

PROJECT 24

On behalf of
CAMDEN COUNCIL
CAMPBELLTOWN CITY COUNCIL
WINGECARRIBEE SHIRE COUNCIL
WOLLONDILLY SHIRE COUNCIL

RECEIVAL AND DISPOSAL SERVICES FOR MUNICIPAL
WASTE AND RESOURCE STREAMS

RFT T21/13



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Date

Receival and Disposal Services for Municipal Waste and Resource Streams Agreement

Campbelltown City Council

ABN 31 459 914 087

and

Cleanaway Pty Ltd

ACN 000 164 938

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Receival and Disposal Services for Municipal Waste and Resource Streams Agreement (T21/13)

Dated

Parties

| | |
|------------|--|
| Name | Campbelltown City Council ABN 31 459 914 087 |
| Address | 91 Queen Street, Campbelltown NSW 2560 |
| Email | tharun.kesavan@campbelltown.nsw.gov.au |
| Contact | Tharun Kesavan |
| Short name | Council |

| | |
|------------|--|
| Name | Cleanaway Pty Ltd ACN 000 164 938 |
| Address | Level 4, 441 St Kilda Road, Melbourne Vic 3004 |
| Email | stuart.baird@cleanaway.com.au |
| Contact | Stuart Baird |
| Short name | Contractor |

Background

- A. By request for tender process (T21/13) the Project 24 Councils sought tenders for the provision of the Services to Council.
- B. The Contractor was selected to provide the Services to each Project 24 Council, under separate agreements with each Project 24 Council.
- C. The Contractor has agreed to provide the Services to Council, subject to and upon the terms and conditions of this Agreement.

Operative Terms

The Parties agree

1. Interpretation

1.1 Definitions

The following definitions apply in this Agreement unless expressed to the contrary:

Adjustment Date has the meaning given to that term in Schedule 2.

Agreement means this document, including the schedules, annexures and any other document or materials incorporated by reference from time to time.

Alternative Facility means a facility other than the Disposal Facility, which is approved by Council under clause 5.4 for either or both of receiving and Disposing of Delivered Material under this Agreement.

Application means any application for an Approval relating to the Services including, for the avoidance of doubt, applications specifically defined in this Agreement such as an Application for a Planning Approval.

Approval means:

- (a) any authorisation, direction, consent, instruction, declaration, exemption, accreditation, licence, notarisation, permit, certificate, waiver or other approval, however described, given by an Authority (including, for the avoidance of doubt, approvals specifically defined in this Agreement); and
- (b) any authorisation in relation to anything that could be prohibited or restricted by Law if an Authority acts in any way within a specified period and that period has expired without that action being taken by the Authority,

including any renewal, amendment, modification or variation of or to any of them by any Authority.

Authority means any:

- (a) government department;
- (b) local government;
- (c) governmental or statutory authority; or
- (d) other person or entity which, under a Law, has a right to impose a requirement or whose consent is required in relation to the Services,

including Council when performing its regulatory functions but in that capacity only.

Best Industry Practice means the degree of skill, professionalism, care, prudence, diligence and contracting practice which would reasonably be expected from a skilled and experienced operator, contractor, manager or consultant engaged in the performance of services the same as, or substantially similar to, the Services.

Business Day means, unless the parties agree otherwise, any day that is not a Saturday, Sunday or public holiday in New South Wales.

Change in Control means any act, event or circumstance that results in or causes any variation, amendment or modification of the Control of the Contractor, where **Control** has the meaning in section 50AA(1) of the Corporations Act.

Change of Law means:

- (a) a change in an existing Law; or
- (b) a new Law,

(whether or not it is also a Qualifying Change under clause 11) which takes effect after the date of this Agreement.

Characteristic means in respect of any waste the type, classification, character, nature, content, quality, quantity, consistency, degree of homogeneity or heterogeneity, volume, or weight of waste or any combination of these and the manner in which the waste may break down or react in any circumstance and any consequential effects or bi-products of any such breakdown or reaction (and in other respects it has its plain English meaning).

Claim means any claim, notice, demand, debt, account, lien, liability, action, proceedings or suit however arising, including under, arising out of, or in any way in connection with:

- (a) this Agreement, or the Services;
- (b) any other contract, deed or agreement; or
- (c) either party's conduct under this Agreement whether before or after it came into force,

whether at law (including breach of contract) or in equity (including restitution), by statute, in tort (including negligence) or for restitution.

Collection Vehicle means a vehicle used by or on behalf of Council or its contractor for the delivery of Delivered Material to the Disposal Facility during the Services Term.

Conflict of Interest means any actual or potential:

- (a) obligation, direct or indirect financial or other interest;
- (b) connection to immediate relatives or close friends with a direct or indirect financial or other interest; or
- (c) personal bias, personal obligation, alliance, loyalty,

which may in any way affect decisions in connection with the Services or create a conflict with the Contractor's obligations under this Agreement.

Consequential Loss means, in respect of a party, loss of profit, loss of revenue, loss of goodwill, loss of future opportunities and loss of anticipated savings by that party whether arising in contract, tort (including negligence), equity, under statute or on any other basis at Law.

Contamination (of land) means the presence in, on or under land of a substance (whether a solid, liquid or gas) at a concentration above the concentration at which the substance is normally present on, in or under (respectively) land in the same locality, being a presence

that presents a risk of harm to human health or to any other aspect of the Environment. For the purpose of this definition a substance may present a risk of harm either on its own or by reason of the presence of or interaction with another substance or aspect of the land, structure or other matter (and **Contaminant (of land)** has a corresponding meaning).

Contract Date means the date identified in Item 1 of Schedule 1.

Contractor means the person named in this Agreement as the Contractor.

Contractor's Plant means the Disposal Facility and any other plant, implements, appliances, vehicles and equipment used, or to be used, by the Contractor or its contractors of any tier to undertake the Services.

Contractor's Representative has the meaning given in clause 2.8, as changed from time to time under clause 2.8.3, and includes any delegate of that person.

Contractor's Staff means each and every employee, agent or Subcontractor of the Contractor who is used by the Contractor (or a Subcontractor) to supply, provide, deliver or perform any part of the Services.

Contract Preparation Program means the Contractor's program, to be prepared in accordance with clause 2.4, for mobilisation and service implementation, which program sets out all key preparatory steps and milestones necessary to ensure the commencement of Services on the Services Commencement Date.

Corporations Act means the *Corporations Act 2001* (Cth).

Council means Campbelltown City Council ABN 31 459 914 087.

Council's Representative means each of the representatives of Council referred to in clause 2.7, as applicable in the context, as changed from time to time by written notice from Council to the Contractor under clause 2.7.4, and includes any delegate of that person.

CPI means the CPI (All Groups – Sydney) index as published by the Australian Bureau of Statistics from time to time.

Default Notice means a notice issued under clause 22.1.1.

Delivered Material means Mixed Waste.

Directions include an approval, authorisation, certification, decision, demand, determination, instruction, notice, order, permission, rejection, request or requirement.

Disclosed Information means all of the information disclosed to the Contractor by or on behalf of Council and includes all of the information listed or referred to in this Agreement.

Dispose or Disposal means activities or works to load, transport and dispose at the Disposal Facility any Delivered Material.

Disposal Facility means the disposal facility (or facilities) that is required to be made available by the Contractor for the receipt and Disposal of material under this Agreement. From the Services Commencement Date until otherwise approved by Council's Representative under clause 5.4.2, the location of the Disposal Facility is set out in Item 5 of Schedule 1.

Disposal Services means the provision of all of the operations, maintenance and management services related to the acceptance and Disposal of Delivered Material at the Disposal Facility, including as set out in the Specifications.

Dispute is defined in clause 31.1.

Disputed Service means a Service the subject of a Monthly Statement that is disputed in a notice issued by Council in respect of that Monthly Statement under clause 12.4.

Documentation means any document, record, system, program or other material which the Contractor is required by this Agreement (including the Specifications) to produce or contribute to in the provision of the Services or which is otherwise required in order to perform the Services at the Disposal Facility.

Emergency means a circumstance where, in the opinion of Council or Council's Representative, there is a potential or immediate threat:

- (a) to public interest, health or safety;
- (b) of damage to property; or
- (c) of harm to the Environment.

Endorse means acknowledge – it does not mean approve or adopt. The consequences of Endorsement are set out in clause 1.3.

Enforcement Notice means a notice issued under clause 22.2.

Environment means land, air, water, organisms and ecosystems and includes the built and cultural environment.

Environmental Law means any legislation which regulates or has as its purpose, objective or effect the regulation, protection or enhancement of:

- (a) the Environment; or
- (b) the interaction of any activity on land, or of land itself, with the Environment,

including the *Protection of the Environment Operations Act 1997* (NSW).

Environmental Management System means the Contractor's environmental management system that is maintained by the Contractor and Endorsed under clause 8 as part of the Management Systems, and:

- (a) is consistent with the outline of the Environmental Management System included in Part 2 of Schedule 10; and
- (b) contains an Environmental Emergency Plan that complies with the requirements of Schedule 9.

EPA means the New South Wales Environment Protection Authority constituted under the *Protection of the Environment Administration Act 1991* (NSW).

Expiry Date means the date stated in Item 3 of Schedule 1.

Facility Commencement Date means the Services Commencement Date.

Facility Operating Date means the date that is 6 months prior to the Facility Commencement Date for the Disposal Facility.

Fee or **Fees** means the total payments or periodic payments payable by Council under clause 12, as calculated from the Service Prices.

Force Majeure means any of the following circumstance that render it impossible for the Contractor to perform the Services or relevant obligation forming part of the Services:

- (a) lightning strike, severe storm, earthquake, natural disaster, landslide, bushfire, mudslide or tsunami;
- (b) sabotage, vandalism, malicious damage, riot or a 'terrorist act' as defined in the *Terrorism Insurance Act 2003* (Cth);
- (c) explosion, flood or fire resulting from any of the events in paragraph (a) or (b);
- (d) war (declared or undeclared), civil war, insurrection, invasion, rebellion, revolution, military action or usurped power, martial law, act of public enemy or embargo;
- (e) ionising radiation, radioactive contamination, nuclear contamination or toxic, chemical or biological contamination;
- (f) national or state-wide industrial action; or
- (g) governmental work stoppages, mandatory business, service or workplace closures, full or partial lockdowns of affected areas, quarantines, border closures and travel restrictions, resulting from an epidemic, pandemic or public health emergency,

that is beyond the reasonable control of a party, was not caused by an act or omission of the party, and could not have been prevented, avoided, mitigated, remedied or overcome by the party taking steps a prudent and reasonable person would have taken in the circumstances.

Gross Negligence means a negligent act or omission that arises as a result of a significant departure from the standard of care that would ordinarily be expected from a highly skilled and experienced person engaged in the same type of undertaking under the same or similar circumstances as the negligent person.

GST Laws means the GST law (as defined by *A New Tax System (Goods and Services Tax) Act 1999* (Cth)) together with all associated legislation and any additional or substituted legislation.

Heavy Vehicle National Law means the *Heavy Vehicle National Law (NSW) No 42a*, including each Regulation made under the *Heavy Vehicle National Law (NSW) No 42a*.

Insolvency Event, in relation to a person, means any of the following events:

- (a) the person, being an individual, commits an act of bankruptcy;
- (b) the person becomes insolvent;
- (c) the person ceases, suspends or threatens to cease or suspend the conduct of a majority of its business, or disposes of or threatens to dispose of its assets, except for the purposes of a solvent reconstruction or amalgamation previously approved by Council;
- (d) the person is or states that it is, or under applicable legislation is taken to be, unable to pay its debts (other than as a result of a failure to pay a debt or claim that is the subject of a dispute in good faith), or stops or suspends, or threatens to stop or suspend, payment of all or a class of its debts;
- (e) a receiver, receiver and manager, administrator, controller or similar officer of any of the assets or the whole or any part of the undertaking of the person is appointed;

- (f) a resolution is passed by the person to appoint an administrator, or an administrator of the person is appointed;
- (g) an order is made to appoint a liquidator or a provisional liquidator of the person;
- (h) the person resolves to wind itself up or otherwise dissolve itself, or gives notice of its intention to do so, except for the purposes of a solvent reconstruction or amalgamation previously approved by Council, or is otherwise wound up or dissolved;
- (i) an order is made that the person be wound up;
- (j) the person is, or makes a statement from which it may be reasonably inferred by Council that the person is, the subject of an event described in section 459C(2) of the Corporations Act;
- (k) the person assigns any of its property for the benefit of creditors or any class of them;
- (l) an order is made or a resolution is passed for the person to enter into any arrangement, compromise or composition with, or assignment for the benefit of, its creditors or any class of them, except for the purposes of a solvent reconstruction or amalgamation previously approved by Council;
- (m) any Security Interest becomes enforceable or is enforced against that person;
- (n) the person's interest in or under this Agreement or in the subject matter of this Agreement becomes attached or is taken, in execution or under any legal process;
- (o) a distress, attachment or other execution is levied or enforced against that person in excess of \$10,000;
- (p) the person has a judgment or order given against it in an amount exceeding \$10,000 (or the equivalent in another currency) and that judgment or order is not satisfied or quashed or stayed within 20 Business Days after being given;
- (q) any power of sale is exercised or steps are taken to take possession of any assets of the person subject to a Security Interest;
- (r) any step is taken to do anything listed in the above paragraphs; and
- (s) any event that is analogous or has a substantially similar effect to any of the events specified in this definition in any jurisdiction.

Intellectual Property Right means all present and future rights conferred by statute, common law or equity in or in relation to copyright, trademarks, designs, patents, circuit layouts, plant varieties, business and domain names, inventions and other results of intellectual activity in the industrial, commercial, scientific, literary or artistic fields whether or not registrable, registered or patentable.

Key Performance Indicator means each of the measures of Contractor performance in the Performance Management System.

Law includes:

- (a) Commonwealth and State legislation including regulations, by laws or other subordinate legislation;

- (b) principles of common law and equity;
- (c) requirements of Authorities and Approvals; and
- (d) guidelines, policies and codes of the Commonwealth, State and local governments and Authorities with which the Contractor is legally required to comply.

Loss includes any damage, expense, loss, cost (including legal costs on a solicitor/own client basis), duty, obligation or liability, either direct or indirect.

Management Systems means the management systems for management of quality, safety and environmental outcomes in performance of the Services, as identified in Item 8 of Schedule 1, which are to be developed and maintained by the Contractor under clause 8. To avoid doubt, the Management Systems may take the form of a single integrated management system.

Mixed Waste means mixed solid waste that has been collected by or on behalf of Council and delivered to the Disposal Facility in a Collection Vehicle during the Services Term, including waste that is sourced from the following categories of waste:

- (a) materials collected in Council's kerbside collection service via the red lidded bin or bin used for mixed waste (whether consolidated or not) and may include domestic or commercial waste materials;
- (b) materials collected in Council's public place litter bins;
- (c) materials collected at Council's administration and business premises; and
- (d) other mixed waste suitable for delivery to the Disposal Facility that is collected by or on behalf of Council.

Mobilisation Period means the period commencing on the Contract Date and ending the day before the Services Commencement Date.

Monthly Statement means a monthly statement submitted by the Contractor under clause 12.2.

Moral Rights means any of the rights described in Article 6bis of the Berne Convention for the Protection of Literary and Artistic Works 1886 (as amended and revised from time to time), being 'droit moral' or other analogous rights arising under any statute (including the *Copyright Act 1968* (Cth)) or any other Law (including any Law outside Australia), that exist, or that may come to exist, anywhere in the world.

Opening Hours means the hours specified for the opening of the Disposal Facility in the table in clause 7.1 of Schedule 6.

Operational and Management Plan means a plan prepared by or on behalf of the Contractor for a Disposal Facility, that is required to be provided to the Council's Representative under clause 5.3 and be Endorsed under clause 8, and that complies with the requirements of Schedule 9.

Operative Terms means clauses 1 to 32 of this Agreement.

Performance Management System means the system for measuring and benchmarking performance referred to in clause 9 and further described in Schedule 3.

Planning Approval means any of:

- (a) a development consent granted under Part 4 of the *Environmental Planning and Assessment Act 1979* (NSW);
- (b) an environmental assessment required by a determining authority under Division 5.1 of Part 5 of the *Environmental Planning and Assessment Act 1979* (NSW); or
- (c) an approval under Division 5.2 of Part 5 of the *Environmental Planning and Assessment Act 1979* (NSW).

Pollution means a release, emission or discharge into the Environment (including of a substance) which causes or has the potential to cause (directly or indirectly) damage or harm to any aspect of the Environment, for example:

- (a) pollution of air;
- (b) pollution of waters;
- (c) noise; and
- (d) pollution of land,

which is not authorised by a licence obtained under the *Protection of the Environment Operations Act 1997* (NSW) or other Environmental Law.

Project 24 Council means each of:

- (a) Camden Council;
- (b) Campbelltown City Council;
- (c) Wingecarribee Shire Council;
- (d) Wollondilly Shire Council.

Project 24 Council % means in any calendar month during the Services Term, the percentage of the tonnes of Delivered Material delivered to the Disposal Facility in that month compared to the total tonnes of material delivered to the Disposal Facility in that month by or on behalf of all Project 24 Councils.

Pricing Date means 1 July 2023.

Quality Management System means the Contractor's quality management system that is maintained by the Contractor and Endorsed under clause 8 as part of the Management Systems, and:

- (a) is consistent with the overview of the Quality Management System included in Part 3 of Schedule 10; and
- (b) contains a Chain of Responsibility Management Plan and Business Continuity Plan that each comply with the requirements of Schedule 9.

Reputable Insurer means an insurance company operating in Australia, or London having a credit rating of not less than A- at the inception of the policy by Standard & Poor's (Australia) Pty Limited or equivalent. (If the description or nomenclature of a credit rating specified in this definition or the manner in which a credit rating is calculated or determined changes

after the Contract Date, then the reference to a credit rating in this definition is to be taken to be the credit rating which most closely corresponds to the credit rating so specified.)

RFT means Request for Tender Number T21/13 – Receival, Processing and Disposal Services for Municipal Waste and Resource Streams.

Security means the performance security identified in clause 15.1, in the form required by clause 15.2.

Security Interest means:

- (a) any mortgage, pledge, lien, charge or other preferential right, trust arrangement, agreement or arrangement of any kind given or created by way of security, including a security interest (as defined in the *Personal Property Securities Act 2009*); and
- (b) any agreement to create or grant any arrangement described in paragraph (a).

Service Prices means for each of the Services the rates and prices which are stated in or calculated in accordance with Schedule 2, as adjusted under this Agreement.

Service Year means each one-year period commencing on the Services Commencement Date until the Expiry Date.

Services means the whole of the tasks, activities and services to be provided or performed by the Contractor under this Agreement on and from the Contract Date, as described in this Agreement (including the Specifications) and as may be varied in accordance with this Agreement, including any Documentation required to be created, provided or produced by the Contractor and any other services necessary to achieve the performance objectives of this Agreement, including:

- (a) the Disposal Services;
- (b) any other works or activities described in the Specifications or forming part of the Services; and
- (c) anything incidental or ancillary thereto required to be performed under this Agreement.

Services Commencement Date means the date specified in Item 2 of Schedule 1.

Services Fee has the meaning given to that term in Schedule 2.

