

[Date]

(1) **ABERDEEN CITY COUNCIL**

(2) **ABERDEENSHIRE COUNCIL**

AND

(3) **THE MORAY COUNCIL**

INTER-AUTHORITY AGREEMENT FOR THE PROCUREMENT OF AN EFW FACILITY (IAA2)

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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 and Project Objectives and Criteria set out in Part 5 of the Schedule ;
- (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 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 Agreement (the "**Procurement Inter-Authority Agreement**").

THE PARTIES AGREE as follows:

1. DEFINITIONS AND INTERPRETATION

1.1 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 5.1;
"Appointment"	means the appointment between the Team and [SGN] in respect of the carrying out of remediation works on the Site;
"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 17.10;

"Communication Officer"	means such person as may be nominated by the Project Board from time to time;
"Confidential Information"	means information concerning any Council or the Project that ought to 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 including for the construction and operation of the EFW Facility;
"Contract Award Notice"	means the notice placed in the Official Journal of the European Union advertising the award of the Contract;
"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;
"Disclosing Council"	shall have the meaning given to it in Clause 17.6;
"Effective Date"	means the last date of signing of this Agreement];
"EFW Facility Elected Member Engagement Group"	has the meaning given to it in Clause 7.1;
"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 5.5;
"ESPD"	means the European Single Procurement Document (Scotland) prepared for the Project;
"Evaluation Panel"	means a group of people appointed by the Project Board to evaluate an aspect of the ESPD and tenders received from Bidders, which group shall include at least one representative from each Council;
“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 the 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 8.6;
“Intellectual Property Rights”	means any and all patents, rights to inventions, trademarks, 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 5.4.5;
“Inter-Authority Legal Lead”	has the meaning given to it in Clause 5.4.6;

“Inter-Authority Technical Lead”	has the meaning given to it in Clause 5.4.7;
“Lead Authority”	means Aberdeen City who has been nominated by the other Councils to act as the lead authority for the Project ;
“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;
"Missives"	means the contract between Aberdeen City and SGN under which Aberdeen City will acquire title to the Site from SGN;
“Month”	means a calendar month;
“Nominated Group Representative”	has the meaning given in Clause 7.2;
“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 3.1.2 of this Agreement;
Pre-procurement Inter-Authority Agreement	Means the agreement between the Councils initiating the Project dated 17 December 2015
“Procurement Costs”	means the aggregate of the costs and expenses properly and reasonably incurred by each of the Councils in respect of the procurement of the Project including without prejudice to the generality: (one) payment for services carried out by the Project Director and the external advisors and (two) the costs of finalising the suite of project documentation and all activities required to achieve the Contract Execution Date;
"Procurement Documentation"	means the OJEU, the ESPD, the ITPD, Evaluation Methodology, the Contract and all other documentation prepared during the course of the procurement of the Project;
"Procurement Principles"	means the principles to be reflected in the Procurement Documentation and Contract set out in Part 4 of the Schedule;
“Project”	has the meaning given to it in Recital (A);
“Project Budget”	means the budget agreed by the Councils, for the period from the Effective Date until the Contract Execution Date for the purpose of achieving the Contract Execution Date, 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 Director”	means Linda Ovens or any other such person as may appointed by the Project Board in accordance with Clause 5 (<i>Governance</i>) from time to time and who is responsible for the management of the procurement of the Project and leading the Project Team;
“Project Manager”	means any such person as may appointed by the Project Board to assist 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 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, Communications Officer and such other personnel as may be appointed from time to time to provide administrative support to the Project Director, 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 2.1;
“Receiving Council”	shall have the meaning given to it in Clause 18.1;
“Requesting Council”	shall have the meaning given to it in Clause 17.6;
“Request for Information”	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”	shall have the meaning given to it in Clause 18.1;

Councils”

"Schedule" means the Schedule to this Agreement;

SGN means SGN Commercial Services Limited a company incorporated in England and Wales under the Companies Acts (Registered Number 05969465) and having its registered office at Lawrence House, Station Approach, Horley, Surrey RH6 9HJ

“Site” means the area edged [red] on the Site Plan;

“Site Plan” means the plan annexed and executed as relative hereto; and

"Team" shall have the meaning in the Missives;

“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.

2. DURATION

2.1 This Agreement and the rights and obligations of the Councils set out in this Agreement shall commence on the Effective Date and, subject to Clause 15 (*Consequences of Termination*), shall remain in force until the date this Agreement is terminated in accordance with Clause 14 (*Termination*) of this Agreement;

2.2 For the avoidance of doubt the Councils agree that this Agreement supersedes the Pre-procurement Inter-Authority Agreement with effect from the Effective Date;

3. INTER-AUTHORITY AGREEMENTS

3.1 Without prejudice to Clause 15 (*Consequences of Termination*), the Councils acknowledge and agree that this Agreement governs the joint working arrangements between the Councils during the period from the OJEU Publication Date until the day immediately prior to the Contract Execution Date and that:

3.1.1 this Agreement shall cease to have effect from the Contract Execution Date; and

3.1.2 this 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**").

