councils by the Pre-procurement Longstop Date, the Project Board shall be required to seek instructions from the Councils (by referring the matter as a Council Decision) as to whether they wish to abandon the Project.

Where the Project has been abandoned pursuant to Clause 0, the Councils shall use all monies within the Project Budget at the date of abandonment to settle the Project Costs which are due and payable at such date. Where there are insufficient funds within the Project Budget to settle all such Project Costs, each Council shall pay their proportion (as set out in Clause 0) of the

remaining costs from their own internal budget. Any surplus monies from the Project Budget following settlement of such Project Costs shall be apportioned with reference to each Council's share under Clause 0 and each Council shall receive their respective share of the surplus monies no later than thirty (30) days after full settlement of the Project Costs.

COUNCIL LIABILITIES

Subject to Clause 0, each Council's total liability under this Agreement (including, but without limitation to, Clauses 0 (Withdrawal During the Procurement Process) 0 (Termination) and 0 (Consequences of Termination)) whether in contract, delict (including negligence or breach of statutory duty) or otherwise arising out of or in connection with this Agreement shall be limited to their proportion set out in accordance with Clause 0 of the total Project Budget.

Nothing in this Agreement shall exclude or limit:

any Council's liability for fraud or fraudulent misrepresentation; or

any Council's liability for death or personal injury caused by its (or its agent's or sub-contractor's negligence).

Each Appointed Representative shall be deemed to be acting on behalf of the Council in respect of which they are a director (or Head of Service), regardless of whether the particular matter under consideration by the Board relates to their particular Council or another Council.

Subject to Clause 0 below, each member of the Project Team and any other officer engaged in connection with the Project shall be required to act in the best interests of the Project at all times.

Subject to Clause 0 below and without prejudice to Clause 0 above, each member of the Project Team shall be deemed to be acting on behalf of the Council in respect of which they are an employee, regardless of whether the particular matter under consideration by the Project Team relates to their particular Council or another Council and shall be entitled to report all matters to their Council.

Where a member of the Project Team considers at any time that their compliance with the obligation under Clause 0 above could (one) conflict with their duties as an employee of a Council or (two) adversely affect their Council's commercial or financial interests, such member shall be required to promptly relay their concerns to the Project Director. The Project Director shall, thereafter, promptly refer the matter to the Project Board for consideration.

The Project Team and the Project Board shall, when working on the Project, be deemed to be made available and working on behalf of all Councils in accordance with the powers granted to each Council under Sections 56 and 57 of the Local Government (Scotland) Act 1973.

No Council or any of its members, directors or officers shall be liable to any other Council for any loss such Council incurs as a result of any act or omission by any such member, director, or officer during their engagement with the Project.

TERMINATION

Without prejudice to Clause 0 (Consequences of Termination) below, this Agreement shall terminate on the earliest of:-

the OJEU Publication Date;

the date upon which a second Council has exercised its rights to withdraw under Clause 0 which has resulted in one Council remaining a party to this Agreement;

the date upon which all Councils agree in writing to its termination; and

the date upon which the Councils collectively decide to abandon the Project in accordance with Clause 0.

CONSEQUENCES OF TERMINATION

The termination of this Agreement pursuant to Clause 0 (Termination) above shall:-

be without prejudice to any other rights or remedies which any Council may be entitled to under this Agreement;

not affect any accrued rights or liabilities which any Council may then have; and

not affect any provision of this Agreement that is expressly or by implication intended to come into or continue in force on or after such termination. Such provisions shall include but not be limited to this Clauses 0 (Project Budget and Costs), 0 (Withdrawal during the Procurement Process), 0 (Abandonment of the Project), 0 (Council Liabilities), 0 (Consequences of Termination) 0 (Intellectual Property), and 0 (Confidentiality and Freedom of Information).

INTELLECTUAL PROPERTY

Each Council shall own all property rights (including all Intellectual Property Rights) in its respective Material.

Each Council hereby grants each of the other Councils under this Agreement a non-exclusive, perpetual, non-transferable and royalty-free licence to use, modify, amend and develop any such Material for the purposes of the Project.