Specifications means the specification for the provision of the Services by the Contractor under this Agreement, which is contained in Schedule 4.

Services Term means the period from the Services Commencement Date until the Expiry Date.

Subcontract means an agreement between the Contractor and a Subcontractor, or a Subcontractor and another Subcontractor, under which a Subcontractor is engaged to deliver or perform any part of the Services.

Subcontractor means a contractor (or sub-contractor of any tier) that is used to supply, provide, deliver or perform any part of the Services.

Tax means a tax, levy, contribution requirement, duty, charge, deduction or withholding, however it is described, that is imposed by law (including by an Authority), together with any

related interest, penalty, fine or other charge, other than one that is imposed on net income in any jurisdiction.

Tender means the Contractor's proposal submitted in respect of the RFT.

Tender Documents means the RFT and the Tender.

Term means the period from the Contract Date until the Expiry Date.

Unscheduled Opening Hours Request means a request issued by Council to the Contractor under clause 4.1.3 of the Specifications.

Unscheduled Opening Hours Fee means an amount of money calculated in accordance with clause 6 of Schedule 2.

Variation is defined in clause 11.1.

Waste Levy means the dollar amount levied under s88 of the *Protection of the Environment Operations Act 1997* (NSW) or any other levy or charge payable for the storage, processing or disposal of waste.

Weighbridge means the weighbridge located at the Disposal Facility, at the location which is specified in Item 18 of Schedule 1.

WHS Act means the *Work Health and Safety Act 2011* (NSW).

WHS Law means the WHS Act, the WHS Regulation, and any other work health and safety law, regulation, by-law standards and codes of practice that applies to work being carried out as part of the Services.

WHS Regulation means the *Work Health and Safety Regulation 2017* (NSW).

Wilful Default means a wanton or reckless act or omission which amounts to a wilful and utter disregard for the harmful and avoidable consequences of a person's action, but does not include errors of judgement, mistake, act or omission made in good faith.

Working Day means Monday to Sunday inclusive, and includes public holidays.

Workplace Health and Safety Management System means the Contractor's workplace health and safety management system that is maintained by the Contractor and Endorsed under clause 8 as part of the Management Systems, and:

- (a) is consistent with the outline of the Workplace Health and Safety Management System included in Part 1 of Schedule 10; and
- (b) contains a WH&S Emergency Plan that complies with the requirements of Schedule 9.

1.2 Rules for interpreting this Agreement

Headings are for convenience only, and do not affect interpretation. The following rules also apply in interpreting this Agreement, except where the context makes it clear that a rule is not intended to apply.

1.2.1 A reference to:

- (a) legislation (including subordinate legislation) is to:

- (i) legislation in the jurisdiction in which the Services are being performed; and
 - (ii) that legislation as amended, re-enacted or replaced, and includes any subordinate legislation issued under it;
 - (b) Parliament is a reference to that term, as defined in the *Interpretation Act 1987* (NSW);
 - (c) a document or agreement, or a provision of a document or agreement, is to that document, agreement or provision as amended, supplemented, replaced or novated;
 - (d) a party to this Agreement or to any other document or agreement includes a permitted substitute or a permitted assign of that party;
 - (e) a person includes any type of entity or body of persons, whether or not it is incorporated or has a separate legal identity, and any executor, administrator or successor in law of the person;
 - (f) a clause, Schedule, Annexure or Attachment is a reference to a clause, Schedule, Annexure or Attachment in or to this Agreement;
 - (g) 'A\$', '\$', 'AUD' or 'dollars' is a reference to Australian dollars; and
 - (h) any thing (including a right, obligation or concept) includes each part of it.
- 1.2.2 A singular word includes the plural, and vice versa.
- 1.2.3 A word which suggests one gender includes the other genders.
- 1.2.4 If a word is defined, another part of speech has a corresponding meaning.
- 1.2.5 The word 'includes' in any form is not a word of limitation.
- 1.2.6 The word **agreement** includes an undertaking or other binding arrangement or understanding, whether or not in writing.
- 1.2.7 The words **subsidiary**, **holding company** and **related body corporate** have the same meanings as in the Corporations Act.
- 1.2.8 Unless otherwise indicated, all financial amounts stated in this Agreement are exclusive of GST.
- 1.2.9 A reference to a liability includes any obligation whether present or future or actual or contingent or as a principal, surety or otherwise.
- 1.2.10 A reference to a party is a reference to a party to this Agreement.
- 1.2.11 The terms and phrases used as definitions in clause 1.1 or in any other clause of this Agreement are used for convenience only, and do not affect the interpretation of the meaning given to those terms and phrases in this Agreement.
- 1.2.12 This Agreement or any part of it will not be interpreted against the interest of a party on the basis that the party drafted it or seeks to rely on it.
- 1.2.13 References to terms not defined in this clause 1 which are defined in the Specifications have the meanings given to those terms in the Specifications.

- 1.2.14 References in the Specifications to terms not defined in the Specifications but which are defined in this clause 1 have the meanings given to those terms in this clause 1.
- 1.2.15 Where the same term is defined in the Specifications and also in the Operative Terms, the definition used in the Specifications shall apply in the Specifications and the definition used in the Operative Terms shall otherwise apply in this Agreement (including in the Operative Terms).
- 1.2.16 All Schedules, Attachments or Annexures in or to this Agreement are deemed to be part of this Agreement (except to the extent otherwise expressly provided in this Agreement).

1.3 Endorsement

- 1.3.1 If a document, plan or system is "Endorsed" by Council:
 - (a) Council is merely acknowledging that that document, plan or system will be used by the Contractor under this Agreement;
 - (b) the Contractor must not amend the document, plan or system without further Endorsement from Council; and
 - (c) the parties may use the document, plan or system as Endorsed as one basis for auditing and monitoring performance by the Contractor under this Agreement subject to any other requirements of this Agreement and any conditions of the Endorsement.
- 1.3.2 Council has no liability for, arising from, or in connection with, the Endorsement of a document, plan or system and anything the Contractor does or does not do under or in accordance with that document, plan or system is entirely at the risk of the Contractor.
- 1.3.3 The Endorsement of a document:
 - (a) is not a representation or admission that the document, plan or system is adequate, complete, correct, reliable or that it has any other characteristic;
 - (b) does not impose or create any duty, liability or obligation on Council or Council's Representative;
 - (c) does not waive, prejudice or limit Council's or Council's Representative's rights, powers or privileges; and
 - (d) does not affect, limit, alter, release or reduce the obligations, duties, liabilities or responsibilities of the Contractor under this Agreement in any way.
- 1.3.4 An Endorsed document does not form part of this Agreement.
- 1.3.5 Council may:
 - (a) Endorse a document subject to conditions;
 - (b) refuse to Endorse a document; or
 - (c) vary or withdraw its Endorsement of a document.

1.4 Business Days

If the day on or by which a person must do something under this Agreement is not a Business Day:

- 1.4.1 if the act involves a payment that is due on demand, the person must do it on or by the next Business Day; and
- 1.4.2 in any other case, the person must do it on or by the previous Business Day.

1.5 Multiple parties

If a party to this Agreement is made up of more than one person, or a term is used in this Agreement to refer to more than one party:

- 1.5.1 an obligation of those persons is joint and several;
- 1.5.2 a right of those persons is held by each of them severally; and
- 1.5.3 any other reference to that party or term is a reference to each of those persons separately, so that (for example) a representation, warranty or undertaking is given by each of them separately.

1.6 Priority of documents

- 1.6.1 The documents forming this Agreement are to be taken as mutually explanatory of one another. If an ambiguity or discrepancy is found in the documents an interpretation that imposes the higher standard, quality of service or level of performance shall prevail.
- 1.6.2 Subject to clause 1.6.1 any ambiguity, discrepancy or inconsistency between documents forming part of this Agreement shall be resolved by giving precedence to documents in the following order of priority:
 - (a) the Operative Terms;
 - (b) Schedule 1 and Schedule 2 to this Agreement;
 - (c) the Specifications (Schedule 4);
 - (d) Schedule 3, Schedule 5, Schedule 7, and Schedule 9; and
 - (e) each other schedule to this Agreement.
- 1.6.3 This Agreement sets out the legal rights and obligations of the parties and prevails over Management Systems. In particular:
 - (a) if there is a conflict or inconsistency between Management Systems, an interpretation that gives effect to this Agreement shall be preferred;
 - (b) if a Management System specifies a less stringent or less complete requirement than the Specifications or other requirement of this Agreement then the more stringent or complete requirement shall prevail;
 - (c) the provisions and requirements of the Management Systems do not limit the role or power of Council or any Authority; and

- (d) once a Management System is Endorsed, then unless expressed to the contrary a reference to that Management System in this Agreement is to the Endorsed Management System.

2. Commencement and Term

2.1 Commencement

Subject to the terms of this Agreement, the rights and obligations of the Contractor and Council under this Agreement begin on the Contract Date and expire on the Expiry Date.

2.2 Extended Term

- 2.2.1 Subject to clause 2.2.4, either party may provide the other party with a written notice, at least six months prior to the end of the Term, requesting that the Term be extended by any period of up to 5 years.
- 2.2.2 Within 20 Business Days after a party receives a notice under clause 2.2.1, that party must give written notice to the other party as to whether or not it agrees to the requested extension.
- 2.2.3 If a party notifies the other party in accordance with clause 2.2.2 that it agrees to the requested extension, then upon receipt by the other party of that notice, the Expiry Date shall be extended by the period of up to five years specified in the notice under clause 2.2.1, on the same terms as this Agreement, unless the parties otherwise agree to variations to this Agreement that will apply during the extended period of the Term.
- 2.2.4 Either party may exercise the option under clause 2.2.1 on any number of occasions provided that the aggregate length of the Term does not exceed 10 years.

2.3 Pre-Start meetings

The Contractor must attend pre-start meetings in accordance with clause 16 of the Specifications, and carry out such other preparatory activities as are required by the Specifications.

2.4 Contract Preparation Program

- 2.4.1 Within three months after the Contract Date, the Contractor must prepare and submit to Council the Contract Preparation Program in accordance with clause 8, as if it were a Management System.
- 2.4.2 Council must either:
 - (a) give written notice to the Contractor Endorsing the Contract Preparation Program submitted to it under clause 2.4.1; or
 - (b) if Council reasonably considers that any aspect of the Contract Preparation Program does not comply with the requirements of this Agreement, give notice to the Contractor within 15 Business Days of receipt of the Contract Preparation Program specifying the areas of non-compliance.

- 2.4.3 If Council gives a notice under clause 2.4.2(b), the Contractor must:
- (a) amend the Contract Preparation Program to address the matters identified in that notice; and
 - (b) within 10 Business Days of the notice re-submit the amended Contract Preparation Program to Council.
- 2.4.4 The provisions of clauses 2.4.2 and 2.4.3 will apply to any re-submitted Contract Preparation Program as if it was the Contract Preparation Program originally submitted under clause 2.4.1.

2.5 Mobilisation Period

- 2.5.1 During the Mobilisation Period the Contractor must carry out:
- (a) all work required for mobilisation and service implementation in accordance with the Contract Preparation Program; and
 - (b) all other work specifically required under this Agreement to be carried out prior to the Services Commencement Date.
- 2.5.2 The Contractor must:
- (a) update the Contract Preparation Program; and
 - (b) review the updated Contract Preparation Program with Council's Representative,
- at least once in each quarter during the Mobilisation Period.
- 2.5.3 Without limiting clause 2.5.2, if the Contractor becomes aware of anything which may cause delay to the ability of the Contractor to commence the Services on and from the Services Commencement Date, the Contractor:
- (a) must promptly give written notice of probable delay; and
 - (b) in any event must confirm any delay within 15 Business Days, giving the Council's Representative written notice of the cause of the delay and the estimated length of the delay, including:
 - (i) details of the cause of the delay and all relevant facts;
 - (ii) how the ability of the Contractor to commence the Services on and from the Services Commencement Date is likely to be affected.
- 2.5.4 A notice issued by the Contractor under clause 2.5.3 may also request that the Services Commencement Date be changed to a later date specified in the notice, in which case the notice must also specify what interim arrangements (if any) are proposed by the Contractor in respect of the Delivered Material in the period from the current Services Commencement Date until the proposed Services Commencement Date.
- 2.5.5 Council may, in its absolute discretion and without any obligation to do so, extend the Services Commencement Date to the date specified in a notice issued by the Contractor under clause 2.5.3, or otherwise agreed with the Contractor in writing.

- 2.5.6 Within 5 Business Days after a new Services Commencement Date is determined or agreed under this clause, the Contractor's Representative must provide an updated Contract Preparation Program to Council.

2.6 Council responsibility while accessing Disposal Facility

- 2.6.1 Council must ensure that, Council, Council's Representative and its employees, agents and contractors (other than the Contractor or its Subcontractors), must comply with:

- (a) all Laws;
- (b) such reasonable Contractor policies and procedures as are notified to Council from time to time; and
- (c) the reasonable directions of Cleanaway,

when delivering Delivered Material to the Disposal Facility, or when otherwise accessing the Disposal Facility for the purpose of this Agreement.

2.7 Council's Representative

- 2.7.1 Council shall ensure that at all times there is a Council's Representative.

- 2.7.2 Council has appointed a Council's Representative in relation to the Services, as identified in Item 9 of Schedule 1, to perform the function of Council's Representative under this Agreement.

- 2.7.3 A person who is a Council's Representative is, in respect to the Services in relation to which they are appointed, and subject to the provisions in clause 11, authorised:

- (a) as the agent of Council to perform the functions of Council's Representative under this Agreement;
- (b) to give and receive notices and make Directions under this Agreement; and
- (c) to monitor the performance of the Contractor and its compliance with the requirements of this Agreement,

provided always that the limits of the appointment of a Council's Representative are always to be construed as being limited to the powers and functions that can lawfully be delegated to a person in the position of a Council's Representative under the *Local Government Act 1993* (NSW).

- 2.7.4 Council may by written notice to the Contractor appoint a replacement Council's Representative.

- 2.7.5 Council's Representative may delegate some or all of Council's Representative's functions and powers under this Agreement to one or more persons, and vary or terminate, in whole or part, such delegations from time to time.

- 2.7.6 Any instructions, decisions, consents, notices, documents or other communications given to Council's Representative are taken to have been given to Council, and if given verbally must be confirmed in writing as soon as practicable.

- 2.7.7 The Contractor must at its cost comply with all lawful Directions and reasonable instructions given by Council's Representative in respect of the performance of the Services. If the Contractor considers that a Direction has been made by Council or

Council's Representative that constitutes a variation under clause 11 (where not expressly so stated), the Contractor must comply with clause 11.8.

- 2.7.8 If the Contractor considers that any action or Direction of Council's Representative is outside of the powers of Council's Representative or is in breach of this Agreement or Law, the Contractor must within 5 Business Days inform Council's Representative in writing, giving details of the action or Direction and the reasons why the Contractor has formed that opinion. The Contractor must continue to perform in accordance with this Agreement.
- 2.7.9 The Contractor is not entitled to make any Claim against Council in respect of any Loss in connection with any action or Direction of Council's Representative that is outside of the powers of Council's Representative or is in breach of this Agreement that has not been notified to Council's Representative under clause 2.7.8 and the Contractor releases Council from any such Claim and the Contractor releases Council and Council's Representative accordingly.

2.8 Contractor's Representative

- 2.8.1 The Contractor must appoint a person to be the Contractor's Representative for the purposes of this Agreement.
- 2.8.2 The Contractor has appointed the Contractor's Representative as the agent of the Contractor who has authority to act for and on behalf of the Contractor in all matters relating to this Agreement. The Contractor's Representative is identified in Item 10 of Schedule 1.
- 2.8.3 The Contractor may appoint a replacement Contractor's Representative from time to time by written notice to Council.
- 2.8.4 Any instructions, decisions, consents, documents, notices or other communications given to the Contractor's Representative are taken to have been given to the Contractor, and if given verbally must be confirmed in writing as soon as practicable.
- 2.8.5 Matters within the Contractor's Representative's knowledge (including Directions received from Council's Representative) shall be deemed to be within the Contractor's knowledge.
- 2.8.6 The Contractor must ensure that the Contractor's Representative is contactable by Council at all times during business hours (including by telephone, mobile telephone, facsimile, email, pager or other suitable communication device) and must provide details of other representatives of the Contractor who are to be contactable by Council outside business hours.

3. Services

3.1 Performance of the Services

From the Services Commencement Date, the Contractor must:

- 3.1.1 perform the Services for Council in accordance with this Agreement;
- 3.1.2 perform the Services at all times during the Services Term;
- 3.1.3 ensure that the Services comply with the Specifications; and

- 3.1.4 ensure that there is no disruption to the Services except where expressly permitted by this Agreement.

3.2 Representation

The Contractor agrees and represents to Council that:

- 3.2.1 it has carefully reviewed the description of the Services prior to entering into this Agreement; and
- 3.2.2 the Contractor is satisfied as to the adequacy of the Service Prices and Specifications having cognisance of the matters referred to in clause 3.2.1.

3.3 Standard of Services

- 3.3.1 The Contractor must ensure that the Services:
- (a) are carried out in a proper and workmanlike manner with due skill, care and diligence;
 - (b) are carried out in a manner that does not offend reasonable members of the public, including ensuring that all Contractor's Staff do not behave in an offensive manner;
 - (c) are executed and completed in accordance with Law;
 - (d) are carried out in a safe, timely and efficient manner; and
 - (e) strictly comply with Council's reasonable instructions and Directions relating to the Services.
- 3.3.2 The Contractor must do all things necessary to comply with and meet the requirements of the Specifications and the Contractor's obligations under this Agreement.
- 3.3.3 Council is not required to make any payment whatsoever in connection with the Services except for the performance of the Services and then only in accordance with this Agreement.

3.4 Acceptance of risks

- 3.4.1 Subject to this Agreement, the Contractor accepts all risks of and associated with the Services and Delivered Material including:
- (a) the demand for or revenue generated from the Services being less than estimated;
 - (b) liability for Taxes and the creation or imposition of Taxes or imposts, whether or not existing at the date of this Agreement;
 - (c) in connection with any Law (as at the date of this Agreement or in the future) including any Change of Law or any new Law, including any requirement to obtain or modify any Approval or the conditions of, delay in obtaining, modifying or refusal of any Approval or the challenge to the validity of any Approval; and
 - (d) in connection with the financing, design, construction, commissioning, operation and maintenance of any Contractor's Plant.

3.4.2 Subject to the express provisions of this Agreement, the Contractor:

- (a) is solely responsible for the cost and conduct of the Services and assumes the risk of all delay, increased costs and any Loss it suffers or incurs in relation to the Services;
- (b) acknowledges that the Disclosed Information may not be comprehensive. To the extent permitted by Law, the Contractor is not entitled to and must not make any Claim (including a Claim for an adjustment of part or all of the Service Prices) against Council (or any person acting on Council's behalf) arising out of or in connection with any actual or alleged error, omission, defect or incompleteness in any of the Disclosed Information;
- (c) acknowledges that Council makes no warranty or representation as to whether any waste or Delivered Material has or does not have any or any particular Characteristic (or, to avoid doubt, that any particular quantity of Delivered Material will be delivered);
- (d) acknowledges that during the Services Term Council may, following reasonable prior notice to the Contractor, alter the kerbside collection services provided to residents in respect of any type of Delivered Material, including by changing the size of a bin or the frequency of collection; and
- (e) is not entitled to and must not make any Claim under this Agreement (including a Claim for an adjustment of part of all of the Service Prices) against Council (or any person acting on Council's behalf) arising out of or in connection with any such risk, event, cost or expense having eventuated or been incurred in connection with the Services.