4. KEY PRINCIPLES

4.1 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:-

4.1.1 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;

4.1.2 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;

4.1.3 each Council shall be transparent in its dealings with each other Council and shall, without prejudice to Clause 17 (*Confidentiality and Freedom of Information*) endeavour to respect matters of confidentiality and political sensitivities of the other Councils;

- 4.1.4 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;
- 4.1.5 each Council shall ensure that individuals with relevant expertise are appointed as members (including any replacements thereto) to the Project Board and Project Team;
- 4.1.6 each Council shall ensure that individuals appointed to the Project Team are available to the Project where necessary, including for attendance at bidder meetings;
- 4.1.7 each Council shall not make any representations, give any warranties or incur any liabilities on behalf of another Council;
- 4.1.8 subject always to the right to withdraw in accordance with Clause 10 (*Permitted Withdrawals During the Procurement Process*) or Clause 11 (*Withdrawals During the Procurement Process*), the Councils agree that they shall each:
- (i) use all reasonable endeavours to procure that the Project achieves the Project Milestones by the deadlines specified in PART 1; and
 - (ii) use all reasonable endeavours to procure that the Operational Inter-Authority Agreement is executed by duly authorised signatories by no later than the Contract Execution Date;
- 4.1.9 each Council shall use its reasonable endeavours to act in the best interests of the Project at all times; and
- 4.1.10 each Council shall not seek to be recompensed by the other Councils for expenditure and Procurement 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.
- 4.2 Without prejudice to Clause 4.1 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.
- 4.3 Each Council hereby warrants to each of the other Councils that it has obtained all necessary authorities to authorise the joint working arrangements contemplated by this Agreement including delegating to its Authorised 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.
5. **GOVERNANCE**
- 5.1 The Councils have established a Project Board whose members comprise one director (or one Head of Service) from each of the Councils (each an “**Appointed Representative**”). The Councils may also appoint an alternate to attend and fulfil the role of Appointed

Representative provided that the alternate is at least of the level of Head of Service and has been duly authorised to attend.

- 5.2 An Appointed Representative from each Council shall be present at each meeting of the Project Board.
- 5.3 Without prejudice to Clause 5.10 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.
- 5.4 The Project Board shall be supported in its functions by a Project Team which shall include the following members:-
 - 5.4.1 the Project Director;
 - 5.4.2 the Project Manager;
 - 5.4.3 Communication Officer;
 - 5.4.4 such other personnel as may be appointed from time to time to provide administrative support to the Project Director;
 - 5.4.5 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**");
 - 5.4.6 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**");
 - 5.4.7 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
 - 5.4.8 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.
- 5.5 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.
- 5.6 All members of the Project Team have been or shall be appointed by the Project Board.
- 5.7 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.

- 5.8 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.
- 5.9 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).
- 5.10 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):-
- 5.10.1 contact each Appointed Representative and confirm availability for Project Board meetings;
 - 5.10.2 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:-
 - (i) any Project Board Decisions requiring to be taken at that meeting;
 - (ii) any Project Board Decisions which remain outstanding from previous meetings;
 - (iii) review of the progress of the procurement and key issues arising in dialogue/negotiation with Bidders, receipt and evaluation of tenders, appointment of a preferred bidder and contract award;
 - (iv) review of the progress of the preparation of the Operational Inter-Authority Agreement;
 - (v) confirmation of matters which each Project Board member shall action prior to subsequent meetings; and
 - (vi) such other matters which the Project Director considers necessary for the progression of the Project.
 - 5.10.3 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;
 - 5.10.4 notify the Appointed Representative of arrangements for Project Board meetings reasonably in advance of the meeting;
 - 5.10.5 provide all Appointed Representatives copies of all agendas and reports in good time for the Project Board meeting; and
 - 5.10.6 attend and chair all Project Board meetings.

- 5.11 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.
- 5.12 The Project Director and the Project Team shall act under the direction of the Project Board.
- 5.13 The Councils agree that no later than five (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:-
- 5.13.1 status of the Councils' Programme;
 - 5.13.2 status of the achievement of the Project Milestones;
 - 5.13.3 statement of expenditure of the Project Budget;
 - 5.13.4 a summary of any Project Team Decisions, Project Board Decisions and/or Council Decisions;
 - 5.13.5 a summary of any Project Team Decisions, Project Board Decisions and Council Decisions which remain outstanding at the date of issue of such report;
 - 5.13.6 review of the progress of the preparation of the Operational Inter-Authority Agreement;
 - 5.13.7 review of the progress of the procurement and key issues arising in dialogue/negotiation with Bidders, receipt and evaluation of tenders, appointment of a preferred bidder and contract award; and
 - 5.13.8 such other matters which the Project Team and/or the Project Board consider necessary for the progression of the Project from time to time.

6. **DECISION MAKING, AUTHORITY AND EVALUATION PANELS**

- 6.1 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.
- 6.2 The only persons authorised to communicate with any prospective or actual bidder in respect of the Project shall be:
- 6.2.1 the Project Director, the Project Manager, the Inter-Authority Legal Lead, the Inter-Authority Finance Lead and the Inter-Authority Technical Lead; and
 - 6.2.2 those officers or consultants specifically authorised by the Project Director for the purpose of negotiating with any prospective or actual bidder in respect of the Project.