Without prejudice to Clause 0, if more than one Council has a legal or beneficial right or interest in any aspect of the Material for any reason (including the eventuality that no Council has the ability to demonstrate that it independently supplied or created the Material without the involvement of any of the other Councils), each Council which has contributed to that Material shall grant to the other Council(s) under this Agreement a non-exclusive, perpetual, non-transferable and royalty-free licence to use such Material pursuant to or in connection with the Project.

Each Council hereby warrants that it has the necessary rights to grant the licences under Clauses 0 and 0. Subject to Clause 0 (Council Liabilities), each Council shall indemnify the other Councils against any loss arising out of any dispute or proceedings brought by a third party alleging infringement of its intellectual property rights as a result of that Council's use of another Council's Intellectual Property Rights pursuant to or in connection with the Project.

CONFIDENTIALITY AND FREEDOM OF INFORMATION.

The Councils agree that the provisions of this Agreement shall not be treated as Confidential Information and may be disclosed without restriction.

The Councils shall keep confidential all Confidential Information received by one Council from the other Council(s) relating to this Agreement and shall use all reasonable endeavours to prevent their employees and agents from making any disclosure to any person of any such Confidential Information.

Clauses 0 and 0 above shall not apply to:

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

any matter which a Council under this Agreement can demonstrate is already or becomes generally available and in the public domain otherwise than as a result of a breach of this Clause 0 (Confidentiality and Freedom of Information);

any disclosure to enable a determination to be made under Clause 0 (Dispute Resolution Procedure);

any disclosure which is required pursuant to any statutory, legal (including any order of a court of competent jurisdiction) or Parliamentary obligation placed upon the Council making the disclosure or the rules of any stock exchange or governmental or regulatory authority;

any disclosure of information which is already lawfully in the possession of the receiving Council(s), prior to its disclosure by the disclosing Council;

any provision of information to the Council's own professional advisers or insurance advisers;

any disclosure by any Council of information relating to the design, construction, operation and maintenance of the Project otherwise than in accordance with this Agreement;

any disclosure of information by any Councils to any other department, office or agency of the Government or their respective advisers or to any person engaged in providing services to the Council for any purpose related to or ancillary to this Agreement;

any disclosure for the purpose of:

- (a) the examination and certification of any of the Council's accounts;
- (b) any examination pursuant to the Local Government in Scotland Act 2003 of the economy, efficiency and effectiveness with which the Council has used its resources;
- (c) complying with a proper request from any Council's insurance adviser, or insurer on placing or renewing any insurance policies; or

- (d) (without prejudice to the generality of Clause 0 above) compliance with the FOISA and/or the Environmental Information Regulations;

provided that, for the avoidance of doubt, neither Clause 0 nor Clause 0(d) above shall permit disclosure of Confidential Information otherwise prohibited by Clause 0 above where that information is exempt from disclosure under section 36 of the FOISA.

Where disclosure is permitted under Clause 0 (other than Clauses 0, 0, 0 and 0 above), the Council providing the information shall procure that the recipient of the information shall be subject to the same obligation of confidentiality as that contained in this Agreement.

The Councils acknowledge and agree that they are subject to the requirements of the FOISA, the Environmental Information Regulations, the INSPIRE (Scotland) Regulations 2009 and the Data Protection Act 1998 and shall facilitate the other Councils' compliance with their legal obligations or Information disclosure requirements pursuant to the same in the manner provided for in Clauses 0 to 0 inclusive below.

Where a Council receives a Request for Information in relation to Information ("Requesting Council") that another Council ("Disclosing Council") is holding on its behalf and which the Requesting Council does not hold itself, the Requesting Council shall refer to the Disclosing Council such Request for Information that it receives as soon as practicable and in any event within five (5) Business Days of receiving a Request for Information and the Disclosing Council shall:

provide the Requesting Council with a copy of all such Information in the form that the Requesting Council requires as soon as practicable and in any event within ten (10) Business Days (or such other period as the Requesting Council acting reasonably may specify) of the Requesting Council's request; and

provide all necessary assistance as reasonably requested by the Requesting Council in connection with any such Information, to enable the Requesting Council to respond to a Request for Information within the time for compliance set out in section 10 of the FOISA or Regulation 5 of the Environmental Information Regulations.