3.5 Contractor supplied plant, equipment and infrastructure

The Contractor must at its cost provide all management systems, management and technical support services, supervision, employees, materials and equipment and other services, consumables and all other things whether of a temporary or permanent nature which are necessary to provide the Services, unless otherwise excluded under this Agreement.

3.6 Council to supply Delivered Material

3.6.1 During the Services Term, except as otherwise provided for in this Agreement Council will deliver, or procure the delivery of all Mixed Waste collected via Council's kerbside mixed waste collection services, to the Disposal Facility.

3.6.2 The Contractor acknowledges and agrees that:

- (a) Council does not guarantee or warrant that any particular volume or weight of material referred to in clause 3.6.1 will be delivered to the Disposal Facility; and
- (b) the Contractor accepts all risks associated with the volume or weight of Delivered Material (including material referred to in clause 3.6.1) that is delivered to the Disposal Facility, and the Contractor is not entitled to and must not make any Claim under this Agreement (including a Claim for an adjustment of part of all of the Service Prices) against Council (or any person acting on Council's behalf) arising out of or in connection with any such risk including any Claim relating to the costs of any capital works that the Contractor may be required to undertake in order to accommodate the weight or volume of Delivered Material that is delivered to the Disposal Facility.

3.7 Application of Schedule 6, Schedule 11, Schedule 12 and Schedule 13

- 3.7.1 If a provision of Schedule 6, Schedule 11, Schedule 12 or Schedule 13 imposes a different standard of performance on the Contractor than is specified in the Specifications or other provision of this Agreement then the more stringent standard of performance must be complied with.
- 3.7.2 The provisions and requirements of Schedule 6, Schedule 11, Schedule 12 and Schedule 13 do not:
- (a) limit, waive or affect the role, power or rights of Council or any Authority; or
 - (b) impose any obligation on Council.

4. Compliance

4.1 Compliance with Law generally

- 4.1.1 The Contractor must at its cost at all times during the Term comply with:
- (a) all Law (including any change in Law) applicable from time to time to its obligations under this Agreement, its performance of the Services including:
 - (i) obtaining and maintaining all requisite Approvals other than the Approvals that are expressed under this Agreement to be obtained and maintained by Council; and
 - (ii) if contractors (or sub-contractors of any tier) are used to deliver or perform any part of the Services, ensure that the contractors (or sub-contractors of any tier) have obtained all necessary Approvals to perform that part of the Services;
 - (b) relevant Australian standards; and
 - (c) applicable industry codes.
- 4.1.2 The Contractor must at its cost at all times during the Term ensure that when transporting materials and waste (including Delivered Material where applicable):
- (a) the waste is transported in suitably licensed vehicles;
 - (b) comprehensive waste tracking methodology, including as required by Law; and
 - (c) accurate documentation is obtained and retained by the Contractor to verify that the materials and waste were received by facilities that were able to lawfully receive, and if applicable use, the materials and waste.
- 4.1.3 The Contractor warrants and represents that it shall schedule, pack, load, consign and transport the Delivered Material at and from the Disposal Facility and accepts all risks of, and associated with the scheduling, packing, loading, consignment and transport of Delivered Material.
- 4.1.4 Without limiting, affecting or waiving any other obligation under this clause 4.1, the Contractor must ensure that:

- (a) it performs the Services and carries out all its obligations under this Agreement in compliance with Heavy Vehicle National Law;
- (b) each of the Contractor's Staff comply with the Heavy Vehicle National Law, in connection with the Services;
- (c) it carries out the Services in a manner which ensures that, and otherwise provide all required assistance to Council to ensure that, Council satisfies its obligations under the Heavy Vehicle National Law, in connection with the Services; and
- (d) each Subcontractor has in place, and complies with, a management system to ensure compliance with the Heavy Vehicle National Law while carrying out any of the Contractor's obligations under this Agreement.

4.2 Approvals

Without limiting the generality of clause 4.1, the Contractor must at its cost in connection with the Services:

- 4.2.1 make (and use reasonable endeavours to progress) in sufficient time to comply with its obligations under this Agreement, every Application for every necessary Approval and ensure that each such Approval has been obtained, and is maintained and complied with and where necessary renewed;
- 4.2.2 pay all lodgement or other fees in relation to any Application;
- 4.2.3 promptly fully and accurately respond to any requests for further information made by any Authority in respect of any Application;
- 4.2.4 in sufficient time to comply with its obligations under this Agreement, provide to any relevant Authority and other relevant person all information, assurances, bonds, payments and securities necessary or required by the Authority or that person to evaluate, process, determine, grant, obtain or comply with any necessary Approval;
- 4.2.5 comply with:
 - (a) the lawful requirements of each Authority to enable proper consideration by the Authority of any Applications for Approvals made;
 - (b) the proper requirements of any relevant person (other than an Authority) to enable proper consideration by that person of Applications made;
 - (c) all lawful terms and conditions of the Approvals issued (whether or not obtained by and issued to the Contractor) and with all lawful Directions given by an Authority; and
 - (d) all applicable orders, decisions, findings or rulings made by a court, commission or tribunal.

4.3 Environment

Without limiting clause 4.1 or 4.2, the Contractor must at its cost:

- 4.3.1 ensure that in carrying out the Services it complies with all Environmental Law, including in respect of Contamination (of land) or Pollution caused or contributed to by the Contractor or Contractor's Staff;

- 4.3.2 ensure that there is no risk of harm to the Environment arising out of, or in any way in connection with, the carrying out of Services;
- 4.3.3 not cause or permit any nuisance or hazard to any member of the public;
- 4.3.4 suppress odours to minimise impacts on people;
- 4.3.5 contain and lawfully dispose of leachates;
- 4.3.6 ensure that the Disposal Facility is properly constructed, operated and maintained to prevent harm to the Environment;
- 4.3.7 without limiting clauses 4.3.1 to 4.3.6, ensure that:
 - (a) it does not Pollute or damage the Environment, or cause Contamination (of land);
 - (b) there is no leakage, spillage or other escape of any waste, Pollution or Contaminant (of land) to the Environment;
 - (c) its Subcontractors comply with the requirements of this clause 4.3 in respect of any Services; and
- 4.3.8 indemnify Council against any Loss suffered or incurred by Council arising out of, or in any way in connection with, any breach by the Contractor of its obligations under this clause 4.3.

4.4 Cartage

Without limiting clause 4.1, 4.2 or 4.3, the Contractor must ensure that (other than in relation to Collection Vehicles or other cartage of Council or its collection contractor):

- 4.4.1 all cartage of any kind or actions of the Contractor's Staff in connection with this Agreement must be carried out in compliance with the requirements of any Law controlling the use of vehicles on roads or rail;
- 4.4.2 when any vehicle carrying waste or other material is passing along roads or left standing in any public place, it must be secured so as to prevent the escape of any matter from the vehicle; and
- 4.4.3 no vehicle is, in the conduct of the Services, left standing or idling in such a manner as to cause offence or present a hazard or unreasonable inconvenience to a member of the public.

4.5 Cooperation with other Council staff and other contractors

- 4.5.1 In the performance of this Agreement, the Contractor will need to interact frequently with Council's staff and contractors who provide other waste management services. It is essential for the efficient operation of the entire integrated waste management service and effective and efficient provision of services to Council's customers that the Contractor cooperate with Council's staff and Council's other contractors.
- 4.5.2 The Contractor undertakes to make all reasonable endeavours to ensure cooperation at both operation and management levels with Council's staff and Council's other contractors, in relation to the performance of the Services.

4.6 Contractor's Staff

- 4.6.1 The Contractor warrants and represents to Council that each Contractor's Staff engaged to perform any portion of the services, works or other activities or obligations under this Agreement will:
- (a) have the appropriate qualifications, skills and experience required to provide the Services in accordance with this Agreement;
 - (b) hold all necessary current Approvals, certificates and accreditations required by Law in order to provide the Services;
 - (c) have a standard of experience, workmanship and behaviour that is suitable for the performance of the Services and the requirements of this Agreement;
 - (d) be paid in accordance with applicable Law.
- 4.6.2 The Contractor must only replace personnel or refill a position with replacement personnel who are properly qualified and competent.
- 4.6.3 The obligations, duties and liabilities of the Contractor under this Agreement are unaffected by the fact that the Contractor contracts for the performance of any service, work or other activity by a subcontractor and the Contractor is at all times fully responsible to Council for the provision of the Services and all other services, works or other activities or obligations under this Agreement irrespective of whether the Services or other works, activities or obligations under this Agreement are provided by the Contractor's Staff and must ensure that the Contractor's Staff fully comply with the Contractor's obligations under this Agreement and do not (by act or omission) cause the Contractor to be in breach of this Agreement.
- 4.6.4 Except where this Agreement otherwise provides, the Contractor shall be liable to Council for the acts, defaults, omissions and negligence of any employees of the Contractor, any employees of any of the Contractor's Subcontractors, and any agents of the Contractor's Staff as if they were those of the Contractor.
- 4.6.5 Where Council's Representative is of the opinion that a member of the Contractor's Staff fails to meet the requirements of this Agreement, Council's Representative may request the Contractor to commence warning, counselling and training in accordance, where applicable, with the Contractor's Workplace Health and Safety Management System. If the person's performance continues not to meet the requirements of this Agreement Council's Representative may request the removal of that person. Upon receipt of this request, the Contractor must immediately remove that person at no cost to Council and must replace that person with a suitably qualified person. This clause 4.6.4 does not limit Council's other rights under this Agreement, including under clause 25 and clause 22.

4.7 Subcontracting

- 4.7.1 Subject to clause 4.7.3, the Contractor must not subcontract or delegate the performance of the whole or any part of its obligations under this Agreement without the prior written consent of Council which consent (if provided) may be given subject to such conditions as Council considers appropriate in its discretion. The conditions of approval may include the provision of collateral warranties and acknowledgments of Council's rights under this Agreement sufficient to ensure that Council's rights are in no way affected or limited by the proposed contracting arrangement.
- 4.7.2 The Contractor acknowledges that any consent given by Council under clause 4.7.1 does not release the Contractor from any of its obligations under this

Agreement and that the Contractor will be liable to Council for the acts, defaults, negligence or omissions of its Subcontractors as if they were acts or omissions of the Contractor.

- 4.7.3 If the Contractor's Tender specified that a particular subcontractor would perform particular obligations under this Agreement, then Council's consent is deemed to have been provided under clause 4.7.1 for the performance of those particular obligations by that subcontractor.

4.8 Ownership of Delivered Material

The ownership and property in all Delivered Material under this Agreement will transfer from Council to the Contractor once the Delivered Material arrives at the entrance to the Disposal Facility in a Collection Vehicle.

4.9 Making good damage

- 4.9.1 The Contractor must immediately remedy or make good all breakages of or damage to any property of Council or any of Council's employees, contractors or agents caused by or as a result of the neglect, default or misconduct of the Contractor or the Contractor's Staff whilst engaged in the performance of the Services.
- 4.9.2 If the Contractor fails to remedy or make good the breakage or damage immediately, Council's Representative may direct the Contractor to do such things as Council's Representative considers necessary to remedy or make good the breakage or damage.
- 4.9.3 The provisions of clause 19 will apply to any Claim incurred or suffered by Council in relation to:
- (a) such breakage or damage; and/or
 - (b) any action taken by the Contractor to remedy or make good such breakage or damage irrespective of whether such action was taken at the direction of Council's Representative.
- 4.9.4 If the Contractor fails to comply with Council's Representative's Direction, Council's Representative may have the breakage or damage rectified and the cost of rectification will be a debt due to Council from the Contractor.

4.10 Urgent action

If in respect of the Services urgent action is necessary to protect people, property or the Environment, Council may take the necessary action but will, when reasonably possible, direct the Contractor to take the necessary action. If the action taken by Council was action that the Contractor should have taken at the Contractor's cost, the cost incurred by Council will be a debt due to Council from the Contractor. A direction under this clause 4.10 will not constitute a Variation.

4.11 Work health and safety

The Contractor must:

- 4.11.1 at all times identify and exercise, and must ensure that the Contractor's Staff at all times identify and exercise, all necessary precautions for work health and safety of all persons who may be affected by the Services'

- 4.11.2 ensure that the Workplace Health and Safety Management System at a minimum demonstrates compliance with all duties of an employer under the WHS Law;
- 4.11.3 perform the Services and carry out all its obligations under this Agreement in compliance with WHS Law;
- 4.11.4 ensure that each of the Contractor's Staff comply with all WHS Law in connection with the Services and Contractor's Plant;
- 4.11.5 in performing the Services take all possible and reasonably practicable steps and measures to eliminate risk to health and safety and to avoid and minimise the consequences of work health and safety issues;
- 4.11.6 ensure that it carries out the Services in a manner which ensures that, and otherwise provide all required assistance to Council to ensure that, Council satisfies its obligations under the WHS Law in connection with the Services and Contractor's Plant;
- 4.11.7 ensure that there is no unreasonable risk to health, safety and welfare of any persons employed in connection with the Services and Contractor's Plant (whether by the Contractor, any of the Contractor's Staff or otherwise);
- 4.11.8 manage risks associated with the carrying out of the Services in accordance with Part 3.1 of the WHS Regulation;
- 4.11.9 ensure that if any Law requires that:
 - (a) a person:
 - (i) be authorised or licenced (in accordance with the WHS Act and WHS Regulation) to carry out any work at that workplace, that person is so authorised or licensed, and complies with any conditions of such authorisation or licence; and/or
 - (ii) has prescribed qualifications or experience or, if not, is to be supervised by a person who has prescribed qualifications or experience (as defined in the WHS Act or WHS Regulation), that person has the required qualifications or experience or is so supervised; or
 - (b) a workplace, plant, substance, design, or work (or class of work) be authorised, registered or licensed, that workplace, plant, substance, design, or work is so authorised, registered or licensed;
- 4.11.10 not direct or allow a person to carry out or use plant or substances at a workplace unless the requirements of clause 4.11.9 are met (including any requirement to be authorised, licensed, qualified or supervised); and
- 4.11.11 if requested by Council's Representative or required by the WHS Law, produce evidence of any Approvals, registration, prescribed qualifications or experience, or any other information relevant to work health and safety (as the case may be) to the satisfaction of Council's Representative;
- 4.11.12 report any serious bodily injuries or dangerous events to the relevant Authority within the time frame required by Law. In addition, the Contractor must immediately notify Council's Representative in writing of:
 - (a) any accident or injury which occurs during the performance of the Services; or

- (b) any act, fact or circumstances associated with the Services, Contractor's Plant relevant to the ability of the Contractor to comply with the requirements of this clause 4.11 and 4.12; and

4.11.13 immediately notify all lost time incidents in relation to the Services to Council. The Contractor must within three days of any such incident provide a report giving complete details of the incident, including results of the investigations into the causes, and any recommendations or strategies identified for the future prevention of such incidents.

4.12 Principal Contractor

In respect of any works commissioned by, or carried out by or on behalf of, the Contractor in connection with the Disposal Facility or the Services or Contractor's Plant, without limiting or otherwise affecting the obligations of the Contractor under any other provision of this Agreement, Council and the Contractor agree that, if the works are a construction project to which Chapter 6 of the WHS Regulation applies:

- 4.12.1 the Contractor must carry out such works in accordance with the requirements of the WHS Law;
- 4.12.2 Council engages the Contractor as principal contractor in respect of such works;
- 4.12.3 Council authorises the Contractor to:
 - (a) have management and control of such works; and
 - (b) discharge, exercise and fulfil the functions, duties and obligations of a principal contractor under Chapter 6 of the WHS Regulation in connection with such works;
- 4.12.4 the Contractor accepts the engagement as principal contractor and agrees to discharge, exercise and fulfil the functions, duties and obligations imposed on a principal contractor by the WHS Law;
- 4.12.5 to the extent that the Contractor is for any reason, taken or otherwise found not to be the principal contractor for such works, the Contractor nonetheless must discharge, exercise and fulfil the functions, duties and obligations of a principal contractor in respect of such works as if the Contractor was the principal contractor for those works;
- 4.12.6 the Contractor is aware of its obligations as principal contractor, or its obligations that may otherwise arise under clause 4.12.5; and
- 4.12.7 the Contractor shall comply with the WHS Law, including to the extent that the Contractor is a person conducting a business or undertaking (including to whom any of sections 22, 23, 24, 25 or 26 of the WHS Act applies).

4.13 WHS Law definitions

Except as otherwise provided in clause 1.1, all terms used in clause 4.11 and 4.12 have the meanings given to them in the WHS Act and the WHS Regulation.

4.14 Incidents

Without limiting clause 4.11.12 or 4.11.13, the Contractor must:

4.14.1 immediately notify Council's Representative:

- (a) of any Contamination (of land) or Pollution which is caused; or
- (b) of any accident, notifiable incident (being an incident which is notifiable under any WHS Law), injury or property damage which occurs,

in connection with the Services, and do everything necessary to minimise harm to humans and the Environment in connection with the Contamination (of land), Pollution, accident, notifiable incident, injury or property damage;

4.14.2 within 24 hours of any such matter notified under clause 4.14.1, provide a written report to Council's Representative giving complete details of the matter, including the results of investigations into its cause and any recommendations or strategies for prevention of a recurrence; and

4.14.3 notify Council's Representative as soon as reasonably practicable after becoming aware of:

- (a) a breach of the Environmental Management System;
- (b) an Authority having issued a fine, notice or order to, or having commenced a prosecution against, the Contractor or a Subcontractor in relation to an alleged breach of Law relating to the Environment,

in connection with the Services.

4.15 Plant, equipment and property

The Contractor must comply with the obligations (if any) set out in Schedule 11.

5. Contractor facilities and plant

5.1 Disposal Facility

During the Services Term, the Contractor must ensure that:

5.1.1 unless expressly permitted otherwise by this Agreement, at all times each Disposal Facility is available and capable of performing the Services;

5.1.2 subject to clause 5.6:

- (a) all Delivered Material is accepted at the Disposal Facility; and
- (b) unless the Contractor is not lawfully able to do so, all Delivered Material is Disposed of at the Disposal Facility.

