

SCHEDULE 21

Unitary Charge Adjustment Protocol

1. Introduction

1.1 Whenever a Relevant Event occurs, the financial consequence shall (save where otherwise provided in this Contract or where the Parties mutually agree otherwise) be determined in accordance with this Schedule 21 (Unitary Charge Adjustment Protocol) which sets out the methodology to be applied whenever an amendment of, addition to or deletion from the Base Case and/or the Unitary Charge is required in response to a Relevant Event. For the avoidance of doubt:

- (a) the provisions of this Schedule 21 shall not apply to a Qualifying Refinancing; and
- (b) where a Relief Event has occurred which postpones the NWTF Planned Completion Date (and, as a consequence, the Expiry Date) in accordance with clause 20.2.4, the provisions of this Schedule 21 shall apply to the financial consequences of the Relief Event (which will be a "Relevant Event" for the purposes of this Schedule 21).

1.2 Where in accordance with this Schedule 21 the Base Case or the Unitary Charge is to be adjusted by reference to a Relevant Event, this shall be carried out by the Contractor (in consultation with the Councils as set out in this Schedule 21), to reflect the cumulative impact of any prior Relevant Events on the version of the Base Case applicable immediately prior to the Relevant Event to reflect the impact of the Relevant Event in respect of which such adjustment is being undertaken.

2. Base Case

The Base Case at the Amendment and Restatement Date shall comprise the SPV financial model in the Agreed Form being the Microsoft Excel document ref

Derby Financial Close Model - 20 August 2014

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The Parties acknowledge that the Base Case has been prepared by reference to a suite of underlying models being the following Microsoft Excel models:

- (a) Waste Flow Model (initial services), ref *Derby Initial Services Financial Close*
- (b) Operating Company Model (initial services), ref *Derby Initial Services Financial Close*
- (c) A co-ordinating Master model (initial services), ref *Derby Initial Services Financial Close*
- (d) Waste Flow Model (full services), ref *Derby Financial Close*
- (e) Capital Expenditure Model, ref *Derby Financial Close*
- (f) Operating Company Model (full services), ref *Derby Financial Close*
- (g) A co-ordinating Master model (full services), ref *Derby Financial Close*

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which the Councils may refer to, as appropriate, in assessing any amendment to the Base Case or the Unitary Charge but which the Parties agree shall not be

determinative of any change to the Base Case or Unitary Charge in accordance with this Schedule 21. For the avoidance of doubt, the Contractor shall not be obliged (and the Councils shall not be entitled) to update any of the models listed at (a) to (g) above when amending the Base Case or the Unitary Charge in accordance with this Schedule 21.

3. **Adjustment of Unitary Charge following a Relevant Event**

3.1 Any adjustments to the Base Case or the Unitary Charge (or to the dates set out therein) in response to a Relevant Event (a **"Relevant Event Adjustment"**) shall be calculated by the Contractor in accordance with principles set out in paragraph 3.2 below.

3.2 The Relevant Event Adjustment shall be made using the approach below as appropriate:

3.2.1 where the Estimated Change in Project Costs, Change in Costs and/or Change in Revenues associated with a Relevant Event do not include a requirement for additional funding and the Change in Costs or Change in Revenue can be addressed between the Parties without making changes to the Base Case, the relevant elements of the Unitary Charge shall be adjusted by an amount equating to the net change in the Change in Costs and/or Change in Revenues, and taking into account the Operating Contractor's operating margin of 10%; or

3.2.2 where the Change in Costs and/or Change in Revenue can only be determined by a change to the Base Case but where additional funding is not required then the provisions in paragraphs 4 and 5 will be implemented to determine how the relevant elements of the Unitary Charge will be adjusted by the lowest amount necessary to maintain the following parameters (the **"Key Financial Parameters A"**):

(a) an Operating Contractor's operating margin of 10% (where appropriate);

(b) a Base Case Equity IRR (in nominal terms) of 14% as shown in cell E41 of the worksheet entitled Base Case Output – Summary within the Base Case; and