Following notification under Clause 0, and up until such time as the Disclosing Council has provided the Requesting Council with all the Information specified in Clause 0, the Disclosing Council may make representations, within 5 Business Days of receiving such notification, to the Requesting Council where it considers that:-

the Information is exempt from disclosure under the FOISA or the Environmental Information Regulations;

in the circumstances of the particular case, the public interest in maintaining the exemption outweighs the public interest in disclosing the Information referred to in the Request for Information;

the Information should not be disclosed in response to the particular Request for Information; and/or

further information should reasonably be provided in order to identify and locate the information requested.

Where the Disclosing Council has made representations under Clause 0 (save a representation under Clause 0), the Requesting Council and the Disclosing Council shall discuss such representations with a view to agreeing (which, in any event, shall be no later than the tenth day of the Disclosing Council receiving the Requesting Council's notification under Clause 16.6) as to whether the Requesting Council should refuse the Request for Information in accordance with the FOISA or Environmental Information Regulations (as applicable). Where the Disclosing Council and the Requesting Council are unable to agree by the tenth day of the Disclosing Council receiving the Requesting Council's notification, the Requesting Council shall determine in its absolute discretion as to whether the Request for Information is to be refused and shall be entitled to require the Disclosing Council to provide the Requesting Council with all such Information and assistance to enable the Requesting Council to respond to the Request for Information within the time for compliance set out in section 10 of the FOISA or Regulation 5 of the Environmental Information Regulations.

In the event of a request from the Requesting Council pursuant to Clause 0 above, the Disclosing Council shall as soon as practicable, and in any event within five (5) Business Days of receipt of such request, inform the Requesting Council of the Disclosing Council's estimated costs of complying with the request to the extent these would be recoverable if incurred by the Requesting Council under Section 13(1) of the FOISA and the Fees Regulations. Where such costs (either on their own or in conjunction with the Requesting Council's own such costs in respect of such Request for Information) will exceed the prescribed amount referred to in Section 12(1) of the FOISA and as set out in the Fees Regulations, the Requesting Council shall inform the Disclosing Council in writing whether or not it still requires the Disclosing Council to comply with the request and where it does require the Disclosing Council to comply with the request, the ten (10) Business Days period for compliance shall be extended by such number of additional days for compliance as the Requesting Council is entitled to under Section 10 of the FOISA. In such case, the Requesting Council shall notify the Disclosing Council of such additional days as soon as practicable after becoming aware of them and shall reimburse the Disclosing Council for such costs as the Disclosing Council incurs in complying with the request to the extent the Requesting Council is itself entitled to reimbursement of such costs in accordance with the its own FOISA policy from time to time.

The Disclosing Council acknowledges that (notwithstanding the provisions of this Clause 0) the Requesting Council may, acting in accordance with the Scottish Ministers' Code of Practice on the Discharge of Functions of Public Authorities Under the Freedom of Information (Scotland) Act 2002 (the "**Code**"), be obliged under the FOISA, or the Environmental Information Regulations to disclose Information concerning the Disclosing Council or this Agreement:

in certain circumstances without consulting with the Disclosing Council;

following consultation with the Disclosing Council and having taken their views into account,

provided always that where Clause 0 above applies the Requesting Council shall, in accordance with the recommendations of the Code, draw this to the attention of the Disclosing Council prior to any disclosure.

1.12 The obligations in this Clause 0 shall survive the termination of this Agreement.

OMBUDSMAN AND COMPLAINTS

- 1.13 Where a Council under this Agreement receives a request for comments or information from the Scottish Public Services Ombudsman (the "Receiving Council") regarding a complaint which the Scottish Public Services Ombudsman has received and such complaint relates to matters pursuant to this Agreement or the Project, the Receiving Council shall:-
- (a) notify the other Councils (the "Respondent Councils") as soon as practicable after receipt and in any event within two (2) Business Days of receiving a request for comments and/or information; and
 - (b) provide the Respondent Councils with a copy of its draft response to the complaint within five (5) Business Days or such other time period considered necessary by the Receiving Council (provided that such period does not exceed any time limit imposed by the Scottish Public Services Ombudsman in which the Receiving Council is required to respond).
- 16.14 The Respondent Councils shall provide all necessary assistance as reasonably requested by the Receiving Council to enable it to respond to the complaint within the time for compliance set by the Scottish Public Sector Ombudsman.
- 16.15 The Respondent Councils shall provide comments and any relevant information requested by the Receiving Council to the Receiving Council no later than five (5) Business Days of receiving such request.
- 16.16 The Receiving Council shall forward the final copy of the response (incorporating as appropriate the comments and information from the Respondent Councils) to the Responding Councils upon sending such response to the Scottish Public Services Ombudsman.
- 16.17 Where the Scottish Public Services Ombudsman issues a report under sections 15 and 16 of the Scottish Public Services Ombudsman Act 2002, the Respondent Councils shall provide all reasonable assistance and information to ensure that the Receiving Council complies with its obligations under such Act and shall, where requested, assist the Receiving Council in remedying the issue pursuant to the complaint.