5.2 Risk of Disposal Facility

Subject to this Agreement, the Contractor:

- 5.2.1 assumes the risk of all delay, increased costs and any Loss it suffers or incurs in relation to the conditions and characteristics of the Disposal Facility;
- 5.2.2 acknowledges and agrees that:
 - (a) access to any land or facility including the Disposal Facility which is required for the purposes of carrying out the Services and other obligations under this Agreement is at the sole risk, cost and responsibility of the Contractor;
 - (b) the Contractor may not Claim, and Council has no liability in respect of, any delay, additional costs or other effects on the Services related to:
 - (i) the ability of the Contractor or its contractors or any other person to obtain access to any land or facility including the Disposal Facility; or
 - (ii) the condition or suitability of any land or facility including the Disposal Facility; and
 - (c) Council is not required to obtain, construct or provide to any person formal or informal access to any land or facility (including the Disposal Facility);
- 5.2.3 acknowledges and agrees that:
 - (a) the Contractor must at the Contractor's cost make arrangements for access to and use of the Disposal Facility and obtain and comply with all necessary Approvals to use the Disposal Facility;
 - (b) the Contractor must ensure that there is insurance in place covering the operation of the Disposal Facility at least at the same level as required by clause 18; and
 - (c) if following the Services Commencement Date a Disposal Facility is not available and operational to perform the Services to the standard required by this Agreement, then:
 - (i) the Contractor must nominate an Alternative Facility and obtain Council's written consent to use that Alternative Facility under clause 5.4;
 - (ii) subject to clause 5.4.7, indemnify Council in relation to all costs, Claims, charges or expenses in relation to the use of an Alternative Facility (including any increased or additional storage or transportation costs over and above transport to the Disposal Facility), over and above the amount that would have been required to be paid under this Agreement by Council to the Contractor had the Disposal Facility been used to perform the Services rather than the Alternative Facility; and
 - (iii) for any Delivered Material, Council is not required to pay the Contractor a Fee for the Services in respect of that Delivered Material until the Services are performed in accordance with this Agreement in relation to that Delivered Material, provided always that the performance of the Services at an Alternative Facility will be taken to be the performance of the Services at a Disposal Facility under clause 5.4.

5.3 Disposal Facility must be available

For the Disposal Facility, the Contractor must:

- 5.3.1 on or before the Facility Operating Date, ensure that the Disposal Facility is constructed and capable of operation to provide the relevant Services required to be performed at that facility under this Agreement (**Relevant Services**).
- 5.3.2 on or before the date specified in column 3 of the table in clause 3 of Schedule 6 in respect of that Disposal Facility, provide to the Council's Representative the necessary documentation that demonstrates to the satisfaction of Council's Representative that:
 - (a) it owns or otherwise has access to and can use:
 - (i) each Disposal Facility for the Relevant Services;
 - (ii) any proprietary technology proposed to be utilised in undertaking the Relevant Services; and
 - (iii) any land necessary to undertake the Relevant Services at each Disposal Facility,from the Facility Commencement Date for that Disposal Facility until the Expiry Date; and
 - (b) all necessary Approvals are held for the construction and operation of the Disposal Facility to enable the performance of the Relevant Services,and an Operational and Management Plan in accordance with clause 8, as if it were a Management System.

5.4 Use of the Disposal Facility and consent to use Alternative Facilities

- 5.4.1 In performing the Services the Contractor must not without the prior written consent of Council use any facilities other than the Disposal Facility.
- 5.4.2 The Contractor may only use the Disposal Facility for a different purpose for which it is listed in Item 4 or Item 5 of Schedule 1 with the prior written consent of Council.
- 5.4.3 To avoid doubt, the circumstances in which the Contractor is required to obtain the prior written consent of Council under clause 5.4.1 or 5.4.2, includes where the Contractor proposes to use a facility that is not the Disposal Facility for a particular part of the Services during down time (as defined in clause 11.2 of the Specifications).
- 5.4.4 Council will not unreasonably withhold its consent under clause 5.4.1 or 5.4.2 provided that either:
 - (a) the proposed facility:
 - (i) is demonstrated to the satisfaction of Council's Representative to be lawful, suitable and safe for the proposed use;
 - (ii) is conveniently located so as not to cause additional costs to Council;
 - (iii) is the subject of insurances as required by clause 18;

- (iv) will not have any adverse impact on any of:
 - (A) the Service Prices;
 - (B) the ability of the Contractor to perform the Services that are required to be performed at the Disposal Facility being replaced; and
 - (v) meets the requirements of the Specifications.
- 5.4.5 Such consent (if provided under clause 5.4.1 or 5.4.2) may be given subject to such conditions as Council considers appropriate in its discretion, including (for example) a condition that the performance of the Services at the Alternative Facility must cease in full or in part after a particular time period or event.
- 5.4.6 Subject to clause 5.4.7, if Council consents to the use of an Alternative Facility under clause 5.4.1 or 5.4.2 that is a Disposal Facility, the Contractor must pay Council on demand any increased or additional transportation costs that Council incurs over and above the cost of transporting Delivered Material to the Disposal Facility immediately prior to the use of the Alternative Facility under this Agreement.
- 5.4.7 For the purposes of clause 5.2.3(c)(ii) and clause 5.4.6, where a Collection Vehicle is used by Council (and not by a contractor of Council) to transport Delivered Material to an Alternative Facility, the transportation costs incurred by Council over and above the transportation costs that would have been incurred had the Delivered Material been transported to the Disposal Facility are to be calculated by Council's Representative, acting reasonably, based on costs including:
 - (a) additional employment costs (including overtime, workers compensation insurance, payroll tax and superannuation guarantee levy and other employee on-costs);
 - (b) additional fuels, oils, and other fleet operational costs;
 - (c) additional capital costs associated with additional fleet requirements;
 - (d) additional road tolls; and
 - (e) additional management costs.

5.5 Use of Contractor's Plant

- 5.5.1 The Contractor must ensure that at the Services Commencement Date and throughout the Services Term, all of the Contractor's Plant:
 - (a) is in safe working condition;
 - (b) complies with all applicable Law;
 - (c) is suitable for the purpose for which it is to be used; and
 - (d) is maintained:
 - (i) in accordance with this Agreement;
 - (ii) in a proper, safe and efficient condition;

- (iii) to comply with Law in respect of harm to the Environment; and
- (iv) in accordance with the conditions and requirements of all applicable Laws and Approvals.

5.5.2 In using a Disposal Facility or any Contractor's Plant, the Contractor must ensure that:

- (a) the Disposal Facility and Contractor's Plant are operated in a proper and efficient manner, by competent operators, in accordance with all necessary Approvals to:
 - (i) store and receive the Delivered Material that is delivered to that Disposal Facility; and
 - (ii) in respect of the Disposal Facility, Dispose of the Delivered Material that is delivered to that Disposal Facility;
- (b) the Disposal Facility and Contractor's Plant are, and are demonstrated to be, lawful, suitable and safe for the proposed use;
- (c) proper and efficient environmental controls are properly installed and properly maintained at the Disposal Facility so as to comply with all Laws and this Agreement;
- (d) for a Disposal Facility, any waste is safely and lawfully handled, stored; and
- (e) for a Disposal Facility, any waste is safely and lawfully handled, stored and Disposed.

5.6 Material Increase Event

5.6.1 In this clause 5.6:

- (a) **Base Monthly Tonnes** means the average number of tonnes of Delivered Material delivered to the Disposal Facility per month, in the 12-month period immediately prior to a Material Increase Event;
- (b) **Maximum Monthly Tonnes** means the number of tonnes of Delivered Material equal to 130% of the Base Monthly Tonnes;
- (c) **Material Increase Event** means either:
 - (i) a change to the boundary of the Council's local government area;
 - (ii) the introduction of a kerbside collection service to Council residents that did not exist at the Pricing Date; or
 - (iii) the removal of an existing kerbside collection service to Council residents that existed at the Pricing Date,that would result in the tonnes of Delivered Material delivered to the Disposal Facility in each month following the change, introduction or removal being equal to or exceeding the Maximum Monthly Tonnes;
- (d) **MIE Notice** means a notice issued by Council to the Contractor under clause 5.6.2; and

- 5.6.2 Council must notify the Contractor in writing as soon as reasonably practicable after becoming aware that a Material Increase Event is likely to occur, including the date that the Material Increase Event is expected to occur.
- 5.6.3 Within 20 Business Days after receiving an MIE Notice, the parties must meet to discuss in good faith the MIE Notice and whether Contractor is able to accept the increased tonnes from Council.
- 5.6.4 Despite any other provision of this Agreement requiring the Contractor to accept Delivered Material, in each month following a Material Increase Event the Contractor is not required to accept the additional tonnes of Delivered Material that have arisen as a result of the Material Increase Event and exceed the Maximum Monthly Tonnes.

6. Disposal Services

6.1 Not Used

6.2 Disposal obligation

The Contractor must Dispose of the Delivered Material:

- 6.2.1 at the Disposal Facility unless:
 - (a) the Contractor is not lawfully able to do so;
 - (b) the Contractor has otherwise obtained Council's prior written consent to dispose of the Delivered Material elsewhere; or
 - (c) because of an unplanned shutdown, it is not practicable for the Contractor to obtain Council's prior written consent to the disposal of the Delivered Material elsewhere, provided that Council is notified of the facility at which the Delivered Material is disposed of as soon as reasonably practicable following disposal; and
- 6.2.2 at its cost.

7. Not Used

8. Management Systems

8.1 Contractor's Management Systems

- 8.1.1 For the purposes of this clause 8 (other than clause 8.1.3), a reference to a Management System is taken to include:
 - (a) the Contract Preparation Program; and
 - (b) each Operational and Management Plan.
- 8.1.2 The Contractor must prepare, implement and comply with the Management Systems in relation to provision of the Services.

8.1.3 Each Management System must:

- (a) comply with the requirements of the relevant ISO or Australian Standard;
- (b) demonstrate how the Contractor will comply with all Laws;
- (c) adopt a planned and systematic approach to minimise risks created in the performance of the Services;
- (d) comply with the requirements set out in the Specifications and Schedule 9; and
- (e) contain at least the following components:
 - (i) a method of identifying and recording risks or processes related to the provision of the Services and subsequent procedures to manage those risks;
 - (ii) a documented review process;
 - (iii) a process of continual improvement;
 - (iv) a process to identify and monitor relevant Law as it relates to this Agreement;
 - (v) identified targets and objectives to be achieved;
 - (vi) the keeping of relevant records and monitoring of the system;
 - (vii) periodic auditing of the system; and
 - (viii) any other items required by Council.

8.1.4 For the Management Systems pertaining to quality, environment and safety; the Contractor must be and remain accredited for compliance with the relevant ISO or Australian Standard for the duration of the Term.

8.1.5 The Contractor must throughout the Term in the performance of the Services implement continuous improvements, adopt systems, invest in technology and introduce efficiency measures consistent with good industry practice, to at least the standard common to providers of similar services in Australia.

8.2 Endorsement of Management Systems

8.2.1 Prior to the Services Commencement Date, or prior to such other date as is specified in the Specifications, the Contractor must prepare (if not already in existence) and submit to Council the Management Systems.

8.2.2 Council must either:

- (a) give written notice to the Contractor Endorsing the Management Systems submitted to it under clause 8.2.1; or
- (b) if Council reasonably considers that any of the Management Systems do not comply with the requirements of this Agreement, give notice to the Contractor within 15 Business Days of receipt of the relevant Management System specifying the areas of non-compliance.

- 8.2.3 If Council gives a notice under clause 8.2.2(b), the Contractor must:
- (a) amend the relevant Management System to address the matters identified in that notice; and
 - (b) within 10 Business Days of the notice re-submit the amended Management System to Council.
- 8.2.4 The provisions of clauses 8.2.2 and 8.2.3 will apply to any re-submitted Management Systems as if they were the Management Systems originally submitted under clause 8.2.1.

8.3 Updating Management Systems

- 8.3.1 The Contractor must review and, if necessary, update the Management Systems at least every second year during the Term (or at such greater frequency as is specified for a particular Management System in the Specifications) to take into account:
- (a) changes in Law;
 - (b) deficiencies or omissions in the Management Systems of which the Contractor or Council becomes aware;
 - (c) improvements in the Management Systems; and
 - (d) Permitted Variations under clause 11.
- 8.3.2 The Contractor must submit a copy of the updated Management Systems to Council for Endorsement in accordance with clause 8.2. The Contractor must submit a copy of each Endorsed updated Management System to Council by 30 November each year or within 20 Business Days from Endorsement, whichever is the earlier.

8.4 Application and Audit

- 8.4.1 The Contractor must comply with each Endorsed Management System from the Services Commencement Date until the Expiry Date.
- 8.4.2 The Contractor acknowledges and agrees that its compliance with the Management Systems will not release or discharge it from compliance with its obligations under this Agreement.
- 8.4.3 The Contractor must provide all reasonable assistance to Council and its nominees to enable Council to monitor and audit the Contractor's compliance with its obligations under this Agreement, including by, at all times during the Term, allowing Council and its nominees reasonable access to the Contractor's systems and records used by the Contractor (including the Contractor's Staff) in the provision of the Services.
- 8.4.4 The provision of comments or Endorsement by Council or Council's Representative, or any of those persons not providing comments or refusing to provide Endorsement in relation to:
- (a) a Management System under clause 8.2 or the Contract Preparation Program under clause 2.4; or

- (b) an update to an Endorsed Management System under clause 8.3 or an the Contract Preparation Program under clause 2.5.2,

does not limit the obligations or potential liability of the Contractor or rights of Council or Council's Representative.

9. Performance Management System

9.1 Key Performance Indicators

The Performance Management System set out in Schedule 3 comprises a range of Key Performance Indicators to measure the Contractor's performance throughout the Services Term. The intent of the Performance Management System is to have a fair and equitable manner of measuring performance and encouraging continuous improvement of the Services under this Agreement.

9.2 Change to Key Performance Indicators

Council's Representative and the Contractor's Representative will periodically review the Key Performance Indicators, and may by written agreement subsequently amend them in any way, including creating new Key Performance Indicators. In reviewing the Key Performance Indicators, the parties must consider to what extent the Key Performance Indicators will be used to encourage performance by:

9.2.1 taking account of the disbenefit to Council of declining performances through:

- (a) Fee adjustments under clause 12.8; or
- (b) requiring the Contractor to address particular areas of non-performance within a stated time frame; and

9.2.2 where required by Council, defining consistently poor performance over an extended time frame as constituting a default for the purposes of clause 22.

9.3 Measuring performance

Council will review the performance of the Contractor against the agreed Key Performance Indicators and determine the Contractor's performance against the benchmark. Where applicable, the Fees payable under clause 12.1 may be adjusted in accordance with clause 12.8.

9.4 Performance improvement plan

9.4.1 If there is a non-performance or poor performance as measured through the Performance Management System, then:

- (a) Council's Representative may, instead of or in addition to exercising Council's rights under clause 9.3 or clause 12.8, give the Contractor a notice which:
 - (i) must state that it is a performance improvement notice under this clause 9.4; and
 - (ii) requires that the Contractor submit a performance improvement plan to the reasonable satisfaction of Council's Representative, within such reasonable period of time as is specified in the notice, which plan

contains a description of the steps that the Contractor will take to ensure that the non-performance will not be repeated; and

- (b) if Council's Representative gives the Contractor a performance improvement notice then the Contractor must comply with it.

9.4.2 If Council's Representative notifies the Contractor that it is satisfied with the performance improvement plan submitted under clause 9.4.1 then the Contractor must fully implement and comply with that performance improvement plan.

9.4.3 If Council's Representative notifies the Contractor that it is not satisfied with the performance improvement plan submitted under clause 9.4.1 then the Contractor must promptly and in accordance with any directions of Council's Representative, review and correct the performance improvement plan and resubmit it to Council's Representative and clauses 9.4.2 and this clause 9.4.3 shall reapply.

9.5 Council's rights not affected

The application of the Performance Management System, including any adjustment to Fees payable under clause 12.8 or the requirement for the preparation and implementation of a performance improvement plan under clause 9.4, in relation to poor performance or non-performance by the Contractor will not limit or waive Council's rights under clause 22 or any other provisions of this Agreement in relation to such poor performance or non-performance.

9.6 Acknowledgement

The parties acknowledge and agree that:

- 9.6.1 the amount of each reduction in the Fee specified in Schedule 3 is an agreed, genuine pre-estimate of the minimum damages of Council if the circumstances described in respect of each Fee reduction occur, and is not a penalty; and
- 9.6.2 if this clause 9 or Schedule 3 (or any part of this clause 9 or Schedule 3) is found for any reason to be void, invalid or otherwise inoperative, so as to disentitle Council from recovering the reduction in the Fee specified in Schedule 3 for the Contractor's failure to comply with the corresponding Key Performance Indicator, Council will be entitled to recover damages from the Contractor for such failure under general law.

10. Meetings, Reporting and Records

10.1 Record keeping

10.1.1 The Contractor must maintain written records of:

- (a) all waste received at the Disposal Facility and all waste Disposed of at the Disposal Facility during the Services Term, including:
 - (i) identification of the Disposal Facility and Weighbridge;
 - (ii) date and time of entry and departure of each Collection Vehicle;
 - (iii) identification of Collection Vehicles by registration number;
 - (iv) type of Delivered Material including the product type identified by a specific product code;

- (v) gross weight of Delivered Material;
- (vi) tare weight of the Collection Vehicle delivering the Delivered Material;
- (vii) net weight of the load of Delivered Material delivered;
- (viii) identification, in weight, of Delivered Material, for sorting, transferring or Disposal;
- (ix) identification, in weight, of Delivered Material from the Disposal Facility for disposal to a Disposal Facility;
- (x) details of any loads rejected from the Disposal Facility (noting that the Contractor will remain responsible for such rejected loads);
- (xi) details of any Waste Levy or other Taxes paid by the Contractor in respect of Delivered Material; and
- (xii) any waste disposal or transport documents required by Law;
- (b) all data required by the Council's Representative to enable Council to comply with its reporting obligations to any Authority;
- (c) any breach of this Agreement by the Contractor;
- (d) implementation of the Endorsed Management Systems; and
- (e) any other information required to be maintained by the Specifications or reasonably requested by Council's Representative,

for a period of not less than 7 years in respect of each record from the date of creation of that record.

10.1.2 At any time during the Services Term Council's Representative may request that the Contractor provide it with, or make available for inspection, any or all of:

- (a) any information described in clause 10.1.1; and
- (b) other information in respect of the conduct of the Services, which Council reasonably requires,

and the Contractor must promptly comply with that request.

10.2 Inspection, monitoring and audits during Services Term

During the Services Term:

10.2.1 Council or its nominees may, subject to compliance with the reasonable requirements of the Contractor as to insurance, health, safety and site security, arrange or carry out inspections, monitoring and audits as necessary (with reasonable notice) to:

- (a) ensure that the Contractor is complying with its obligations under this Agreement in relation to the Services (including without limitation to audit compliance with an obligation under clause 4 or 8); or
- (b) enable Council to comply with the requirement of any Authority or Law,

but in doing so must use reasonable endeavours not to cause unnecessary inconvenience to the Contractor when carrying out an inspection. The Contractor must provide any reasonable assistance requested by Council or its nominee or a member of their respective staff or a third party engaged for this purpose;

- 10.2.2 if access to any documentation and records of the Contractor is required for the carrying out of any inspection referred to in clause 10.2.1, then the Contractor must provide sufficient access to such documentation and records as requested; and
- 10.2.3 the Contractor must ensure it (including any of the Contractor's Staff identified by Council's Representative) is available to discuss details of the Services, compliance with applicable Approvals, quality and other relevant matters during the inspections, monitoring and audits, with the person conducting the inspection, monitoring or audit.