(c) the following funders covenants of at least ADSCR (as defined in the Senior Financing Agreement) of 1.35 and a minimum LLCR (as defined in the Senior Financing Agreement) of 1.40 as per cells J6 and J9 respectively of the worksheet entitled Base Case Output – Summary within the Base Case the Debt Service Reserve Account Required Balance (as defined in the Senior Financing Agreement) and the LRA Required Balance (as defined in the Senior Financing Agreement) and financial gearing; or

3.2.3 where additional funding is required then the provisions in paragraphs 4 and 5 will be implemented to determine how the relevant elements of the Unitary Charge will be adjusted by the lowest amount necessary to maintain the following parameters (the **"Key Financial Parameters B"**):

(a) an Operating Contractor's operating margin of 10% (where appropriate);

- (b) a Base Case Equity IRR Blended (nominal) of 14% as shown in cell E41 of the worksheet entitled Base Case Output – Summary within the Base Case; and
- (c) the relevant terms of the additional funding that may be required by the Senior Lenders.

3.3 Notwithstanding any other provision of this Schedule 21, the Councils shall be entitled to pay any sum (or part thereof) which would give rise to an adjustment of the Unitary Charge by way of a lump sum, in which event and to that extent there shall be no adjustment of the Base Case under this Schedule 21.

4. **Model Adjustment Process**

4.1 Where in respect of a Relevant Event paragraph 3.2.1 only has been implemented the Parties agree that such change shall, on the next occasion that there is a revision to the Base Case in accordance with this Schedule 21, be consolidated as an update to the Unitary Charge and Base Case.

4.2 Where in respect of a Relevant Event paragraph 3.2.2 or 3.2.3 is to be implemented then the Parties agree that any changes to any element of the Unitary Charge shall be by way of a revision to the Base Case in accordance with this Schedule 21.

4.3 The Unitary Charge shall be revised so as to ensure that the Contractor is in a no better and no worse position (as defined by paragraph 5.3 below) than it was under the Base Case applicable immediately prior to the Relevant Event to reflect the impact of the Relevant Event in respect of which such adjustment is being undertaken. In no circumstances shall any revision provide compensation to the Contractor for any deviation in performance from that predicted in the latest Base Case.

4.4 In calculating the Estimated Change in Project Costs and in assessing other adjustments to be made to the Base Case arising from a Relevant Event, the Contractor shall be entitled to take into account, inter alia:

- 4.4.1 any Change in Costs and Change in Revenue without double counting any financing costs relating to the additional capital expenditure;
- 4.4.2 reasonable economic assumptions and market prices available to the Contractor in respect to the Relevant Event at the time; and
- 4.4.3 changes in the prospective technical performance of the Project arising as a result of the Relevant Event,

provided that the Councils shall not be required (and the Contractor shall not be entitled) to (otherwise than as provided in this Schedule 21) take into account the financial impact up to the date of the Relevant Event those risks which the Contractor bears under the terms of this Contract, including (to the extent so borne by the Contractor under this Contract) changes in VAT rates, taxation rates and the impact of Unavailability Deductions and Performance Deductions.

4.5 If the Base Case is to be revised, then the Contractor shall make appropriate electronic amendments to it to effect such revisions made in accordance with this Schedule 21.

4.6 Where a revision to the Unitary Charge is required but no change is required to the Base Case model, the Contractor shall issue the calculations used to determine the relevant variance to the Unitary Charge and shall submit to the Councils.

5. **Model Principles of Adjusting the Base Case**

5.1 The following guidelines shall be followed in revising the Base Case:

5.1.1 wherever possible the revision shall be carried out without altering the logic, formulae, inputs and assumptions incorporated in the Base Case in any way whatsoever and only data such as costs incurred by the Contractor and the timing and amounts of draw downs of funding shall be changed. For the avoidance of doubt, any such revision to the Base Case will not constitute a Refinancing;

5.1.2 where it is necessary to amend the logic, formulae, inputs and assumptions incorporated in the Base Case to permit revisions to be made, this shall be carried out to the minimum extent necessary and, including but not limited to, in accordance with generally accepted accounting principles as used within the International Financial Reporting Standards;