- 6.3 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.
- 6.4 Where the Project Board cannot agree a Project Board Decision, or where a decision is deemed to be a key issue by the Project Board, that decision may be referred to the Councils to be determined as a Council Decision.
- 6.5 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. All Council Decisions shall require the approval of all of the Councils.
- 6.6 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.
- 6.7 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.
- 6.8 Evaluation Panels shall be appointed by the Project Board for the purpose of evaluating each tender response and ESPD received from Bidders. The Evaluation Panels will each have a chairperson who will be responsible for collating and reporting the consensus score for the evaluation stream for which that Evaluation Panel is responsible.
7. **EFW FACILITY ELECTED MEMBER ENGAGEMENT GROUP**
- 7.1 The Councils acknowledge that they have created and established 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**"). The EFW Facility Elected Member Engagement Group shall act as an advisory body to the Project.
- 7.2 The EFW Facility Elected Member Engagement Group shall comprise of at least two nominated elected representatives (each a "**Nominated Group Representative**") from each Council. Where for any reason any Nominated Group 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 7.3 below), each Council shall use reasonable endeavours to procure that a fellow elected representative assumes and fulfils their role as a member of the EFW Facility Elected Member Engagement Group until such time as the Nominated Group Representative is able to re-assume its duties as member.
- 7.3 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.

- 7.4 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 recommend the Project Board should adopt. The chairperson shall, thereafter, relay all such recommendations following such meeting to the Project Director who shall advise the Project Team and the Project Board.
- 7.5 Any recommendation provided by EFW Facility Elected Member Engagement Group pursuant to Clause 7.4 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.

8. PROJECT BUDGET AND COSTS¹

- 8.1 Subject to each Council complying with Clause 4.1.10, the Procurement Costs, for the period from the Effective Date until the Contract Execution 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	38.09%
Aberdeenshire	47.93%
Moray	13.98%

- 8.2 Each Council shall pay the amount(s) allocated to it in accordance with the forecast set out in the Project Budget.
- 8.3 The Project Team shall provide the Project Board with a statement, on a [Quarterly] basis, showing the expenditure and costs during that [Quarter] together with a variance analysis and commentary between the forecast Project Budget and the actual Procurement 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.

- 8.4 The Project Board shall review the forecast Project Budget and shall assess such Project Budget against the actual Procurement Costs on a 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 shall allocate additional funds where necessary.
- 8.5 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 twenty eight (28) days of issuing said statement.
- 8.6 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 Procurement Costs or whether such work, cost or expense should be borne by the Initiating Council.
- 8.7 Any dispute as to the allocation of the Procurement Costs shall be resolved in accordance with Clause 26 (*Dispute Resolution Procedure*) of this Agreement.

9. **PROCUREMENT PRINCIPLES**

- 9.1 The Councils agree that the Procurement Documentation, Contract and Operational Inter-Authority Agreement shall be prepared in a manner which is consistent with the Procurement Principles set out in Part 4 of the Schedule.

10. **TITLE TO THE SITE**

- 10.1 Aberdeen City shall use all reasonable endeavours to acquire a valid and marketable title to the Site as soon as reasonably practicable and in any event prior to the Contract Execution Date. Without prejudice to the Procurement Principles set out in Part 4 of the Schedule, failure to acquire a valid and marketable title as a result of the suspensive conditions in the Missives not being purified shall be a project risk with no claim arising between the Parties.
- 10.2 No later than the OJEU Publication Date, Aberdeen City shall deliver to Aberdeenshire and Moray a duty of care letter in terms acceptable to the Moray and Aberdeenshire acting reasonably, from Amec Forster Wheeler in relation to the Amec Forster Wheeler Report on the Site dated March 2015.
- 10.3 The Parties agree that they shall jointly instruct a suitably qualified consultant to undertake a review of the evidence provided by SGN in support of completion of remediation as soon as practicable after Aberdeen City acquires a valid and marketable title to the Site to confirm ground conditions for the purposes of the Project.

- 10.4 Without prejudice to the provisions of Clause 11, if Aberdeen City withdraws from the Project or fails to execute the Operational Inter-Authority Agreement, it shall as soon as practicable thereafter, if required by the remaining Councils transfer its title and whole interest to the Site or where Aberdeen City has not acquired title to the Site, its whole right and interest in the Missives (including any rights it may have in relation to the remediation of the Site) to the remaining Councils (or one of them) for an amount equal to the Price paid (if any) for the Site by Aberdeen City under the Missives.