NOTICES

Subject to Clause 0, any notice given under or in connection with this Agreement is to be in writing and signed by or on behalf of the Council giving it.

Any notice under Clause 0 is to be served by delivering it personally or by commercial courier or sending it by pre-paid recorded delivery or registered post or by electronic mail to the address and the attention of the relevant party set out below:-

Aberdeen City:

Address: Marischal College, Broad Street, Aberdeen, AB10 1AB

Att: Peter Leonard, Director of Communities, Housing and Infrastructure

E-mail: PLeonard@aberdeencity.gov.uk

Aberdeenshire:

Address: Woodhill House, Westburn Road, Aberdeen, AB16 5GB

Att: Alan Wood, Head of Finance

E-mail: alan.wood@aberdeenshire.gov.uk

Moray:

Address: The Moray Council Office, High Street, Elgin, Moray, IV30 1BX

Att: Rhona Gunn, Corporate Director (Economic Development, Planning and Infrastructure)

E-mail: rhona.gunn@moray.gov.uk

or such other address, designated person or e-mail address as may be notified from time to time by the relevant Council to the other Council(s).

Any notice served under Clause 0 shall be deemed to have been received:-

if delivered personally or by commercial courier, at the time of delivery;

in the case of pre-paid recorded delivery or registered post, two (2) Business Days from the date of posting;

in the case of e-mail, on the day of transmission if sent before 4.00 pm on any Business Day and otherwise at 9.am on the next Business Day, subject to confirmation of completion of transmission (which shall, for the avoidance of doubt, include the sender not receiving an error message indicating failure to deliver after sending such e-mail).

WAIVER

No failure or delay by any Council to exercise any right or remedy provided under this Agreement is to constitute a waiver of that (or any other) right or remedy, nor preclude or restrict its further exercise. No single or partial exercise of such right or remedy is to preclude or restrict the further exercise of that (or any other) right or remedy. Any express waiver of any breach of this Agreement shall not be deemed to be a waiver of any subsequent breach.

ENTIRE AGREEMENT

This Agreement constitutes the entire agreement between the Councils and supersedes any prior drafts, agreements, undertakings, understandings, representations, warranties and arrangements of any nature between the Councils, whether or not in writing, in relation to the subject matter of this Agreement.

ASSIGNATION

No Council shall be entitled to assign, novate, sub-contract, transfer or dispose of any of its rights or obligations under this Agreement.

VARIATION

No variation of this Agreement shall be valid unless recorded in writing and signed by a duly authorised representative on behalf of each of the Councils.

SEVERANCE

If any provision (or part of a provision) of this Agreement is or becomes, or is declared to be invalid, unenforceable or illegal by the courts of any competent to which it is subject, such invalidity, unenforceability or illegality shall not prejudice or affect the remaining provisions (and parts of that provision) of this Agreement which shall continue in full force and effect notwithstanding such invalidity, unenforceability or illegality.

THIRD PARTY RIGHTS

It is expressly declared that no rights shall be conferred under and arising out of this agreement upon any person other than the parties hereto and, without prejudice to the generality of the foregoing, there shall not be created by this agreement a jus quaesitum tertio in favour of any person whatsoever.

DISPUTE RESOLUTION PROCEDURE

Any disputes or differences arising between the Councils in relation to this Agreement shall be resolved in accordance with this Clause 0 having regard to their obligation under Clause 0 to act in good faith.

Where a dispute or difference is considered by the Project Team to be incapable of swift and satisfactory resolution, the matter shall be referred to the Project Board for determination as a Project Board Decision. The Project Board shall refer the matter to the Councils for determination as a Council Decision where the members of the Project Board are unable to reach a consensus on the matter.