5.1.3 where any amendment is to be made to the logic, formulae and assumptions within the Base Case, such changes will be made first to ensure that the outputs from the Base Case as amended correspond to the outputs immediately prior to amendment and the difference in the Project IRR Post Tax Cell E38 within the worksheet entitled Base Case Output Summary in the Base Case at the Amendment and Restatement Date does not differ by more than two (2) basis points (being zero point zero two per cent (0.02%));

5.1.4 once the Parties have confirmed that the Project IRR Post Tax is in accordance with paragraph 5.1.3, the inputs in respect of the Relevant Event will be included in the Base Case which will then be solved to confirm whether a revision to the Unitary Charge is required and the relevant Key Financial Parameters have been met, and if so the model shall be used to calculate the Unitary Charge necessary to satisfy the provisions of paragraph 3.2.2 or 3.2.3 above as applicable;

5.1.5 unless otherwise agreed by the Parties in writing, the Parties shall not be permitted to backdate any change in the Unitary Charge as a result of the Relevant Event to a date which is earlier than the date on which the Relevant Event occurred;

5.1.6 where additional funding is required covenants imposed by lenders as part of such borrowing will be reflected in the updated Base Case; and

5.1.7 all revisions to the Base Case will require to be approved by Senior Lenders before becoming the updated Base Case for the purposes of this Contract.

5.2 Any amendment to the logic, formulae, inputs and assumptions incorporated in the Base Case shall be fully recorded so that the manner in which the relevant elements of the revised Unitary Charge is calculated can be readily verified.

5.3 Where, pursuant to the Contract, either Party is entitled to payment of any sum the assessment of which properly requires reference to the Base Case (with the exception of a Qualifying Refinancing, payment of the Councils' Refinancing Share to which clause 36 (Refinancing) shall apply and payment of any lost Third Party Income to which paragraph 7 of this Schedule 21 shall apply) the adjustment to the Unitary Charge due shall be that required to ensure that, by reference to the Base Case adjusted under this Schedule 21 the Contractor is left in a no better and no worse position than the Contractor would have been in under the version of the Base Case applicable immediately prior to the Relevant Event, and shall be ascertained by:

5.3.1 determining the adjustment to the Unitary Charge required to maintain the financial position of the Contractor with that in which it would have been under the version of the Base Case applicable immediately prior to the Relevant Event to reflect the impact of the Relevant Event in respect of which such adjustment is being undertaken;

5.3.2 reference to:

(a) the Contractor's rights, duties and liabilities under or arising pursuant to performance of this Contract, the Financing Agreements the Construction Contract and Operating Contract and to avoid doubt, this includes the costs of cancelling, breaking, extending, amending and/or replacing any hedging arrangements or instruments taken out by the Contractor pursuant to the Financing Agreements; and

(b) the Contractor's ability to perform its obligations and exercise its rights under this Contract, the Financing Agreements, the Construction Contract and the Operating Contract;

so as to ensure that the comparison of the output from the Base Case shows that the Project Post Tax IRR is unchanged (assessed to two decimal places).

5.4 If any material change in the risk profile of the Project arises from the revision, taking account of similar projects exposed to similar risks to those arising out of the circumstances giving rise to the revision, the Parties may agree that the Project IRR should be adjusted provided that such revision may only be an upwards adjustment unless the cost of the additional funding is less than that in the Base Case applicable immediately prior to the amendment.

6. Procedure

6.1 The Base Case shall be revised by the Contractor in accordance with the provisions of this Schedule 21 within fifteen (15) Business Days of the date at which the need for and basis of such a change become known.

6.2 If the Base Case is to be revised the Contractor shall revise the Base Case and submit to the Councils the revised Base Case for approval (such approval not to be unreasonably withheld or delayed).

6.3 The revised Base Case produced pursuant to paragraph 6.2 shall, when it is approved by the Councils (such approval not to be unreasonably withheld or delayed) and the Senior Lenders, become the Base Case for the purposes of this Contract until its further amendment in accordance with this Contract.