10.3 Monthly reports

During the Services Term the Contractor must:

- 10.3.1 deliver a report to Council's Representative monthly, in a format approved by Council's Representative, acting reasonably, on:
- (a) the records it is required to keep under clause 10.1.1, and clause 17 of Schedule 4;
 - (b) for the Disposal Facility, a copy of the EPA acknowledgement (if any) confirming that the monthly report that was required to be submitted to the EPA under clause 22 of the *Protection of the Environment Operations (Waste) Regulation 2014* in the previous month in respect of that Disposal Facility was submitted; and
 - (c) a summary of:
 - (i) any environmental or safety issues arising in the reporting period, and actions taken to mitigate those issues;
 - (ii) any technical or maintenance issues arising in the reporting period, and actions taken to mitigate those issues; and
 - (iii) any complaints received regarding the Services or the Disposal Facility, and actions taken in response to those complaints;
- 10.3.2 if directed by Council's Representative provide some or all of the data contained in the report to Council's Representative in an electronic version, a spread sheet or database package nominated by Council's Representative; and
- 10.3.3 make the records available on demand for inspection by Council's Representative or a person nominated by Council's Representative. If directed by Council's Representative, acting reasonably, the Contractor must prepare a report on any issue arising from the records within any period specified by Council's Representative.
- ### 10.4 Other reports
- 10.4.1 In addition to the reports required under clause 10.3, the Contractor must during the Term deliver to Council's Representative, when requested, a written report on any aspect of this Agreement when requested.

- 10.4.2 If required by the Council's Representative from time to time, a report under this clause 10 must be certified by way of a statutory declaration by a person authorised to make that declaration on behalf of the Contractor.

10.5 Meetings

Council and the Contractor must meet at the frequency specified in the Specifications or as otherwise reasonably required by Council to discuss:

- 10.5.1 the performance of the Services; and
- 10.5.2 any other matters which Council may wish to raise at a meeting concerning the Services and this Agreement.

10.6 Accounts

The Contractor must maintain all those financial and financial planning records that would be expected of a prudent, efficient contractor performing services the nature of the Services.

10.7 Compatibility of information systems

Any information, data and records required to be provided to Council under this Agreement must be provided, if so requested by Council, in a form which is compatible with Council's electronic data and records systems as modified and notified from time to time.

11. Variations

11.1 Definitions

In this clause 11:

- 11.1.1 '**Capital Contribution Amount**' means an amount calculated in accordance with clause 11.4.10;
- 11.1.2 '**Permitted Variation**' means any of the following kinds of variations to this agreement:
- (a) a Council directed Variation as described in clause 11.2;
 - (b) an agreed Variation as described in clause 11.3; or
 - (c) a variation to the Fees to account for a Qualifying Increase in Costs arising as a direct result of a Qualifying Change as described in clause 11.4;
- 11.1.3 '**Variation Amount**' means an amount of money assessed, agreed or determined as payable for a Permitted Variation in accordance with this clause 11;
- 11.1.4 '**Qualifying Change**' means a change in an Act of Parliament or Regulation made under an Act of Parliament, a change in an instrument (as defined under the *Interpretation Act 1987* (NSW)), a change in a fee set under any legislation or instrument, or the change in any Approval (provided that the change applies to similar Approvals generally and not specifically to an Approval applying to the

Contractor) that directly regulates the manner of performing the Services, which change:

- (a) directly and naturally results in an increase in the Contractor's operating costs in performing the Services over and above the Contractor's operating costs in performing the Services immediately prior to the change;
- (b) was not reasonably able to be foreseen by a competent contractor in the position of the Contractor on or before the Pricing Date;
- (c) was not in fact foreseen by the Contractor on or before the Contract Date; and
- (d) was not caused or contributed to by the conduct of the Contractor after the Contract Date,

which occurs or comes into effect during the Term.

11.1.5 **'Qualifying Increase in Costs'** means an actual increase in the Contractor's operating costs in performing the Services (over and above the greater of the operating costs that applied at the Pricing Date and the date immediately before the Qualifying Change) reasonably incurred by the Contractor:

- (a) that is the direct and natural consequence of a Qualifying Change; and
- (b) which increase in costs:
 - (i) was not reasonably able to be foreseen by a competent contractor in the position of the Contractor at the Pricing Date;
 - (ii) was not in fact foreseen or allowed for by the Contractor on or before the Contract Date; and
 - (iii) is no more than the increase that would be incurred by a competent and efficient contractor having taken all reasonable and feasible steps to mitigate the impact of the Qualifying Change,

and deducting any savings, reductions in costs or increases in efficiency or income as a consequence of or relating to the Qualifying Change, provided that a Qualifying Increase in Costs may only include an increase in costs associated with any capital works, such as an upgrade to or augmentation to the Disposal Facility, if the cost of such capital works would be in excess of \$200,000 (+GST); and

11.1.6 **'Variation'** may include additions, omissions, substitutions, alterations, changes in quality or character, kind or position and changes in specific sequence, method, timing or technology.

11.2 Variation directed by Council

11.2.1 Prior to the Expiry Date, Council may at any time, after consulting with the Contractor, by written notice:

- (a) order any Variation to any part of the Services that may reasonably be necessary for the performance of the Services; or
- (b) order any Variation considered by Council's Representative to be desirable for the satisfactory performance and function of the Services.

- 11.2.2 The consultation referred to in clause 11.2.1 must include consultation in relation to:
- (a) the scope of the proposed Variation;
 - (b) any increased costs that the Contractor will incur as a result of the proposed Variation; and
 - (c) the effect (if any) of the proposed Variation on any of the Contractor's obligations under this Agreement.

11.3 Agreed variation

- 11.3.1 The parties may by exchange of letters signed by Council's Representative and the Contractor's Representative, agree:
- (a) a Permitted Variation;
 - (b) the Variation Amount for that Permitted Variation; and
 - (c) a period of time for implementation and operation of the Permitted Variation.
- 11.3.2 At any time prior to the Expiry Date, Council may issue a notice to the Contractor regarding the implementation of an improvement, enhancement or innovation in relation to the performance of the Services that would reduce the cost of the Services or otherwise enhance the ability of the parties to achieve any objectives specified in this Agreement, and upon receipt of such notice the Contractor and Council agree to negotiate in good faith regarding agreed variations to this Agreement to implement the improvements, enhancements or innovations.

11.4 Qualifying Change

- 11.4.1 The Contractor may, subject to and in accordance with this clause 11.4, claim a variation to the Service Prices to account for a Qualifying Increase in Costs arising as a direct result of a Qualifying Change.

- 11.4.2 Within:

- (a) six months after the occurrence of a Qualifying Change, where the Qualifying Increase in Costs associated with that Qualifying Change include an amount in respect of capital costs, including any upgrade to or augmentation to a Nominated Facility; or
- (b) 20 Business Days after the occurrence of any Qualifying Change, where the Qualifying Increase in Costs associated with that Qualifying Change that does not include an amount in respect of capital costs,

the Contractor may give to Council's Representative a written notice setting out:

- (c) sufficient evidence to demonstrate to the reasonable satisfaction of Council's Representative that a Qualifying Change occurred;
- (d) the amount of the Qualifying Increase in Costs, with details of:
 - (i) how such amount has been calculated and why the various components of that amount are in each case a Qualifying Increase in Costs, in sufficient detail (and supported by sufficient evidence) to enable Council's Representative to substantiate that amount and the

- extent to which its various components are in each case a Qualifying Increase in Costs;
- (ii) the proportion of such amounts that the Contractor would expect to be paid (whether by Council to the Contractor, or by the Contractor to Council) by way of an adjustment to the Service Prices; and
 - (iii) if the Qualifying Increase in Costs include an amount in respect of capital costs, including any upgrade to or augmentation to a Nominated Facility:
 - (A) the capital works that the Contractor is required to undertake as a result of the Qualifying Change;
 - (B) the procurement process that the Contractor will undertake to procure those works in a manner that achieves value for money;
 - (C) the estimated cost of those works, with calculations provided on an open-book basis or, where it is not possible to provide calculations on that basis because the price was calculated by a proposed subcontractor and the Contractor does not have access to the calculations, all documents (on an open-book basis) substantiating both price that the subcontractor proposes to charge the Contractor and the decision by the Contractor to engage that subcontractor for that price (noting that a Qualifying Increase in Costs may only include capital works that exceed \$200,000 (+GST));
 - (D) the date by which the works will be commissioned;
 - (E) the number of years of service life of the capital works; and
 - (F) the Capital Contribution Amount calculated in accordance with clause 11.4.10;
- (e) in respect of amounts referred to in paragraph 11.4.2(d)(ii) or 11.4.2(d)(iii)
- (i) whether the Contractor proposes that such amounts be payable (whether by Council to the Contractor, or by the Contractor to Council) as a lump sum or as an adjustment to the Service Prices (or combination of those); and
 - (ii) the dates on which each such change is to take effect together with the Contractor's estimation of the total cost increase and increase in Fees for the remainder of the Term and for each month over the remainder of the Term;
- (f) a written statement setting out any proposals the Contractor may have for reducing the impact of the increase in costs;
- (g) a certification that any cost savings, reductions in costs or increases in efficiency to the benefit of the Contractor by reason of the Qualifying Change have been taken into account by the Contractor to the amount referred to in paragraph 11.4.2(d), and details of those cost savings, reductions in costs or increases in efficiency;

- (h) a certification that the Contractor has taken all reasonable and feasible steps to mitigate the impact of the Qualifying Change and details of those steps taken; and
 - (i) a certification that there are not at that time any further Claims for any Qualifying Change (or if there are, specifying these).
- 11.4.3 The Contractor must provide such additional or supplementary information as Council may reasonably require to enable Council's Representative to assess the validity of the claim made.
- 11.4.4 The Contractor must take all reasonable and feasible steps to mitigate the impact of the Qualifying Change and to reduce any associated Qualifying Increase in Costs.
- 11.4.5 Subject to clause 11.4.8, within 60 Business Days of receipt of all of the information required under clauses 11.4.2 and 11.4.3, Council's Representative may by written notice to the Contractor notify the Contractor that Council:
 - (a) accepts that there has been a Qualifying Change, and agrees with the value of the Qualifying Increase in Costs set out in the Contractor's notice under clause 11.4.2(d), in which case the amount set out in the Contractor's notice under clause 11.4.2(d) shall be the Variation Amount; or
 - (b) accepts in whole or in part that there has been a Qualifying Change (identifying the extent to which it accepts that there has been a Qualifying Change), but does not agree with the value of the Qualifying Increase in Costs set out in the Contractor's notice under clause 11.4.2(d) (but identifying the extent to which such value is agreed, and is not agreed) in which case:
 - (i) to the extent Council accepts there has been a Qualifying Change:
 - (A) to the extent Council also agrees with the value of the Qualifying Increase in Costs set out in the Contractor's notice under clause 11.4.2(d), the amount set out in the Contractor's notice under clause 11.4.2(d) shall be the Variation Amount; and
 - (B) to the extent Council does not agree with the value of the Qualifying Increase in Costs set out in the Contractor's notice under clause 11.4.2(d), either party may refer the matter for dispute resolution under clause 31 to determine the value of the relevant Qualifying Increase in Costs for the purposes of determining the Variation Amount;
 - (ii) Council is taken to reject any other aspect of the claim that there has been a Qualifying Change or that there has been, or will be, a Qualifying Increase in Costs – in which case either party may refer the matter for resolution under clause 31 in relation to whether or not there has been a Qualifying Change or to determine the value of the relevant Qualifying Increase in Costs for the purposes of determining the Variation Amount; or
 - (c) accepts that there has been a Qualifying Change, but rejects that there has been, or will be, any Qualifying Increase in Costs, in which case either party may refer the matter for resolution under clause 31; or

- (d) rejects that there has been a Qualifying Change and Qualifying Increase in Costs, in which case either party may refer the matter for resolution under clause 31 in relation to whether or not there has been a Qualifying Change or to determine the value of the relevant Qualifying Increase in Costs for the purposes of determining the Variation Amount.
- 11.4.6 If the Contractor gives Council's Representative a notice under clause 11.4.2, Council's Representative may within 60 Business Days of receipt of all information required under clauses 11.4.2 and 11.4.3 (or if that information is not received within 60 Business Days of the notice having been given under clause 11.4.2) elect on behalf of Council to terminate this Agreement, if:
 - (a) that notice claims or purports to claim an increase in the Service Prices, and the sum of:
 - (i) that increase; and
 - (ii) any other increase to the Service Prices that occurred following a notice from Council under clause 11.4.5(a) or 11.4.5(b) in the 12 months prior to the date of that notice,would equate to an increase in the Services Fees payable in any 12-month period following the date of that notice until the end of the Term, of more than or equal to 30% above the Service Fees payable in the 12 month period prior to the date of that notice disregarding any fees payable in that period that were directly attributable to any increase referred to in clause 11.4.6(a)(ii) that occurred within that period, (assuming the delivery to each Disposal Facility in each 12-month period following the date of that notice of the same quantity and type of Delivered Material as was delivered to each Disposal Facility in the 12 months prior to the date of that notice); and
 - (b) that notice is not withdrawn by the Contractor within 5 Business Days of receiving notice from Council's Representative of Council's intention to terminate this Agreement under this clause 11.4.6.
- 11.4.7 If Council elects to terminate this Agreement under clause 11.4.6 then clause 22 shall apply and Council's Representative must serve a termination notice under clause 22.2.
- 11.4.8 A notice from Council under clause 11.4.5 must be evidenced by written certification by or on behalf of Council's Representative.
- 11.4.9 If the Contractor gives Council's Representative a notice under clause 11.4.2 that claims or purports to claim under clause 11.4.2(d)(iii), a Capital Contribution Amount, Council's Representative may within 60 Business Days of receipt of all information required under clauses 11.4.2 and 11.4.3 (or if that information is not received within 60 Business Days of the notice having been given under clause 11.4.2) elect on behalf of Council to terminate this Agreement, and if Council elects to terminate under this clause 11.4.9 then:
 - (a) Council must do so by written notice to the Contractor, specifying the date at which such termination will take effect, being no less than 30 days following the date of that notice;
 - (b) the time at which such termination will take effect shall be the date specified in the notice issued under clause 11.4.9(b);
 - (c) clauses 22.3.2, 22.3.4, 22.4, 22.6, 22.7 and 22.8.1 shall apply as if the termination occurred under clause 22.2; and

- (d) the Contractor will have no liability whatsoever arising out of, or in connection with, such termination.

11.4.10 If the notice under clause 11.4.2(d)(iii) identifies that the Qualifying Increase in Costs include an amount in respect of capital costs that exceed \$200,000 (+GST), the Capital Contribution Amount is to be calculated as follows:

$$\text{CCA} = \text{CW} \times \text{AP}$$

Where:

- (a) **CCA** means the Capital Contribution Amount;
- (b) **CW** means the cost of the capital works;
- (c) **AP** means the amortised proportion of the capital works cost, and is to be calculated as:

$$\text{AP} = (\text{CT} / \text{LT}) \times (\text{RY} / \text{LA})$$

where:

- (i) **CT** means the total number of tonnes of Delivered Material delivered by Council to the Disposal Facility during the previous full calendar year (or if during the first full calendar year following the Services Commencement Date, the estimated annual tonnes for that calendar year);
- (ii) **LT** means the total number of tonnes the Disposal Facility was able to receive under applicable Authorisations during the previous full calendar year (or if the first calendar year following the Services Commencement Date, the estimated annual tonnes for that year);
- (iii) **RY** means the remaining years until the Expiry Date (excluding any further extensions under clause 2.2); and
- (iv) **LA** means the number of years of service life of the capital works.

11.5 Payment of Variation Amount

11.5.1 If there is a Permitted Variation to this Agreement, then the Variation Amount, will be paid as one or both of:

- (a) a payment in accordance with clause 11.5.4; and
- (b) an adjustment to the Service Prices in accordance with clause 11.5.5,

as agreed between the parties or, failing agreement, as determined by Council's Representative.

11.5.2 Unless there is a Qualifying Change in accordance with clause 11.4, a variation under this clause 11 will only be valid and a variation to this Agreement will only take effect if the variation is a Permitted Variation and a notice directing or certifying the Permitted Variation is provided to the Contractor in writing and signed by or on behalf of Council's Representative, following:

- (a) for a Variation directed under clause 11.2, a determination or agreement of the Variation Amount under clause 11.6 or 11.7; or

- (b) exchange of letters under clause 11.3.

11.5.3 The notice referred to in clause 11.5.2 must include:

- (a) a description of the Permitted Variation;
- (b) a certification of the Variation Amount (if any) assessed by Council's Representative as payable, comprising one or more of:
 - (i) any adjustment to the Service Prices;
 - (ii) any additional payment based on the Service Prices; and
 - (iii) any payment calculated otherwise than by reference to the Service Prices.

11.5.4 Where, and to the extent that, the notice referred to in clause 11.5.2 includes a certificate in accordance with clause 11.5.3 that the Variation Amount comprises a payment calculated otherwise than by reference to the Service Prices or is an additional payment based on the Service Prices, then the Contractor may issue Council's Representative with a claim for that amount as part of the next Monthly Statement, when that payment is payable, for that amount in accordance with clause 12.

11.5.5 Where, and to the extent that, the notice referred to in clause 11.5.2 includes a certificate in accordance with clause 11.5.3 that all or part of the Variation Amount is to be paid by way of an adjustment to the Service Prices then the adjustment amount is to be included in the applicable Service Prices on the next date that the applicable Service Prices are adjusted in accordance with Schedule 2.

11.5.6 Notwithstanding any other clause in this Agreement, where there is a Qualifying Change in accordance with clause 11.4, to the extent that the Variation Amount for that Qualifying Change is in respect of a Capital Contribution Amount:

- (a) that part of the Variation Amount will only be payable, and the variation will only be valid and take effect under this clause 11 in respect of that part of the Variation Amount, once the capital works that are the subject of that amount have been commissioned; and
- (b) the Contractor is not entitled to make any further claim under clause 11.4 in respect of that Qualifying Change.

11.5.7 A notice issued by Council under clause 11.4.5(a) or 11.4.5(b)(i)(A) may include a requirement that at a date specified in the notice:

- (a) the Contractor must provide to Council's Representative evidence demonstrating the actual Qualifying Increase in Costs incurred by the Contractor at that date in respect of the Qualifying Change, along with such additional information as Council's Representative may reasonably require to validate and reconcile that amount against the Variation Amount; and
- (b) Council's Representative is to validate and reconcile the actual Qualifying Increase in Costs incurred at that date by the Contractor against the Variation Amount,

and the parties must comply with that requirement.

- 11.5.8 If Council's Representative determines under clause 11.5.7(b) that the Variation Amount is greater than the actual Qualifying Increase in Costs incurred by the Contractor at the reconciliation date, then:
- (a) Council's Representative may issue a written notice to the Contractor specifying the difference between the two amounts and including a tax invoice for that amount; and
 - (b) the Contractor must pay Council that amount within 20 Business Days of its receipt of that notice.
- 11.5.9 If Council's Representative determines under clause 11.5.7(b) that the Variation Amount is less than the actual Qualifying Increase in Costs incurred by the Contractor at the reconciliation date, then:
- (a) Council's Representative may issue a written notice to the Contractor specifying the difference between the two amounts; and
 - (b) Council must pay the Contractor that amount within 20 Business Days of its receipt of a tax invoice for that amount.