11. WITHDRAWALS DURING THE PROCUREMENT PROCESS

- 11.1 Each Council acknowledges that its withdrawal from the Project will result in the remaining Councils incurring additional costs. These additional costs include, but are not limited to, the cost of undertaking a change to or re-procurement of the Contract, the opportunity costs resulting from any consequential delay in the Contract Execution Date, and the increased costs arising from re-apportioning the milestone payments between the remaining Councils.
- 11.2 Subject to Clause 11.3, if a Council withdraws from the Project or fails to execute the Operational Inter-Authority Agreement for whatever reason and irrespective of whether it has complied with its obligation to use all reasonable endeavours under Clause 4.1.8 (ii), it shall:
- 11.2.1 indemnify each of the remaining Councils against any reasonably incurred additional costs they may incur arising from, or in connection with its withdrawal or failure to execute the Operational Inter-Authority Agreement, including the costs of re-procurement if the procurement has to be cancelled as a result of the withdrawal;
 - 11.2.2 indemnify each of the remaining Councils against any damage, expenses, liability or costs reasonably incurred by those Councils in contesting any claim resulting from or attributable to its withdrawal or failure to execute the Operational Inter-Authority Agreement; and
 - 11.2.3 not recover any contributions previously made by it which have been expended as at the date of its withdrawal; and
- 11.3 Where any Council withdraws from the Project or fails to execute the Operational Inter-Authority Agreement (for whatever reason and irrespective of whether it has complied with its obligation to use all reasonable endeavours under Clause 4.1.8 (ii)):
- 11.3.1 its obligations and rights in relation to the delivery and governance of the Project shall immediately cease
 - 11.3.2 any financial obligations of that Council which may have arisen or may arise out of the performance of this Agreement, including any obligation to indemnify the other Councils as a result of such withdrawal or failure to execute the Operational Inter-Authority Agreement shall remain in force;

- 11.3.3 where that Council has title to the Site or a right to acquire title to the Site, its obligation to transfer title to the Site or its right to acquire title to the Site to the other Councils as set out in Clause 10.2 shall remain in force;
- 11.3.4 it shall afford all non-financial co-operation necessary to facilitate the delivery of the Project by the remaining Councils, including agreement that all jointly funded or jointly owned assets, including land, roads, utilities and other project infrastructure procured up to and including the date on which the Council withdraws or fails to execute the Operational Inter-Authority Agreement shall be provided to the other Councils for the exclusive use of the Project, as originally envisaged; and
- 11.3.5 if the remaining Councils so require, it shall, notwithstanding its withdrawal from the Project or failure to execute the Operational Inter-Authority Agreement, agree to deliver its Contract Waste to the EFW Facility on terms to be agreed by the Councils (acting reasonably).

12. ABANDONMENT OF THE PROJECT

- 12.1 Without prejudice to Clause 12.3 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 Operational Inter-Authority Agreement.
- 12.2 The Project will be deemed to be abandoned on 30 June 2017 if the OJEU Publication Date does not occur before that date, unless the Project Board unanimously agrees otherwise;
- 12.3 Where the Operational Inter-Authority Agreement has not been executed by each of the Councils by the 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.
- 12.4 Where the Project has been abandoned pursuant to Clause 12.1, the Councils shall use all monies within the Project Budget at the date of abandonment to settle the Procurement Costs which are due and payable at such date. Where there are insufficient funds within the Project Budget to settle all such Procurement Costs, each Council shall pay their proportion (as set out in Clause 8.1) of the remaining costs from their own internal budget. Any surplus monies from the Project Budget following settlement of such Procurement Costs shall be apportioned with reference to each Council's share under Clause 8.1 and each Council shall receive their respective share of the surplus monies no later than thirty (30) days after full settlement of the Procurement Costs.

13. COUNCIL LIABILITIES

- 13.1 Subject to Clause 13.2 and except in relation to any liability arising as a result of any Council withdrawing from the Project or failing to execute the Operational Inter-Authority Agreement, or failing to transfer title to the Site in accordance with Clause 10.2, each Council's total liability under this Agreement 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 8.1 of the total Project Budget.

- 13.2 Nothing in this Agreement shall exclude or limit:
- 13.2.1 any Council's liability for fraud or fraudulent misrepresentation; or
 - 13.2.2 any Council's liability for death or personal injury caused by its (or its agent's or sub-contractor's negligence).
- 13.3 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.
- 13.4 Subject to Clause 13.6 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.
- 13.5 Subject to Clause 13.6 below and without prejudice to Clause 13.4 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.
- 13.6 Where a member of the Project Team considers at any time that their compliance with the obligation under Clause 13.4 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.
- 13.7 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.
- 13.8 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.

14. **TERMINATION**

- 14.1 Without prejudice to Clause 15 (*Consequences of Termination*) below, this Agreement shall terminate on the earliest of:-
- 14.1.1 the Contract Execution Date;
 - 14.1.2 the date upon which only one Council remains a party to this Agreement following a second Council withdrawing from the Project or failing to execute the Operational Inter-Authority Agreement.;
 - 14.1.3 the date upon which all Councils agree in writing to its termination;
 - 14.1.4 the date upon which the Councils collectively decide to abandon the Project in accordance with Clause 12.1

- 14.1.5 30 June 2017 if the Project is deemed to be abandoned in accordance with Clause 12.2.

15. CONSEQUENCES OF TERMINATION

- 15.1 The termination of this Agreement pursuant to Clause 14 (*Termination*) above shall:-
- 15.1.1 be without prejudice to any other rights or remedies which any Council may be entitled to under this Agreement;
- 15.1.2 not affect any accrued rights or liabilities which any Council may then have; and
- 15.1.3 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 Clauses 8 (*Project Budget and Costs*), 12 (*Withdrawals During the Procurement Process*), 12 (*Abandonment of the Project*), 13 (*Council Liabilities*), 15 (*Consequences of Termination*) 16 (*Intellectual Property*), and 17 (*Confidentiality and Freedom of Information*).