- 6.4 The Contractor shall ensure that each iteration of the Base Case is provided with a unique reference number and date.
- 6.5 The costs of undertaking a revision of the Base Case shall be treated as a Change in Costs in respect of all Relevant Events and (for the avoidance of doubt) shall be incorporated within the revised inputs associated with the revisions to the Base Case as a result of such Relevant Event.
- 6.6 Where practicable, the Contractor shall use all reasonable endeavours to carry out revisions to the Unitary Charge in the month in which the Relevant Event occurs in order that the revised Unitary Charge may take effect at the beginning of the next Contract Month.
- 6.7 Following agreement of the revised Base Case, the Contractor shall:
 - 6.7.1 promptly deliver a copy of the revised Base Case to the Councils;
 - 6.7.2 return a copy of the revised Base Case to the Councils, having observed the necessary version control in accordance with paragraph 6.4 and the necessary revisions to the Unitary Charge to be made in accordance with this Schedule 21; and
 - 6.7.3 ensure that the necessary adjustments to the relevant element of the Unitary Charge shall be made from the Base Case Change Date but any revisions of the Unitary Charge shall not be due and payable until the copies of the revised Base Case have been returned to the Councils. Revisions that pre-date such approval will be paid by the Councils in the next Payment Period.
- 6.8 Unless otherwise agreed by the Parties in writing, the Contractor shall not be permitted to backdate any increase in the Unitary Charge as a result of a Change to a date which is earlier than the date on which the Change occurred.

7. **Third Party Income**

For the purposes of calculating the financial adjustment pursuant to the provisions of this Schedule 21 the following principles shall be applied to the following Relevant Events:

- 7.1 if the Relevant Event is caused by a Compensation Event, then for the purposes of determining the value of the adjustment to the Unitary Charge due, the financial adjustment shall include an amount in respect of lost Third Party Income equivalent to the amount shown in the Base Case for such Third Party Income;
- 7.2 if the Relevant Event arises from a Qualifying Change in Law, then for the purposes of determining the value of the adjustment to the Unitary Charge due, the financial adjustment shall include an amount in respect of lost Third Party Income equivalent to the lower of:
 - 7.2.1 the average performance, in respect of such Third Party Income, in the three Payment Periods prior to any relevant Qualifying Change in Law; or
 - 7.2.2 the amount shown in the Base Case;
 - in each case net of related costs.

- 7.3 if the Relevant Event arises from a Councils Change, then for the purposes of determining the value of the adjustment to the Unitary Charge due, the financial adjustment shall include an amount in respect of any net additional or lost Third Party Income (as the case may be);
- 7.4 if the Contractor serves a termination notice pursuant to the provisions of clause 59.5 and the Councils notify the Contractor pursuant to the provisions of clause 59.7 that they require the Contract to continue, then for the purposes of determining the value of the adjustment to the Unitary Charge due, the financial adjustment shall include:
- 7.4.1 an amount in respect of lost Third Party Income equivalent to the lower of:
- (a) the average performance, in respect of such Third Party Income, in the three Payment Periods prior to the service of the termination notice; or
 - (b) the amount shown in the Base Case;
- in each case net of related costs; and
- 7.4.2 any amount in respect of any increased landfill costs beyond those assumed in the Base Case (including landfill tax and transport costs), arising from the need to dispose of additional amounts of Waste to landfill,
- but shall not include any relevant changes to the value of the Unitary Charge and any such Facility shall be deemed to be Available until the relevant Force Majeure Event ceases to subsist.

8. **Disputes**

Where the Contractor, Senior Lenders and the Councils are unable to agree the revisions to the Base Case (including the actual version of the Base Case to be used prior to the required changes being made) within twenty (20) Business Days of submission of the revised Base Case by the Contractor to the Councils (or such other time period as is agreed between the Parties), then either Party shall be entitled to refer the matter for resolution under the Dispute Resolution Procedure. Where the Adjudicator so requires, he shall have the assistance of an independent auditor appointed by agreement between the Contractor and the Councils or, failing such agreement, determined by the Adjudicator.