GOVERNING LAW AND JURISDICTION

This Agreement and any dispute or claim arising out of, or in connection with, its subject matter or formation (including non-contractual disputes or claims) shall be governed by and construed in accordance with the law of Scotland.

The Councils unconditionally and irrevocably agree that the courts of Scotland have exclusive jurisdiction to settle any disputes or claims arising out of or in connection with this Agreement or its subject matter or formation (including non-contractual disputes or claims).

The Councils agree that this Agreement may be executed in counterpart.

IN WITNESS WHEREOF these presents consisting of this and the preceding [19] pages together with the Schedule of [3] parts are executed as follows:

SUBSCRIBED for and on behalf of)
Aberdeen City Council by)

At
On
In the presence of:

.....
Signature

.....
Name

.....
Address

SUBSCRIBED for and on behalf of

Aberdeenshire Council)

.....

by , Director)

At

On

In the presence of:

.....

Signature

.....

Name

.....

Address

SUBSCRIBED for and on behalf of

Moray Council)

.....

by , Director)

At

On

In the presence of:

.....

Signature

.....

Name

.....

Address

SCHEDULE

PART 1

PROJECT MILESTONES AND KEY DECISIONS

NO.	DESCRIPTION OF MILESTONE	PROJECT TEAM DECISIONS	PROJECT BOARD DECISIONS	COUNCILS DECISIONS	DATE TO BE ACHIEVED
1.	Establish Project Board			✓	17 December 2015
2.	Appoint Project Director		✓		29 January 2016
3.	Procure and appoint technical, legal and financial advisers in accordance with Project Budget		✓		29 January 2016
4.	Establish Project Team		✓		17 December 2015
5.	Recommend to Project Board procurement strategy, including form of procurement, operational options and risk allocation between Contractor and Councils	✓			1 April 2016
6.	Develop and recommend to Project Board form of contract	✓			1 April 2016
7.	Agree procurement strategy and form of contract		✓		1 April 2016
8.	Approve publication of Prior Information Notice in OJEU for main contract		✓		6 Jan 2016
9.	Agree tonnage capacity requirements of the EFW Facility.		✓		1 April 2016
10.	Recommend to Councils form of Contracting Entity for construction and operation		✓		1 April 2016
11.	Agree Evaluation Criteria for Procurement Process (including PQQ and main tender evaluation criteria)		✓		1 April 2016
12.	Approve funding structure (including agreement on payment terms and security package)			✓	1 April 2016

13.	Agree Mandatory Requirements for the Invitation to Participate in Dialogue which shall include but not be limited to:- <ul style="list-style-type: none"> • Duration of Contract; • Operation requirements; • Maintenance Requirements; • Testing and Commissioning requirements; and • Contract Waste 		✓		1 April 2016
14.	Recommend design, build and operational costs and revenue income apportionment and principles		✓		1 April 2016
15.	Recommend Project Budget for period following publication of the OJEU Contract Notice		✓		1 April 2016
16.	Recommend the strategy for the sale of electricity and heat from the facility and the mechanism on how the partners benefit from any income		✓		1 April 2016
17.	Prepare tender documentation (including terms and conditions of Contract)	✓			1 April 2016
18.	Approve tender documentation including detailed form of contract		✓		1 April 2016
19.	Recommend terms of Procurement Inter-Authority Agreement for approval by Councils		✓		1 April 2016
20.	Agree terms of detailed planning application		✓		22 January 2016
21.	Submit detailed planning application (Aberdeen City Council Only)			✓	22 January 2016
22.	Conclude missives for the			✓	31 Jan 2016

	purchase of the Site (Aberdeen City Council Only)				
23.	Approve and sign Procurement Inter-Authority Agreement incorporating Project Board's recommendations including approval to publish Contract Notice in OJEU			✓	3 June 2016
24.	Publish Contract Notice in OJEU for main contract		✓		17 June 2016
25.	Where Project Milestones [23] and [24] have not been achieved, Councils shall consider whether the Project should be abandoned pursuant to Clause 0			✓	Pre-Procurement Longstop Date 1 November 2016

PART 2
PROJECT BUDGET
[TO BE INSERTED]

PART 3
COUNCILS' PROGRAMME

[TO BE INSERTED]