11.6 Variation Amount for directed Variation - covered by specified rates

- 11.6.1 Where a variation has been directed under clause 11.2 in respect of any services for which a unit rate is contained within Schedule 2, the Contractor is bound to provide those Services that are the subject of the variation at the Service Prices, and the process in clause 11.7 will not apply, provided that the total sum payable under this Agreement in the Service Year following the direction remains within the range of 80% to 150% of the originally estimated total contract value for the performance of Services in that Service Year after allowing any adjustment for rise and fall.
- 11.6.2 For the purposes of clause 11.6.1, the total sum payable under this Agreement following the variation, and the original estimated total contract value is to be:
- (a) determined by the Council's Representative and notified in writing to the Contractor; and
 - (b) if the Contractor disagrees with that determination, resolved in accordance with clause 31 as a Dispute.

11.7 Variation Amount for directed Variation - not covered by specified rates

Where a variation has been directed under clause 11.2 and the variation:

- 11.7.1 is in respect of any services for which a rate is not contained within Schedule 2; or
- 11.7.2 would result in the total sum payable under this Agreement in the Service Year following the direction being outside the range of 80% to 150% of the originally estimated total contract value after allowing any adjustment for rise and fall,
- then:
- 11.7.3 Council's Representative may request a detailed quotation for the Contractor to perform varied services as a Variation;
- 11.7.4 the Contractor must provide the quotation requested and advise the effect the Variation will have on the provision and/or delivery of the Services under this

Agreement. Council will pay a reasonable amount for the provision of the quotation;

- 11.7.5 the parties agree to make all reasonable attempts to agree a price for the Variation;
- 11.7.6 the parties agree that an independent person, agreed upon by the parties, who is expert in the waste services that are the subject of the variation, may be used to provide an opinion as to the reasonableness of the Variation Amount;
- 11.7.7 Council's Representative may instruct the Contractor in accordance with clause 11.2 and 11.5.2 to perform the Variation following agreement of the price of the Variation;
- 11.7.8 Council's Representative may instruct the Contractor in accordance with clause 11.2 and 11.5.2 to perform the Variation without agreement on the price;
- 11.7.9 the Contractor must perform the Variation if so instructed; and
- 11.7.10 if agreement on the price for the Variation is not reached, then the matter is to be resolved in accordance with clause 31 as a Dispute.

11.8 Contractor claim of a directed variation

- 11.8.1 If the Contractor considers that a Direction has been made by Council or Council's Representative that constitutes a variation under this clause 11 (where not expressly so stated):
 - (a) the Contractor must give written notice to Council's Representative to that effect immediately upon receipt of the Direction and again prior to the start of the work or activity which is the subject of the Direction; and
 - (b) despite any other provision in this Agreement, the giving of the notices under clause 11.8.1(a) by the Contractor will be a condition precedent to the Contractor's entitlement to Claim in relation to the Direction or to maintain in any manner that the Direction was or ought to involve a variation under this clause 11.
- 11.8.2 For the avoidance of doubt, this clause 11.8 does not permit a variation independently of the procedures in clause 11.

11.9 Limited application of clause

- 11.9.1 For the avoidance of doubt, an entitlement to additional payment under this clause 11 only applies to:
 - (a) variations directed by Council's Representative or agreed between the parties which require additional work, activities or services over and above that required by this Agreement; or
 - (b) variations under clause 11.4,and which are a Permitted Variation.

11.9.2 For the avoidance of doubt:

- (a) a requirement of Council or Council's Representative or a comment or a Direction of Council or Council's Representative:
 - (i) to require compliance with this Agreement, the requirements of the EPA or of any Law applicable from time to time;
 - (ii) which Council or Council's Representative is otherwise entitled to make under this Agreement or any other document (other than a Direction expressed to be a Variation directed by Council under clause 11.2);
- (b) any error, omission, defect or incompleteness in any Disclosed Information; or
- (c) a requirement of any Authority,

will not be or permit a variation under this clause 11 or otherwise entitle the Contractor to any costs, payment, extension of time or other claim, compensation or relief, these matters being matters that the Contractor has accepted the risk of or is required to comply with under this Agreement.

11.9.3 For the avoidance of doubt the Contractor will only be entitled to payment for a Permitted Variation:

- (a) for which a notice has been issued by or on behalf of Council's Representative in accordance with clause 11.5; and
- (b) that has been carried out in accordance with that notice.

11.10 Beneficial variations

11.10.1 Where:

- (a) there is a Qualifying Change that would directly reduce the actual cost of performing the Services or provide an additional benefit (including a credit or income) to the Contractor, which has the effect of offsetting the cost of performing the Services; or
- (b) the Contractor or Council identifies an option for improvement or innovation in relation to the performance of the Services that would reduce the cost of the Services,

Council's Representative may by written notice to the Contractor, request that the parties negotiate in good faith to determine and agree a reduction in the Service Prices to equitably and reasonably share between the parties that offset, reduction or benefit that is enjoyed in connection with the Services, and the parties must comply with that notice by negotiating in good faith in an attempt to determine and agree a reduction in the Service Prices to equitably and reasonably share between the parties that offset, reduction or benefit.

11.10.2 If agreement on a reduction in the Service Prices to equitably and reasonably share an offset, reduction or benefit referred to in clause 11.10.1 cannot be or has not been reached within 30 Business Days after a notice is served on the Contractor under clause 11.10.1, then clause 31 will apply to the questions of:

- (a) if a reduction; and

- (b) if so, what reduction,

in the Service Prices should apply to equitably and reasonably share between the parties the offset, reduction or benefit.

12. Prices and Payment

12.1 Fees

12.1.1 Subject to clause 11, for a Service performed under this Agreement:

- (a) the Contractor is only entitled to be paid the Fee duly claimed and calculated in accordance with this clause 12; and
- (b) the Contractor is not entitled to and must not claim, any amounts other than in accordance with this clause 12.

12.1.2 All claims for payment of the Fee must be made in accordance with this clause 12 and Council has no liability to pay a Fee unless:

- (a) the preconditions for payment under this clause 12 and Schedule 2 have been satisfied;
- (b) a valid Monthly Statement has been issued to Council together with all supporting documentation required by this Agreement;
- (c) an invoice properly prepared and rendered in accordance with this clause 12.3 has been served on Council;
- (d) the Monthly Statement has not been disputed, provided that payment of the Fee claimed in a Monthly Statement will be made by or on behalf of Council in accordance with this clause 12 to the extent it is not disputed; and
- (e) the amount claimed has been properly calculated in accordance with this Agreement.

12.1.3 The Fee payable in respect of any Services, being any or all of the Services Fee and Unscheduled Opening Hours Fee, must be calculated in accordance with Schedule 2 and for the avoidance of doubt the Contractor cannot charge Council and Council is under no obligation whatsoever to pay any amounts calculated using any change to the formulae, amounts, factors, indices or other matters specified in Schedule 2 unless the Contractor has obtained Council's written consent to such change prior to the Contractor providing the Services to which the change relates.

12.2 Monthly Statement

12.2.1 Within 10 Business Days after the end of each calendar month the Contractor must submit to Council's Representative a monthly statement (**Monthly Statement**) in a form approved by the Council's Representative from time to time.

12.2.2 Each Monthly Statement must comply with any requirements specified in the Specifications and:

- (a) for each Service provided in the month and for which a Fee is claimed, set out the full detailed calculation in accordance with Schedule 2 of the Fee for each Service and in total, including:

- (i) any Services Fee payable by Council in accordance with Schedule 2 in relation to the Disposal of Delivered Material delivered to the Disposal Facility in the month, and the full detailed calculation in accordance with Schedule 2; and
 - (ii) any Unscheduled Opening Hours Fee payable by Council in accordance with Schedule 2 in relation to the opening of the Disposal Facility outside of the Opening Hours pursuant to an Unscheduled Opening Hours Request in the month, and the full detailed calculation in accordance with Schedule 2;
- (b) include deductions, set offs and rebates as calculated in accordance with clause 12.7, 12.8, 12.9 or 12.10;
- (c) include any amount that was previously disputed and for which the dispute has been resolved in accordance with clause 12.6.3;
- (d) include a summary report clearly setting out:
 - (i) the calendar month to which the Monthly Statement relates;
 - (ii) each of the Services to which the Monthly Statement relates;
 - (iii) any Service Prices applicable to each of those Services;
 - (iv) the calculation of the amount claimed for each Service the subject of the Monthly Statement;
 - (v) the calculation of any amounts payable to Council by the Contractor for that month (including deductions or set offs);
 - (vi) the calculation of any Unscheduled Opening Hours Fee for that month;
 - (vii) the total amount claimed or payable by the Contractor;
 - (viii) GST; and
 - (ix) such other information as is required by clause 12;
- (e) provide such additional details as Council's Representative may require; and
- (f) be accompanied by all necessary information to demonstrate the calculated amounts, including a record of the number of loads delivered to the Disposal Facility by Collection Vehicles and, for each such load, the number of tonnes of Delivered Material in that load,

and must be accompanied by a "Subcontractor's Statement" given by the Contractor in its capacity as 'subcontractor' (as that term is defined in the *Workers Compensation Act 1987* (NSW), *Payroll Tax Act 2007* (NSW) and *Industrial Relations Act 1996* (NSW)) which is a written statement:

- (g) under section 175B of the *Workers Compensation Act 1987* (NSW) in the form and providing the detail required by that legislation;
- (h) under Part 5 of Schedule 2 of the *Payroll Tax Act 2007* (NSW) in the form and providing the detail required by that legislation;

- (i) under section 127 of the *Industrial Relations Act 1996* (NSW) in the form and providing the detail required by that legislation; and
- (j) any other similar requirement from time to time.

12.2.3 On submitting a Monthly Statement for any payment under this Agreement, the Contractor must certify in writing to Council's Representative that:

- (a) it has paid all wages and allowances due and owing to any of its workers (including employees and contractors) in respect of the Services claimed for;
- (b) it has paid all amounts due and owing to any person, including any relevant government taxes, levies or charges, in respect of the Services claimed for, to which it has subcontracted any of its rights and obligations under this Agreement;
- (c) it has made any payments that it is required to make in respect of the Contractor's Plant used to undertake the Services, up to the end of the period to which the Monthly Statement applies;
- (d) it has made all superannuation contributions in respect of individuals for whom it has responsibility to make superannuation contributions; and
- (e) it has made all other payments due and owing for costs which were expended in delivering services under this Agreement.

12.2.4 Council's Representative may require that any certification under clause 12.2.3 by the Contractor is confirmed by a statutory declaration to the same effect by a person authorised to make such a declaration on the Contractor's behalf prior to the making of any payment to the Contractor under this Agreement.

12.3 Provision of tax invoice

12.3.1 If the Monthly Statement shows that the net amount is an amount that Council must pay to the Contractor, the Monthly Statement must be accompanied by a tax invoice in compliance with the GST Laws showing the Fee for each Service and in total for all Services for the relevant month in the amounts specified in the Monthly Statement as the net amount payable. The tax invoice must:

- (a) specify the title of this Agreement, the contract number of this Agreement (or any other reference number as Council's Representative may, from time to time, specify in writing to the Contractor as being required to be inserted on any invoice to which this Agreement relates); and
- (b) be addressed to the General Manager of Council for the attention of Council's Representative.

12.3.2 If the Monthly Statement shows that the net amount is an amount that the Contractor must pay to Council then Council must, within 10 Business Days after receiving the Monthly Statement give the Contractor a tax invoice in compliance with the GST Law showing the amounts specified in the Monthly Statement as the net amount payable.

12.4 Payment dispute notice

12.4.1 If Council's Representative disputes an amount or a Service the subject of a Monthly Statement, Council may within 10 Business Days of receipt of a properly rendered Monthly Statement, notify the Contractor of the dispute. The notice must identify the Monthly Statement to which it relates and state:

- (a) the amount assessed by Council's Representative as payable:
 - (i) by Council to the Contractor; or
 - (ii) by the Contractor to Council,
- (b) any amount or Service disputed and the reasons for the dispute;
- (c) if the amount assessed differs from the amount set out in the Monthly Statement, the reasons for the difference; and
- (d) the net amount payable either to Council or the Contractor.

12.4.2 A Service may be disputed because:

- (a) Council's Representative considers that a Service has not been properly performed in accordance with this Agreement; or
- (b) Council's records of the performance of the Service or the number of Services performed disagrees with the Contractor's Monthly Statement.

12.4.3 Council's Representative may issue a notice under clause 12.4.1 at any time (and may issue multiple such notices in one calendar month) even if the Contractor has not lodged a properly rendered Monthly Statement. Council's Representative is not obliged to exercise its discretion under this clause for the benefit of the Contractor.

12.4.4 At any time, Council's Representative may by a further notice under clause 12.4.1 correct any error which has been discovered in any previous Monthly Statement.

12.5 Payment – where Monthly Statement not disputed

12.5.1 If Council has not issued a notice to the Contractor under clause 12.4, a party must pay the other party the amount specified in the Monthly Statement no later than 30 Business Days following receipt of a tax invoice in accordance with clause 12.3. For payments made by Council to the Contractor, payment will be made by electronic funds transfer to an account nominated by the Contractor.

12.5.2 The Contractor acknowledges that payments made by Council to the Contractor under this Agreement are on account only and are not evidence that the Contractor's obligations under this Agreement have been performed satisfactorily.

12.6 Payment – where Monthly Statement disputed

If Council has issued a notice to the Contractor under clause 12.4:

12.6.1 any amount in the Monthly Statement that is not disputed must be paid in accordance with clause 12.5;

12.6.2 Council will only be required to pay the Fee for any amount disputed or Disputed Services if:

- (a) Council's Representative is satisfied that the Disputed Service has been satisfactorily performed to meet the requirements of this Agreement; or
- (b) in accordance with the resolution of the Dispute under clause 31 – in accordance with that resolution;

- 12.6.3 the Fee comprising the disputed amount or for the Disputed Service must be included in the Monthly Statement submitted following:
- (a) the date on which the Service was properly performed, re-delivered or re-performed under this Agreement; or
 - (b) a resolution of the Dispute under clause 31 – in accordance with that resolution;
- 12.6.4 any disputed amount in the Monthly Statement that is payable to Council must be paid in accordance with clause 12.5, but must be reimbursed by Council to the extent that Council was not entitled to that amount if it is so resolved under clause 31; and
- 12.6.5 the Contractor will not be entitled to any interest or charge for extending credit or allowing time for the payment of the Fee.

12.7 Set-off

- 12.7.1 Without limiting Council's rights under any other part of this Agreement or at law, Council may deduct from any moneys due to the Contractor, any sum which is due and payable whether or not Council's right to payment arises pursuant to an indemnity or by way of damages, debt, restitution or otherwise including:
- (a) any costs or expenses incurred by Council in the rectification of breakage or damage in accordance with clause 4.9.4;
 - (b) any costs or expenses incurred by Council in taking action in accordance with clause 4.10;
 - (c) any costs or expenses incurred by Council in taking action under clause 17;
 - (d) any costs or expenses incurred by Council in performing the obligations of the Contractor or obtaining the services of a third party pursuant to clause 22.1, clause 22.2.2(h) or clause 22.8; or
 - (e) any costs or expenses incurred by Council as a result of or arising from any breach of this Agreement by the Contractor.
- 12.7.2 Nothing in this clause will affect Council's right to recover from the Contractor the whole of such moneys, or any balance that remains owing, by other means.

12.8 Fee adjustment

- 12.8.1 In this clause 12.8 **Performance Period** means:
- (a) initially, the period from the Services Commencement Date to the date that is three months after the Services Commencement Date; and
 - (b) each subsequent three-month period during the Term.
- 12.8.2 The Contractor's entitlement to payment of the Fees under clause 12.1 is subject to the Contractor's continuing compliance with the requirements of the Agreement, including the Specifications.

- 12.8.3 In every third monthly report required to be prepared by the Contractor and submitted to Council's Representative under the Specifications, the Contractor must specify:
- (a) each non-performance (if any) as measured through the Performance Management System, that occurred in the Performance Period immediately preceding the date of the report;
 - (b) in reasonable detail the cause and calculation of the applicable Fee reduction in that Performance Period, having regard to the calculations referred to in Schedule 3; and
 - (c) if applicable, any extenuating circumstances that led to the non-performance, including information to substantiate the extenuating circumstances.

The requirements of this clause do not limit any other reporting requirements under this Agreement.

- 12.8.4 For each non-performance as measured through the Performance Management System that occurs in a Performance Period:
- (a) in Council's discretion, the Fees payable to the Contractor under clause 12 for the calendar month immediately following the Performance Period must be reduced in accordance with Schedule 3 to reflect the non-performance; and
 - (b) any Monthly Statement or invoice submitted by the Contractor for Fees or by Council for payment amounts in respect of the calendar month immediately following the Performance Period in which the non-performance occurred must reflect the adjusted Fee or payment amount.

- 12.8.5 The Contractor acknowledges and agrees that:
- (a) the reductions or increases provided for in this clause 12.8 and Schedule 3 reflect a genuine pre-estimate by the parties of part of Council's overheads and administrative costs arising from, and part of Council's costs of responding to, the non-performance of the requirements of or obligations under this Agreement; and
 - (b) nothing in this clause 12.8 and Schedule 3 waives, limits or alters any other right of Council or obligation, requirement or liability of the Contractor under or in connection with this Agreement, except to the extent of the amount actually paid to Council or deducted from the Fees in accordance with this clause 12.8.

- 12.8.6 In any calendar month immediately following a Performance Period in which a non-performance as measured through the Performance Management System occurred, Council may in its absolute discretion by written notice to the Contractor prior to the issue by the Contractor or Council of an invoice for that calendar month under clause 12.3, waive its entitlement to a Fee reduction or payment increase for the non-performance.

12.9 Failure to provide Services

If at any time during the Services Term, the Contractor fails to provide any or all of the Services in accordance with this Agreement for any reason whatsoever, (including due to Force Majeure) without the approval of Council's Representative, Council will not be liable (either at law or in equity) to pay any amount for the Services not delivered.

12.10 Reconciliation amount

12.10.1 At any time between 20 and 40 Business Days after the end of each Service Year, Council's Representative will carry out a reconciliation of the Fees and other amounts paid against the Services provided, the Delivered Material delivered to the Disposal Facility and the Service Prices.

12.10.2 If Council's Representative determines that adjustment of the Fee or other payment amount is necessary following a reconciliation under this clause 12.10, Council's Representative must notify the Contractor and if the reconciliation amount indicates that:

- (a) the Contractor has been overpaid, the Contractor must pay the reconciliation amount to Council; and
- (b) the Contractor has been underpaid, Council must pay the reconciliation amount to the Contractor,

within 30 Business Days following receipt of a tax invoice for the reconciliation amount.

13. Not Used

14. GST

14.1 Definitions

Words in this Agreement have the same meaning as in the GST Laws unless the context makes it clear that a different meaning is intended.

14.2 Interpretation

If a party is a member of a GST group, references to GST which the party must pay and to input tax credits to which the party is entitled include GST which the representative member of the GST group must pay and input tax credits to which the representative member is entitled.