16. INTELLECTUAL PROPERTY

- 16.1 Each Council shall own all property rights (including all Intellectual Property Rights) in its respective Material.
- 16.2 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.
- 16.3 Without prejudice to Clause 16.1, if more than one Council has a legal or beneficial right or interest in any aspect of the Materials for any reason (including the eventuality that no Council has the ability to demonstrate that it independently supplied or created the Materials 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.
- 16.4 Each Council hereby warrants that it has the necessary rights to grant the licences under Clauses 16.2 and 16.3. Subject to Clause 13 (*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.

17. CONFIDENTIALITY AND FREEDOM OF INFORMATION.

- 17.1 The Councils acknowledge that the commercial information contained within this Agreement and all information as referred to in Clause 17.2 below shall remain confidential in and in particular but not limited to Schedule part 2, and Schedule Part 4 paragraph 13.

- 17.2 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.
- 17.3 Clauses 17.1 and 17.2 above shall not apply to:
- 17.3.1 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;
 - 17.3.2 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 17 (*Confidentiality and Freedom of Information*);
 - 17.3.3 any disclosure to enable a determination to be made under Clause 26 (*Dispute Resolution Procedure*);
 - 17.3.4 any disclosure which is required pursuant to any statutory, legal (including any order of a court of competent jurisdiction) or Parliamentary obligation placed upon the Council making the disclosure or the rules of any stock exchange or governmental or regulatory authority;
 - 17.3.5 any disclosure of information which is already lawfully in the possession of the receiving Council(s), prior to its disclosure by the disclosing Council;
 - 17.3.6 any provision of information to the Council's own professional advisers or insurance advisers;
 - 17.3.7 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;
 - 17.3.8 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;
 - 17.3.9 any disclosure for the purpose of:
 - (i) the examination and certification of any of the Council's accounts;
 - (ii) 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;
 - (iii) complying with a proper request from any Council's insurance adviser, or insurer on placing or renewing any insurance policies; or
 - (iv) (without prejudice to the generality of Clause 17.3 above) compliance with the FOISA and/or the Environmental Information Regulations;

provided that, for the avoidance of doubt, neither Clause 17.3.2 nor Clause 17.3.9(iv) above shall permit disclosure of Confidential Information otherwise prohibited by Clause 17.2 above where that information is exempt from disclosure under section 36 of the FOISA.

- 17.4 Where disclosure is permitted under Clause 17.3 (other than Clauses 17.3.2, 17.3.4, 17.3.5 and 17.3.9 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.
- 17.5 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 17.6 to 17.10 inclusive below.
- 17.6 Where a Council (the "**Requesting Council**") receives a Request for Information in relation to Information that another Council (the "**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:
- 17.6.1 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
- 17.6.2 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.
- 17.7 Following notification under Clause 17.6 , and up until such time as the Disclosing Council has provided the Requesting Council with all the Information specified in Clause 17.6.1 , the Disclosing Council may make representations, within 5 Business Days of receiving such notification, to the Requesting Council where it considers that:-
- 17.7.1 the Information is exempt from disclosure under the FOISA or the Environmental Information Regulations;
- 17.7.2 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;
- 17.7.3 the Information should not be disclosed in response to the particular Request for Information; and/or

- 17.7.4 further information should reasonably be provided in order to identify and locate the information requested.
- 17.8 Where the Disclosing Council has made representations under Clause 17.7 (save a representation under Clause 17.7.4), 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 17.6) 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.
- 17.9 In the event of a request from the Requesting Council pursuant to Clause 17.6 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 its own FOISA policy from time to time.
- 17.10 The Disclosing Council acknowledges that (notwithstanding the provisions of this Clause 17) 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:
- 17.10.1 in certain circumstances without consulting with the Disclosing Council; or
- 17.10.2 following consultation with the Disclosing Council and having taken their views into account,

provided always that where Clause 17.10.1 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.

17.12 The obligations in this Clause 17 shall survive the termination of this Agreement.

18. **OMBUDSMAN AND COMPLAINTS**

18.1 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:-

18.1.1 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

18.1.2 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).

18.2 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.

18.3 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.

18.4 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.

18.5 Where the Scottish Public Services Ombudsman issues a report under sections 15 or 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.

19. **NOTICES**

19.1 Subject to Clause 19.2, 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.

19.2 Any notice under Clause 19.1 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: Marc Cole

E-mail: []macole@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 Services)

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).

19.3 Any notice served under Clause 19.1 19.1 shall be deemed to have been received:-

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

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

19.3.3 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).

20. WAIVER

20.1 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.

21. ENTIRE AGREEMENT

21.1 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.

22. ASSIGNATION

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

23. VARIATION

23.1 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.

24. SEVERANCE

24.1 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.

25. THIRD PARTY RIGHTS

25.1 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.

26. DISPUTE RESOLUTION PROCEDURE

26.1 Any disputes or differences arising between the Councils in relation to this Agreement shall be resolved in accordance with this Clause 26 having regard to their obligation under Clause 4.1.1 to act in good faith.

26.2 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.

27. GOVERNING LAW AND JURISDICTION

27.1 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.

27.2 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).