14.3 Payment of GST

A recipient of a taxable supply under or in connection with this Agreement:

14.3.1 must pay to the supplier, in addition to the consideration for the taxable supply, an amount equal to any GST paid or payable by the supplier in respect of the taxable supply; and

14.3.2 must make that payment to the supplier as and when the consideration or part of it is provided, except that the recipient need not pay unless the recipient has received a tax invoice (or an adjustment note) for that taxable supply.

14.4 Reimbursements

Where a supplier incurs a cost or expense for which it may be reimbursed by, indemnified against, claim against or set-off against another party under this Agreement, the amount to

be paid or credited is the cost or expense (reduced by the input tax credit that the supplier is entitled to claim in respect of that cost or expense) plus the amount in respect of GST payable by the recipient under clause 14.3.

14.5 Indemnities and Claims

- 14.5.1 If a payment under an indemnity gives rise to a liability to pay GST, the payer must pay, and indemnify the payee against, the amount of that GST.
- 14.5.2 A party may recover payment under an indemnity before it makes the payment in respect of which the indemnity is given.
- 14.5.3 If a party has a Claim under or in connection with this Agreement whose amount depends on actual or estimated revenue or which is for a loss of revenue, revenue must be calculated without including any amount received or receivable as reimbursement for GST (whether that amount is separate or included as part of a larger amount).

14.6 Other taxes, rates and outgoings

- 14.6.1 Unless otherwise required by Law, the parties agree that Council is not liable to compensate the Contractor in respect of any other Taxes levied in connection with the provision of Services under this Agreement or any payment by Council under this Agreement.
- 14.6.2 Without limiting clause 14.6.1, as between Council and the Contractor, the Contractor must pay all:
- (a) council rates and all water, sewerage and drainage fees and charges;
 - (b) electricity and other utilities consumption charges;
 - (c) waste disposal charges and levies (including a Waste Levy);
 - (d) charges for the connection, management or use of utilities; and
 - (e) all other Taxes, if payable or outgoings,
- levied in connection with the Services, the Disposal Facility or Contractor's Plant.

15. Security

15.1 General

Within 20 Business Days after the Contract Date, the Contractor must provide to Council security in the amount set out in Item 11 of Schedule 1 (**Security**), for the purpose of ensuring the due and proper performance of the Contractor's obligations under this Agreement, including an obligation to pay money.

15.2 Form of Security

The Security must be an irrevocable and unconditional undertaking in the form set out in Schedule 5 with no expiry date provided by:

- 15.2.1 the Sydney office of an Australian bank or financial institution approved in writing by Council;

15.2.2 a financial institution regulated by the Australian Prudential Regulatory Authority (APRA); or

15.2.3 an Australian financial institution that is not regulated by APRA but has a credit rating of:

(a) 'A' or above (as assessed by Standard and Poors); or

(b) 'A2' or above (as assessed by Moody's Investors Services); or

(c) 'A' or above as assessed by Fitch Ratings,

so long as the total value of the performance bond or unconditional undertaking is less than 10% of the financial institution's net assets.

15.3 Recourse to Security

15.3.1 Council may through Council's Representative call on, or otherwise have recourse to, any or all of the Security at any time, without notice to the Contractor, where the Contractor has breached or failed to perform an obligation or owes monies under the Agreement.

15.3.2 The Contractor is not entitled to, and must not seek, an injunction against either Council or the issuer of any Security (if applicable) preventing a demand or payment under the security (whether the demand extends to the whole of the security or part thereof) or the use to which the proceeds of such a demand can be put.

15.3.3 The exercise by Council of any of its powers and rights under this clause will not prejudice or affect any other right or entitlement which Council is entitled to claim under this Agreement or at law.

15.4 Reinstatement of Security

If Council demands and has recourse to the Security, then no later than 5 Business Days after Council gives the Contractor a notice asking for it, the Contractor must deliver to Council a replacement or additional security so that the total held by Council equals the amount stated in Item 11 of Schedule 1.

15.5 Release of Security

Within 60 Business Days after the Expiry Date or earlier termination of this Agreement, and provided the Contractor has duly and punctually performed all of its obligations under this Agreement, Council will release any unused portion of the Security to the Contractor, provided that where this Agreement has been terminated, Council is not required to release any part of the Security under this clause until payment has been made under clause 22.6.

15.6 Trusts and interest

Council:

15.6.1 shall not be obliged to pay the Contractor interest on:

(a) the amount of the Security; or

(b) the proceeds of the Security if it is converted to cash; and

15.6.2 does not hold the proceeds or the Security on trust for the Contractor.

15.7 Replacement Security

15.7.1 In this clause 15.7, **Security Adjustment Date** means:

- (a) initially, the tenth anniversary of the Contract Date; and
- (b) each subsequent tenth anniversary of the Contract Date during the Term.

15.7.2 Within 10 Business Days of each Security Adjustment Date, the Contractor must deliver to the Council's Representative a replacement Security in the amount calculated in accordance with clause 15.7.4.

15.7.3 The Security held by Council immediately prior to the receipt by the Council's Representative of the replacement Security under clause 15.7.1, must be returned to the Contractor upon receipt of the replacement Security.

15.7.4 The amount of the replacement Security must be calculated as an amount equal to 130% of the amount of Security held by Council immediately prior to the Security Adjustment Date.

16. Not used

17. Emergency

17.1 Exercise of powers

The powers given to Council and its authorised representatives under this clause 17 may be exercised:

- 17.1.1 at any time where Council in its discretion determines that an Emergency exists; or
- 17.1.2 if the Contractor requests Council to exercise the powers under this clause.

17.2 Emergency

In an Emergency, or any situation which poses a real risk of an Emergency, the Contractor must:

- 17.2.1 take immediate action to stop or prevent the Emergency in accordance with any applicable emergency management plan; and
- 17.2.2 immediately advise Council of the Emergency or potential Emergency.

17.3 Contractor's obligations

The Contractor must cooperate with Council and its authorised representatives during an Emergency, including ensuring compliance by the Contractor's Staff with all reasonable Directions given by Council and its authorised representatives.

17.4 Suspension of obligations

- 17.4.1 If at any time during this Agreement Council exercises its powers under this clause 17, the obligations of the Contractor are suspended to the extent that the

Contractor's ability to perform those obligations is adversely affected by the assumption of control and delivery of the Services by Council or its authorised representatives.

17.4.2 Nothing in this clause 17 prevents Council from exercising any rights and remedies available to it in respect of:

- (a) any breach or default by the Contractor which occurs before the exercise of the powers under this clause 17; or
- (b) any breach or default by the Contractor while the powers under this clause 17 are being exercised, to the extent that the Contractor's obligations are not suspended.

17.4.3 The Contractor will continue to be paid under this Agreement in accordance with clause 12 and Schedule 2 to the extent that the Contractor continues to provide the Services in accordance with this Agreement, but will not be paid to the extent that the Services are performed by Council exercising its rights under this clause 17.

17.5 Council's Loss

The Contractor must pay to Council the amount of any Loss Council reasonably suffers or incurs as a result of the Contractor's failure to take that actions required by clause 17.2, and that Loss will be due and payable to Council by the Contractor as a debt, and Council may:

- (a) deduct that Loss from amounts payable to the Contractor; or
- (b) recover that Loss against any Security held by Council.

17.6 Council's obligations

17.6.1 Nothing in this clause 17 obliges Council to exercise the powers given under this clause or to remedy the Emergency.

17.6.2 Nothing in this clause 17 makes Council or its authorised representatives liable for any accident, damage or defect to or in the Contractor's facilities or the Contractor's plant and equipment during an Emergency, which was unavoidable as a result of the actions required to address the Emergency.

18. Risk and Insurance

18.1 Care of assets

18.1.1 The Contractor is responsible for the care of all assets used in provision of the Services, from the Services Commencement Date until the Expiry Date, and must, subject to any instructions from Council's Representative, make good any loss or damage that may occur to those assets from any cause whatsoever prior to the Expiry Date, except to the extent the loss or damage was caused by the default or negligence of Council, Council's Representative, Council's employees, contractors or agents (excluding the Contractor).

18.1.2 The Contractor must make every effort to mitigate the effects of any loss or damage occurring to the assets from any cause whatsoever.

18.1.3 The Contractor is responsible for any loss of or damage to any equipment or other property of the Contractor used or intended to be used for the purposes of providing the Services, except to the extent that the loss or damage was caused by

the default or negligence of Council, Council's Representative, Council's employees, contractors or agents (excluding the Contractor).

18.2 Obligation to maintain insurances

Without limiting the respective obligations or liabilities of the parties, the Contractor must effect and maintain the insurances referred to in this clause 18 with Reputable Insurers from the Services Commencement Date until, unless expressly stated otherwise, the Expiry Date.

18.3 Public liability Insurance

The Contractor must maintain broadform public and products liability insurance:

- 18.3.1 for not less than the amount stated in Item 12 of Schedule 1 for any one occurrence and unlimited in the annual aggregate;
- 18.3.2 which specifies Council as an interested party;
- 18.3.3 which indemnifies the Contractor and Council in respect of any liability for:
 - (a) loss of, or damage to or loss of use of, any real or personal property; and
 - (b) personal injury to, disease or illness or death of, any person;arising out of or in connection with the performance of the Services;
- 18.3.4 which covers the Contractor for its liabilities under this Agreement and its liabilities to third parties; and
- 18.3.5 which, without limiting clause 18.3.3, indemnifies Council in respect of Council's liability to any person arising out of any act, error or omission of the Contractor in the performance of Services.

18.4 Workers' Compensation Insurance

- 18.4.1 The Contractor must maintain workers' compensation insurance in accordance with the relevant Laws in respect of any person deemed to be an employee of the Contractor for not less than the amount stated in Item 13 of Schedule 1.
- 18.4.2 Council acknowledges that the Contractor is self-insured under the *Safety, Rehabilitation and Compensation Act 1988* (Cth). At all times while the Contractor maintains that status, the Contractor will be deemed to comply with all workers' compensation insurance requirements of this Agreement.

18.5 Building and contents insurance

The Contractor must ensure that:

- 18.5.1 for the duration of the Term; and
- 18.5.2 such further period as Delivered Material is Disposed of,

the Disposal Facility and their contents are insured for not less than the amount stated in Item 14 of Schedule 1.

18.6 Motor Vehicle Insurance

The Contractor must maintain:

- 18.6.1 compulsory motor vehicle third party insurance (bodily injury) in accordance with the relevant Laws; and
- 18.6.2 motor vehicle third party property insurance for any motor vehicle or any plant or mechanically propelled vehicle (registered or unregistered) to be used by the Contractor in the performance of the Services, for not less than the amount stated in Item 16 of Schedule 1.

18.7 Evidence of insurance

- 18.7.1 The Contractor must, in respect of each of the insurances that are required to be maintained by the Contractor under this clause 18, give Council's Representative:
 - (a) acceptable proof of currency of the insurance on or before the Services Commencement Date and on each anniversary of the Services Commencement Date during the Term, which proof of currency includes details of the period and cover effected; and
 - (b) on request, other evidence of the insurance, including currency, which Council's Representative reasonably requires.
- 18.7.2 If the Contractor does not comply with clause 18.7.1, Council may effect and maintain the insurances that are required to be maintained by the Contractor under this clause 18, and may:
 - (a) recover the cost of doing so as a debt due from the Contractor; or
 - (b) deduct the premiums payable for them from amounts payable to the Contractor.

18.8 Management of insurances

- 18.8.1 In relation to the insurances to be maintained by the Contractor under this clause 18 the Contractor must:
 - (a) pay each premium on or before the due date or under agreed terms with the relevant insurance brokers and, when asked by Council, produce proof of payment;
 - (b) immediately rectify anything which might prejudice any insurance and reinstate the insurance if it lapses;
 - (c) notify Council immediately when an event occurs in relation to the Services which could prejudice a policy of insurance; and
 - (d) notify Council as soon as is reasonably practicable if there is any material adverse change in any policy of insurance under this Agreement.
- 18.8.2 The Contractor must, subject to confidentiality obligations to insurers, within ten Business Days of the occurrence of a relevant incident in relation to the Services, give notice to Council of each insurance claim and of the circumstances surrounding the incident giving rise to the insurance claim.

18.9 No cancellation or avoidance

Council and the Contractor must not knowingly do anything that would entitle the insurer under any of the insurances effected in compliance with this clause 18 to cancel or avoid the policy of insurance, or reduce the amount payable on a claim under the policy.

18.10 Subcontractors

Without limiting the respective obligations or liabilities of the parties, the Contractor must ensure that its Subcontractors take out and maintain insurance policies similar to those required to be effected by the Contractor under this clause 18 for the Subcontractor's services as appropriate (in the opinion of Council's Representative acting reasonably) given the nature of the work to be performed by the Subcontractor.

19. Indemnity and release of Council

19.1 Indemnity of Council

19.1.1 The Contractor indemnifies Council, Council's Representative and Council's employees from and against any Claim, Loss, obligation or duty brought against, suffered or incurred by Council, Council's Representative or Council's employees arising out of, or in any way in connection with:

- (a) any:
 - (i) harm to the Environment;
 - (ii) loss of, or damage to, or loss of use of, any real or personal property;
 - (iii) personal injury to, disease or illness (including mental illness) to, or death of, any person; or
 - (iv) fines, cost orders, orders requiring the performance of work, orders requiring the posting of a bond or other form of security or similar sanctions,

arising out of, or in any way in connection with, the performance of, or any act or omission of the Contractor or of any of the Contractor's Staff in connection with the Services;

- (b) Wilful Default of the Contractor or the Contractor's Staff;
- (c) any infringement or alleged infringement of any Intellectual Property Right in respect of the performance of the Services or anything used or supplied by the Contractor in connection with the Services;
- (d) any breach of the Contractor's duty of confidentiality under clause 27;
- (e) any breach by the Contractor or the Contractor's Staff of the Heavy Vehicle National Law;
- (f) fraudulent or criminal conduct by the Contractor or the Contractor's Staff;
- (g) abandonment of the performance of the Services or repudiation of this Agreement; or
- (h) liability which cannot be limited at Law or arises out of or in connection with a breach of a statutory duty by the Contractor or the Contractor's Staff.

19.1.2 To the fullest extent permitted at law, the indemnity in this clause 19.1 includes indemnification of Council, Council's Representative and Council's employees from any of the following:

- (a) fines;
- (b) cost orders;
- (c) orders requiring the performance of work;
- (d) orders requiring the posting of a bond or other form of security.

19.1.3 The Contractor's liability to indemnify Council, Council's Representative and Council's employees under this clause 19.1 will be proportionately reduced to the extent that the default or negligence of Council, Council's Representative or Council's employees caused or contributed to the Claim, Loss, obligation or duty.

19.2 Release of Council

19.2.1 Subject to this Agreement (including clause 19.2.2), the Contractor releases Council and Council's Representative and their respective officers, employees and agents, from any Loss, Claim, obligation or duty to the Contractor whatsoever in respect of or in connection with any or all of:

- (a) the suitability of the Disposal Facility for the Services;
- (b) the suitability, location, adequacy, availability or capacity or any other aspect of the Disposal Facility or Contractor's Plant;
- (c) any error, misdescription or omission in any of the Disclosed Information; and
- (d) any other risk accepted by the Contractor under clause 3.4.

19.2.2 For the avoidance of doubt, without limiting clause 19.2.1, the release applies to any Loss, Claim, obligation or duty in respect of the negligence or other conduct or omission of any person (including Council or Council's Representative) in respect of the matters the subject of the release prior to or following the date of this Agreement.

19.3 Survives termination and preservation of Contractor's obligations

19.3.1 The indemnity in clause 19.1 survives termination of this Agreement.

19.3.2 The release in clause 19.2 survives termination of this Agreement.

19.3.3 The Contractor's obligations and releases in this clause 19 are absolute, unconditional and irrevocable.

19.3.4 The liability of the Contractor under this Agreement is not affected by any circumstance, act or omission which, but for this clause 19.3, might otherwise affect them at Law or in equity.

19.4 Place, manner and time of payment

Payments by the Contractor under this clause 19 must be made:

19.4.1 at a place and by a method reasonably required by Council's Representative;

- 19.4.2 by 3.00pm local time in the place where payment is to be made;
- 19.4.3 unconditionally;
- 19.4.4 in immediately available funds and without set-offs, counter claims, abatements or, unless required by law, deductions or withholdings; and
- 19.4.5 in Australian dollars.

19.5 Benefit of indemnity

- 19.5.1 Council holds the benefit of clause 19.1 on trust for, and may enforce clause 19.1 directly against the Contractor, on behalf of the Council's Representative, officers and employees.
- 19.5.2 Clause 19.5.1 applies even though Council's Representative, officers and employees are not party to this Agreement.
- 19.5.3 The consent of any or all of Council's Representative, officers and employees is not required for any amendment to or waiver of rights under this Agreement.

20. Liability

20.1 Exclusions and limitations do not apply in certain circumstances

The exclusions and limitations on a party's liability in this Agreement, including this clause 20 do not apply in the case of:

- 20.1.1 fraud, fraudulent concealment or dishonesty;
- 20.1.2 malicious or criminal conduct;
- 20.1.3 death or personal injury, including under the indemnity in clause 19.1.1(a)(iii);
- 20.1.4 damage to tangible property (real and personal), including under the indemnity in clause 19.1.1(a)(ii);
- 20.1.5 Gross Negligence;
- 20.1.6 the indemnities given under clause 19.1.1(c) and clause 26;
- 20.1.7 Wilful Default;
- 20.1.8 any Fee reduction or increase under the Performance Management System; or
- 20.1.9 any liability to the extent that the same may not be excluded or limited as a matter of applicable Law or that arises out of a breach of a requirement prescribed by Law (including any fine or penalty).

20.2 Exclusion of Consequential Loss

- 20.2.1 Subject to clause 20.2.2, and to the extent permitted by Law, neither party will be liable to the other, whether in contract, tort (including negligence), breach of statutory duty, or otherwise, under or in connection with this Agreement for any Consequential Loss.

- 20.2.2 Without limiting any other right of Council, the Contractor acknowledges and agrees that clause 20.2.1 does not operate to prevent Council from being entitled to recover any direct loss or damage including:
- (a) costs of procuring replacement Services from a third party;
 - (b) administrative costs and expenses, including for management and staff time;
 - (c) consultant's fees;
 - (d) mitigation costs and expenses; and
 - (e) out-of-pocket costs and expenses,
- sustained, incurred or suffered by Council.
- 20.2.3 Without limiting any other right of the Contractor, Council acknowledges and agrees that clause 20.2.1 does not operate to prevent the Contractor from being entitled to recover any amount in respect of a valid Monthly Statement under this Agreement.

20.3 Liability cap

Despite any other clause in this Agreement other than clause 20.1, the Contractor's aggregate liability for any and all claims made by Council within a Service Year (arising out of or in connection with this Agreement (including under any indemnity)) is limited to the total aggregate Service Fees paid to the Contractor in the twelve months preceding the first claim made by Council in that Service Year or if the claim arises in the first Service Year, then the expected Service Fees payable under this Agreement for that Service Year.

20.4 Obligation to mitigate

Each party must use reasonable efforts, to the extent within its control and consistent with each party's obligations under this Agreement, to promptly mitigate any Loss likely to be or actually sustained, incurred or suffered by it under or in connection with this Agreement.

21. Force Majeure

21.1 Contractor must not suspend

The Contractor must not interrupt or suspend the Services for any reason whatsoever other than under and in accordance with clause 21.