IN WITNESS WHEREOF these presents consisting of this and the preceding [26] pages together with the Schedule of [5] parts and the plan annexed are executed as follows:

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

At
On
In the presence of:

.....
Signature

.....
Name

.....
Address

SEALED AND SUBSCRIBED for and)
on behalf of
Aberdeenshire Council by)

At
On
In the presence of:

.....
Signature

.....
Name

.....
Address

SEALED AND SUBSCRIBED for and)
on behalf of
The Moray Council by)

At
On

In the presence of:

.....
Signature

.....
Name

.....
Address

SCHEDULE

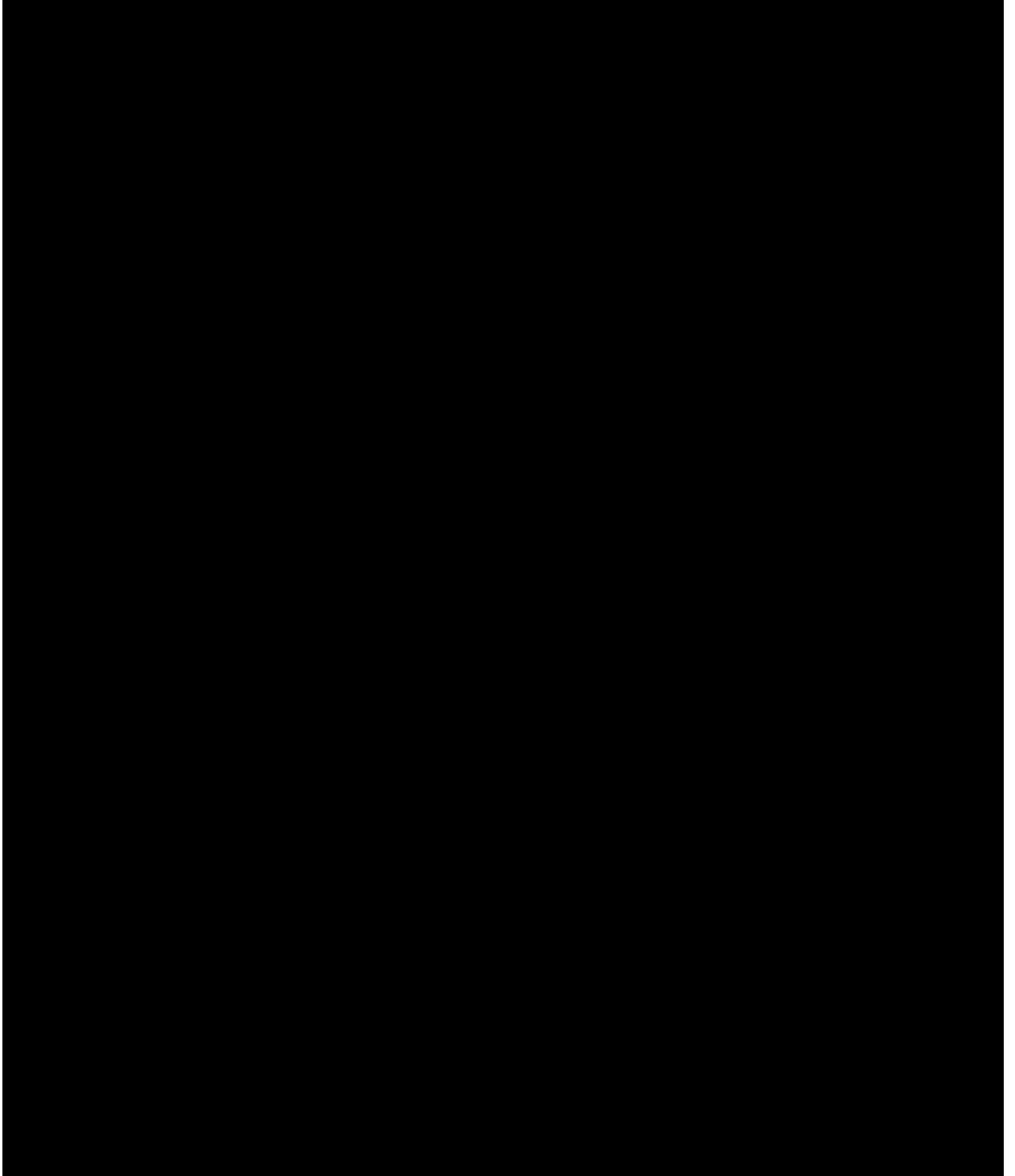
PART 1

PROJECT MILESTONES AND KEY DECISIONS

NO.	DESCRIPTION OF MILESTONE	PROJECT TEAM DECISIONS	PROJECT BOARD DECISIONS	COUNCILS DECISIONS	DATE TO BE ACHIEVED
1.	Agreement to continue Project if OJEU Contract Notice is not published by the 30 June 2017		✓		29 June 2017
2.	Agree Evaluation Criteria for Procurement Process (including PQQ and main tender evaluation criteria)		✓		31 January 2017
3.	Prepare tender documentation (including terms and conditions of Contract)	✓			31 January 2017
4.	Approval of Procurement Documentation including Selection and Award Criteria and publication of OJEU Contract Notice		✓		31 January 2017
5.	Evaluation and ranking of ESPD Responses	✓			31 March 2017
6.	Approval of Bidders to be invited to participate in dialogue		✓		31 March 2017
7.	Decision to Suspend Dialogue following a Project Team recommendation.		✓		
8.	Tender Evaluation	✓			
9.	Down Selection of Bidders Project Board to down select bidders following a Project Team recommendation.		✓		31 December 2017
10.	Approval of and issuing the Invitation to Submit Final Tenders		✓		31 March 2018
11.	Decision to close Dialogue		✓		
12.	Selection of Preferred Bidder following a Project		✓		31 May 2018

NO.	DESCRIPTION OF MILESTONE	PROJECT TEAM DECISIONS	PROJECT BOARD DECISIONS	COUNCILS DECISIONS	DATE TO BE ACHIEVED
	Team recommendation.				
13.	Recommend terms of Operational Inter-Authority Agreement for approval by Councils		✓		31 May 2018
14.	Contract Award Approval and Operational Inter Authority Agreement Approval (IAA3)			✓	30 June 2018
15.	Publish Contract Award Notice in OJEU for Contract Award	✓			31 October 2018
16.	Recommend Project Budget for period following the Contract Execution Date	✓			31 October 2018
17.	Where Project Milestone [13] has not been achieved by 21 December 2018, Councils shall consider whether the Project should be abandoned pursuant to Clause 12			✓	21 December 2018 (Procurement Longstop Date) ²

PART 2
PROJECT BUDGET



PART 3
COUNCILS' PROGRAMME

Activity	Timescale
Lodging of Notice to OJEU	January 2017
ESPD Return Date	March 2017
Completion of ESPD Shortlisting	March 2017
Invitation to Participate in Dialogue issued to up to 4 Bidders	April 2017
Initial Dialogue Phase (6 Sessions each)	May – October 2017
Detailed Solutions Submission Date	November 2017
Down-selection to 2-3 bidders	End December 2017
Final Dialogue Phase (2-3 sessions each)	January/February 2018
Invitation to Submit Final Tenders	March 2018
Final Tenders Submission Date	March/April 2018
Final Tender Clarification and Evaluation	April/May 2018
Preferred Bidder Appointment	June 2018
IAA3/Financial Close/Contract Award	August 2018
Target Service Commencement	August 2021

PART 4

PROCUREMENT PRINCIPLES

1. Works and Services to be procured

A design, build and operate contract will be procured, with an operating period of circa 20 years.

2. Public Sector Contracting Entity.

The Project shall be procured using a Lead Authority model.

3. Site

The EFW Facility will be built on the Site. The Site will have planning permission for the construction of the EFW Facility prior to the issue of the OJEU. The Contractor will be required to apply for and procure the PPC Permit for the EFW Facility.

Title to the site shall be held by the three Authorities in the propositions as set out in the Project Share Percentage (more particularly described at paragraph (7) seven below).

The Site will be leased to the Contractor for a peppercorn rent.

4. Ground Condition/Contamination

Ground Condition and Contamination shall be a Project risk shared between the Councils according to their Project Share Percentage.

5. Mandatory Requirements

- Bids submitted by Bidders will, as a minimum, be required to comply with the following mandatory requirements:
 - Construction of the EFW Facility on the Site;
 - Ability to supply heat to a District Heat Network;
 - Compliance with the Waste (Scotland) Regulations 2012; and
 - Operation of the EFW Facility for an operating period of 20 years.

6. Procurement Strategy

The Project will be procured using the competitive dialogue procedure. The contract will be awarded to the Bidder that submits the most economically advantageous tender based on the best price/quality ratio. The price will be evaluated on the basis of whole life cost. The procurement strategy will include an evaluation of community benefits which Bidders offer as part of their bids.

7. Project Share Percentage

Each Council's Project Share Percentage will be calculated on basis of relative percentages of Contract Waste tonnages for the year 2017.

Contract Waste Tonnages will be determined from the 2017 published residual household waste data from each Council.

The Project Share Percentage will not be revisited during the term of the Contract.

8. Calculation of Capital Contribution

Each Council's capital contribution will equal its Project Share Percentage of the aggregate cost of Site acquisition, design, build and commissioning of the EFW Facility. The cost of Site acquisition is the price payable for the Site in terms of the Missives (together with any Land and Building Transaction Tax and legal fees but exclusive of any interest that may become payable on the price). For the avoidance of doubt this shall also include the cost required to transfer the site into the name of the three authorities in the ratio set out by the Project Share Percentage.

9. Treatment of Income derived from Heat, Power and Third Party Waste

Heat³

The PPC Permit will require the EFW Facility to be capable of meeting a minimum thermal efficiency level (currently 35%). Given the Councils understanding of current technology, this means the EFW Facility will have to be capable of producing heat which can be utilised locally. It is recognised by the three Councils that heat take off reduces the amount of electricity capable of being produced and consequently the amount of income generated.

The Councils will agree to offer heat from the EFW Facility to an operator willing to establish a District Heating Network to provide heat to domestic customers sufficient to enable the minimum thermal efficiency level to be achieved. Any agreement between the Councils and a District Heating Network operator should be transparent and on an open book basis.

Any further heat required above this minimum thermal efficiency level will be supplied on a strictly commercial basis.

Aberdeen City undertakes to the other Councils to prepare and develop a business plan to demonstrate or try to demonstrate the financial viability of a District Heating Network using heat derived from the EFW Facility. .

Power

The Contractor will take volume risk but not price risk.

Subject to the position on Heat, each Council will receive its Project Share Percentage of income generated by the Contractor from Heat, Power and Third Party Waste which is to the public sector's benefit.

The Councils will receive all the benefit of income generated from Energy and will negotiate a sharing mechanism for third party waste and any other third party income stream (e.g. recyclates).

10. Definition of Contract Waste

The definition of Contract Waste will include all municipal solid waste. Street sweepings will be excluded from the definition of Contract Waste.

11. Maximum Tonnage

The maximum tonnage each Council will be permitted to send to the EFW Facility each year will be the proportion of the overall Maximum Tonnage which the Contractor is obliged to accept from the Councils which is equal to each Council's Project Share Percentage. For example if one Council's Project Share Percentage is 50% and the overall Maximum Tonnage which the Contractor is obliged to accept from the Councils is 150,000 tonnes, that Council's Maximum Tonnage will be 75,000 tonnes.

12. Excess Waste and Spare Capacity

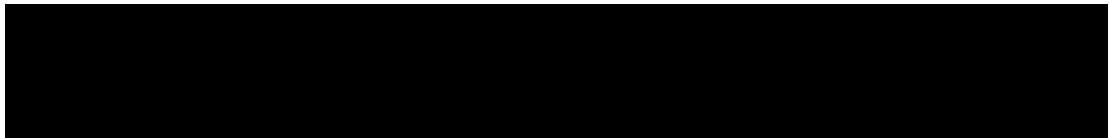
Excess Waste

The Contractor will be obliged to accept Contract Waste above the Maximum Tonnage (but the Councils will not be obliged to send it to him). If this waste cannot be processed at the EFW Facility it will be charged to the Councils as a pass through cost on a basis of the rate for Excess Waste to be set by the Contractor as part of the Contractor's bid.

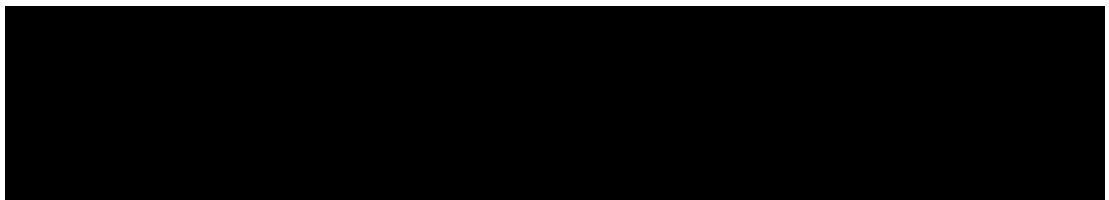
Spare Capacity

Any capacity not used by one Council may be used by the other Council. The detailed mechanism to administer this principle is to be developed.

13. Guaranteed Minimum Tonnage



14. Exclusivity



15. Residual Value of the Facility and Site

The Contractor will be required to hand the EFW Facility back with a residual life of 5 years and all contamination it has caused (relative to the baseline established at contract execution) remediated.

All Council's will share in the residual value of the EFW Facility and the Site and any decommissioning costs not taken by the Contractor at the end of the contract in accordance with the Project Share Percentage.

The Councils will attempt to reach agreement on a future course of action regarding the use or otherwise of the EFW Facility following expiry of the Contract at least 5 years prior to the expiry of the Contract. Unless the Councils agree otherwise if no other course of action is agreed unanimously between the Councils at least one year prior to the expiry of the Contract (e.g. award of another operating contract, one Council buying out the other

Councils' interest), the Site will be sold as soon as possible after expiry and the proceeds from the sale divided between the Councils' in accordance with their respective Project Share Percentage.

16. Liability Issues

Each Council will be liable for any indemnity claim from the Contractor arising as a result of damage attributable to that Council.

PART 5

PROJECT OBJECTIVES AND CRITERIA

The following are the high level objectives of the project and criteria for success.

Objectives:

To provide an affordable, reliable solution for the management of residual municipal waste post 2021

Criteria to be met:

- The solution allows the Councils to move away from landfill within the statutory time limits or as soon as possible thereafter
- The solution is economical and tax efficient with the long term price of waste disposal being predictable, smooth and secure.
- The solution must be deliverable in political, planning, technical, commercial and environmental terms
- The project delivers a local solution that delivers benefits to the North East (local defined as within the 3 authority areas) including jobs, heat and power.
- The solution ensures that the energy produced fully and fairly benefits the Councils and where appropriate the communities served by the Councils
- The project (including during the operational phase) is accountable to the three partner Councils
- The solution recognises partnership working with the risks and benefits being shared in proportion to the partners' contributions
- The solution includes reliable technology with a proven track record
- The solution is provided by a Contractor with a proven track record
- The solutions is a facility capable of meeting Necessary Consents (Planning & Permitting)
- The facility optimises thermal efficiency levels in order to meet SEPA's Thermal Treatment Guidelines with minimal impact on electricity revenue
- The solution is able to cope with a wide range of input material calorific values (CV) to address changing waste composition over the project's lifetime
- The project attracts maximum competition in order to secure best value;
- The solution does not interfere with achieving best practicable levels of source segregated recycling;
- The solution must be commercially understandable and acceptable to the various market players, minimising and transferring or sharing risks with the contractor where appropriate; and
- The solution encourages innovation and optimises post-processing recycling and recovery.

Part 6
SITE PLAN