21.2 Notice of Force Majeure

- 21.2.1 If there is an event of Force Majeure then the Contractor must immediately notify Council in writing of the occurrence of that event including:
- (a) full particulars of the event of Force Majeure;
 - (b) an estimate of its likely duration;
 - (c) the obligations affected by it and the extent of its effect on those obligations; and
 - (d) the steps taken to avoid, plan for, minimise the impact of and rectify it; and

- 21.2.2 If a Force Majeure event notified in accordance with clause 21.2.1 renders it impossible for the Contractor from performing any or all of the Services for a period greater than one Working Day:
- (a) the parties must promptly meet to determine what action is necessary to ensure the continuation of the Services;
 - (b) the Contractor's obligations under this Agreement are suspended to the extent to which they are rendered impossible to be performed by the relevant Force Majeure event for as long as the Force Majeure event continues; and
 - (c) the Contractor may not make any Claim against Council in connection with the event of Force Majeure or its effect on the performance of the Contractor's obligations under this Agreement.

21.3 Mitigation

If any of the Contractor's obligations are rendered impossible to be performed by the Force Majeure event notified in accordance with clause 21.2.1:

- 21.3.1 the Contractor must use its best endeavours to remove, overcome or minimise the effects of the Force Majeure event as quickly as possible, including the reasonable expenditure of funds; and
- 21.3.2 the Contractor must:
- (a) promptly identify alternative viable means of performing the obligations affected and to mitigate the effect of the Force Majeure event; and
 - (b) do everything necessary to ensure that as far as possible the Services are not interrupted.

21.4 Alternate arrangements

- 21.4.1 Subject to clause 21.4.2, during any period in which the Contractor is not performing obligations because of a claimed Force Majeure event, Council may (but need not) make alternative arrangements for the performance of any such obligation, whether by another person or otherwise. Those alternate arrangements may extend beyond the duration of the Force Majeure event to the extent required to allow for completion of obligations reasonably entered into during the occurrence of the Force Majeure event. If Council makes alternative arrangements as contemplated by this clause 21.4, Council must notify the Contractor of those arrangements.
- 21.4.2 If the Services are suspended or interrupted by a Force Majeure event:
- (a) the Contractor may elect to appoint a subcontractor in accordance with clause 4.7 to perform so much of the Services as the Contractor has suspended, provided that there is no additional cost to Council in doing so; and
 - (b) if despite clause 21.4.2(a) Services continue to be suspended or interrupted so that the Contractor is unable to Receive Delivered Material for a period of more than 5 Business Days, Council's Representative may (without limiting any other right Council may have) through an alternative contractor perform so much of the Services as the Contractor has suspended or interrupted.

21.5 Continued payment

The Contractor is only entitled to be paid the Fees during a Force Majeure event to the extent that the Services continue to be supplied, and otherwise in accordance with clause 12.

21.6 End of period of Force Majeure

Subject to the clause 21.7, the suspension of the Contractor's obligations due to a Force Majeure event ends when the Contractor is no longer prevented from being able to recommence fulfilment of the obligation by the Force Majeure event. At which time the Contractor must issue a written notice to Council to that effect and immediately recommence the performance of the obligation.

21.7 Recommencement Plan

21.7.1 If a Force Majeure event (or a series of Force Majeure events):

- (a) continues for a period of at least 20 Business Days affecting the provision of the Services in a material way; or
- (b) causes substantial interference to the Services, and Council's Representative considers that:
 - (i) in the interests of the community, including the health and amenity of the community, the Services that have been interfered with must be performed; and
 - (ii) those Services could be performed by another entity other than the Contractor,

Council's Representative may by written notice require that the Contractor submit a recommencement plan (**Recommencement Plan**) to the reasonable satisfaction of the Council's Representative, within such reasonable period of time as is specified in the notice, which plan:

- (c) contains a detailed description of the steps already taken, and that will be taken, by the Contractor in order to comply with clause 21.3 and in order to ensure that the Services impacted by the Force Majeure event (or series of Force Majeure events) are able to be performed in accordance with this Agreement as quickly as possible; and
- (d) confirms whether or not the Services impacted by the Force Majeure event (or series of Force Majeure events) are able to be performed in accordance with this Agreement by a subcontractor appointed by the Contractor in accordance with clause 4.7 and, if so, commits to doing so; and
- (e) contains a detailed program detailing the dates by which each of the steps outlined in the plan will be performed or achieved, and nominating the date by which the Services impacted by the Force Majeure event (or series of Force Majeure events) will be performed in accordance with this Agreement.

21.7.2 A notice given under clause 21.7.1 must include an explanation as to:

- (a) the basis upon which the notice is being given; and
- (b) if the notice is being given under clause 21.7.1(b)(i), the interests of the community that are being impacted by the failure to deliver the Services.

21.7.3 If Council's Representative gives the Contractor a notice under clause 21.7.1 then the Contractor must comply with it.

21.7.4 If Council's Representative notifies the Contractor that it is satisfied with the Recommencement Plan submitted under clause 21.7.1, or resubmitted under clause 21.7.5, then the Contractor must fully implement and comply with that Recommencement Plan.

21.7.5 If Council's Representative notifies the Contractor that it is not satisfied with the Recommencement Plan submitted under clause 21.7.1 on the basis that either or both of:

- (a) the Recommencement Plan does not satisfy the requirements for a Recommencement Plan under clause 21.7.1; or
- (b) the Recommencement Plan will not, if implemented, ensure the recommencement of the affected Services:
 - (i) within 3 months following the date of the notice given by Council under clause 21.7.1; or
 - (ii) in the opinion of Council's Representative acting reasonably, within a timeframe that would adequately mitigate the impacts of the suspended Services on the affected community interests identified in the notice under clause 21.7.1,

then the Contractor must promptly and in accordance with any directions of Council's Representative, review and correct the Recommencement Plan and resubmit it to Council's Representative and clause 21.7.4 and this clause 21.7.5 shall reapply.

21.7.6 Council's Representative may make more than one such election under clause 21.7.1 and may make elections sequentially as it sees fit.

21.7.7 In clause 21.7.1 and in clause 21.8, a substantial interference includes but is not limited to suspension for a period of one week.

21.8 Termination due to Force Majeure

Despite clause 21.7, if:

- 21.8.1 a notice has been given to the Contractor under clause 21.7.1 in relation to a Force Majeure event (or a series of Force Majeure events); and
- 21.8.2 the Force Majeure event (or series of Force Majeure events) to which the notice related causes substantial interference to the Services for a period of at least 4 calendar months following the issue of the notice,

then Council's Representative may elect to terminate this Agreement immediately by giving written notice to the Contractor under this clause (in which case clause 22 shall apply).

21.9 Termination by either party due to prolonged Force Majeure

Despite clause 21.7 and clause 21.8, if a Force Majeure event (or series of Force Majeure events) prevents the Services from being performed for a continuous period of 12 months, either party may terminate this Agreement by written notice to the other party.

22. Contractor's default and termination

22.1 Default notice

- 22.1.1 If the Contractor is in default under this Agreement through its failure to perform or observe any obligation or undertaking under this Agreement, Council's Representative may give the Contractor a written default notice (**Default Notice**):
- (a) specifying which provision of this Agreement has been breached; and
 - (b) if the default is capable of being remedied, directing the Contractor to remedy that default to Council's reasonable satisfaction within the period specified in the default notice (which is to be not less than 14 days after receipt of the default notice by the Contractor).
- 22.1.2 If Council gives the Contractor a Default Notice directing the Contractor to remedy the default, then the Contractor must comply with that default notice.
- 22.1.3 If the default is capable of being remedied and the Contractor fails to remedy the default within the time period specified, Council may (but is not obliged to) itself or by a third party employed or engaged by Council perform the obligation. The Contractor must pay all costs and expenses incurred by Council in doing so. All costs and expenses incurred by Council in performing the obligation or engaging any such third party may be recovered or set-off by Council in accordance with clause 12.7.
- 22.1.4 Council must cease to exercise its rights under clause 22.1.3 as soon as reasonably practicable after the default has been remedied.
- 22.1.5 If Council has issued a Default Notice and the Contractor has not rectified that default within the time period specified, Council may exercise its rights under clause 22.2.

22.2 Enforcement notice

- 22.2.1 At any time during the Term, Council's representative may serve an enforcement notice (**Enforcement Notice**) on the Contractor if:
- (a) the Contractor is subject to an Insolvency Event;
 - (b) the Contractor (or any member of the Contractor's Staff) has breached any Laws applicable to the provision of the Services or has infringed the Intellectual Property Rights of any third party;
 - (c) the Contractor has materially failed to comply with the requirements of clause 4.1;
 - (d) the Contractor has materially failed to comply with the requirements of clause 4.2;
 - (e) the Contractor has materially failed to perform as required by clause 12.6;
 - (f) the Contractor has materially failed to comply with the requirements of clause 21.7.3 or 21.7.4;
 - (g) the circumstances in clause 21.8 arise and a notice has been served by the Council's Representative on the Contractor under that clause electing to terminate this Agreement;

- (h) the Contractor has failed to rectify a default within the time period specified in a Default Notice;
- (i) the Contractor is in default under this Agreement through its failure to perform or observe any material obligation or material undertaking under this Agreement, and the obligation or undertaking is not capable of being remedied;
- (j) during the Term there is serious fraud, or intentional and dishonest, collusive, misleading or deceptive conduct affecting Council on the part of the Contractor in the performance of the Services or any part of them; or
- (k) the Contractor is found to have offered or given any gratuity, bonus, discount or bribe of any sort to any member of or any officer, Councillor, employee or agent of Council.

22.2.2 Without limiting or waiving any right of Council or any duty, liability or obligation of the Contractor, an Enforcement Notice can, in order to facilitate the:

- (a) orderly termination of this Agreement;
- (b) the orderly resolution and correction of any default or circumstance that has led to the service of the Enforcement Notice; or
- (c) both of the above,

specify at the discretion of Council (any or all of):

- (d) that information or documents in relation to the Services must be delivered by the Contractor to Council or Council's Representative;
- (e) the works or other actions required to be undertaken by the Contractor including:
 - (i) for the orderly cessation of the Services;
 - (ii) to make any Contractor's Plant safe;
 - (iii) to prevent any nuisance;
 - (iv) to comply with any Approval; and
 - (v) anything referred to in clause 17;
- (f) that payment under this Agreement be suspended;
- (g) that all or some of the Services be suspended under clause 25;
- (h) where the Contractor is subject to an Insolvency Event, that all or part of the obligations or Services be performed by Council or a third party contractor employed or engaged by Council; or
- (i) at the election of Council's Representative that this Agreement is terminated and, subject to clause 22.2.3, the time at which such termination will take effect.

22.2.3 If Council's Representative elects to terminate this Agreement by issue of an Enforcement Notice in accordance with clause 22.2.2(i), the time at which such

termination will take effect must, if the Enforcement Notice was issued on the basis of clause 22.2.1(b), 22.2.1(c), 22.2.1(d), 22.2.1(e), 22.2.1(f), 22.2.1(j) or 22.2.1(k), be at least 30 days following the date of the Enforcement Notice.

- 22.2.4 The cost of Council and Council's Representative preparing and serving and the Contractor's compliance with an Enforcement Notice must be borne by the Contractor and the Contractor indemnifies Council and Council's Representative against such costs.
- 22.2.5 If an Enforcement Notice is served, the Contractor must promptly comply with it in accordance with its terms.
- 22.2.6 Council's Representative may serve more than one Enforcement Notice (and may do so in respect of the same events) and may serve an Enforcement Notice at such times and on such dates as it considers appropriate and in such sequences as it considers appropriate. An Enforcement Notice may amend an earlier Enforcement Notice.
- 22.2.7 Clause 31 does not apply to a dispute or difference between the Contractor and Council as to whether Council has validly terminated this Agreement under this clause 22.2.

22.3 Contractor's obligations upon receipt of termination notice

- 22.3.1 If an Enforcement Notice is served and specifies that this Agreement is terminated, this Agreement is terminated as of the latter of the date and time specified in the Enforcement Notice and the date and time that the letter is served on the Contractor. Despite termination, the Contractor must comply with each Enforcement Notice that has been served on it up until the date of termination unless otherwise directed by Council's Representative.
- 22.3.2 On termination, the rights and obligations of the parties will cease except for accrued rights and obligations and any right or obligation that is expressed to continue.
- 22.3.3 Upon receipt of an Enforcement Notice that specifies that this Agreement is terminated, the Contractor must:
 - (a) stop work as specified in the Enforcement Notice;
 - (b) take all available steps to minimise Loss resulting from that termination; and
 - (c) continue to provide any other Services not affected by the Enforcement Notice.
- 22.3.4 Upon the termination of this Agreement under clause 22.2 the Contractor will not be entitled to any compensation for loss of prospective profits and Council's liability to the Contractor (if any) will be limited to payments for the Services (or any part) performed in accordance with this Agreement before the date of termination.
- 22.3.5 Upon service of an Enforcement Notice on the Contractor under clause 22.2.2(h), the Contractor will not be entitled to any compensation for loss of prospective profits or any other payment in relation to the Services or obligations that are the subject of that notice, and Council's liability to the Contractor (if any) will be limited to payments for the Services (or any part) performed in accordance with this Agreement before the date of service of that Enforcement Notice.

22.4 No prejudice to accrued rights

The service of an Enforcement Notice or the termination of this Agreement under this clause 22 is without prejudice to the accrued rights of Council at the time of such Enforcement Notice or termination including rights as to indemnification, payment or set off.

22.5 Rights limited

22.5.1 Notwithstanding any rule of Law or equity to the contrary, neither party may terminate, rescind or treat as repudiated this Agreement or any rights under this Agreement other than as expressly provided for in this Agreement.

22.5.2 The rights of Council under this clause 22 are not limited by anything in clause 17 and in particular Council may serve notices under clause 22.1 or 22.2 whether or not any notice has been served or action taken under clause 17 or 21.4.2.

22.6 Reconciliation of payments following termination

22.6.1 Within three months of Council exercising any right of termination under this clause 22:

- (a) Council will pay to the Contractor; or
- (b) the Contractor will pay to Council,

(as the case requires) the difference between all sums accrued and unpaid in favour of the Contractor under this Agreement and all Claims of Council for damages, loss, cost or expense or other sums owing by the Contractor to Council.

22.6.2 Determination of the sums and Claims referred to in clause 22.6.1 will be made by Council's Representative, who will certify:

- (a) by whom payment (if any) will be made; and
- (b) the amount payable.

22.6.3 Certification in accordance with clause 22.6.2 must be undertaken either:

- (a) prior to the expiration of six months from Council's exercise of any right of termination under this clause 22; or
- (b) within 14 days of a written request so to do made by either party, which request may not be made until the expiration of the six (6) month period.

22.6.4 Council's Representative must forward a copy of the certificate to both parties and the amount payable will be due and payable within 14 days of the date of the receipt of the copy of the certificate by the party required to make the payment referred to in that certificate.

22.6.5 The parties acknowledge and agree that until payment is due in accordance with this clause 22.6, Council will not be obliged to make any further payment to the Contractor.

22.7 Consideration for Services performed and no Claim

Except as provided in this clause 22, if a valid Enforcement Notice terminating this Agreement is served on the Contractor, the Contractor shall have no Claim against Council or Council's Representative (other than in respect of a Claim arising from the breach of this

Agreement) and acknowledges that it has received valuable consideration except as otherwise provided in this Agreement.

22.8 Right to carry out Services

22.8.1 If Council terminates this Agreement under clause 22, Council may respectively itself or by a third party employed or engaged by Council carry out the Services until Council appoints a replacement contractor.

22.8.2 The Contractor must pay on demand all reasonable costs and expenses incurred by Council in engaging any such third party. All costs and expenses incurred by Council in engaging any such third party may be recovered or set-off by Council in accordance with clause 12.7.

23. Council's default and termination

23.1 Council default

23.1.1 If Council is in default of a payment obligation under clause 12, the Contractor may give Council a written default notice:

- (a) specifying the payment obligation under clause 12 that has been breached; and
- (b) directing Council to remedy that default within the period specified in the default notice (which is to be not less than 30 Business Days after receipt of the default notice by Council).

23.1.2 If the Contractor has issued a default notice under clause 23.1.1 and Council has not rectified that default within the time period specified, the Contractor may exercise its rights under clause 23.2.

23.2 Termination by the Contractor for Council default

23.2.1 At any time during the Term, the Contractor may terminate this Agreement immediately by a further 7 days prior notice to Council if:

- (a) Council has failed to rectify a payment obligation under clause 12 within the time period specified in a default notice issued under clause 23.1;
- (b) Council is subject to an Insolvency Event; or
- (c) during the Term there is serious fraud, or intentional and dishonest, collusive, misleading or deceptive conduct affecting the Contractor on the part of Council in relation to the Services or any part of them.

23.2.2 Termination under clause 23.2.1 will be effected by the Contractor giving Council a written termination notice specifying the date of termination, on that specified date of termination.

- 23.2.3 Clause 31 does not apply to a dispute or difference between the Contractor and Council as to whether the Contractor has validly terminated this Agreement under this clause 23.2.

23.3 Contractor's liability on termination

Upon the termination of this Agreement under clause 23.2 Council will not be entitled to any compensation for loss of savings or prospective profits and Council must make payment to the Contractor for all Services performed in accordance with this Agreement before the date of termination.

23.4 No prejudice to accrued rights

The service of a termination notice under clause 23.2 or the termination of this Agreement under this clause 23 is without prejudice to the accrued rights of either party at the time of such termination notice or termination including rights as to indemnification, payment or set off.

24. Contractor's obligations on expiration or termination

24.1 Contractor's obligations

On the expiry of this Agreement or termination of this Agreement the Contractor must:

- 24.1.1 comply with any Directions by Council to bring about an immediate or prompt (as the case may be) winding down and cessation of the Services, including but not limited to:
- (a) giving to Council all records relating to the Services;
 - (b) giving to Council the originals of any documents which were provided to the Contractor by Council; and
 - (c) doing all other acts and things reasonably requested by Council which are necessary to effect an orderly handover of the Services with minimum disruption to Council; and
- 24.1.2 at the date of termination cease performing all Services.

24.2 Specific performance

The parties acknowledge that damages may not be an adequate remedy in respect of a breach of this Agreement and a party is entitled to seek specific performance or pursue any other equitable remedy, including injunction, which it considers appropriate in respect of any other breach.

25. Suspension directed by an Enforcement Notice

25.1 Suspension notice

- 25.1.1 An Enforcement Notice issued under clause 22.2.2(g):
- (a) may direct the Contractor to suspend all or some of the Services until such time as Council thinks fit; and

- (b) must specify each of the Services to be suspended and the effective date of suspension of each of those Services.

25.1.2 While any Service is suspended, this Agreement will continue to apply, with necessary adjustments, to the Services that are not suspended.

25.2 Suspension of Services

Upon receipt of an Enforcement Notice under clause 25.1.1, the Contractor must:

25.2.1 suspend performance of each relevant Service as specified in the notice until directed in writing by Council to resume performance;

25.2.2 take all available steps to minimise Loss resulting from the suspension; and

25.2.3 continue to provide all other Services.

25.3 Payment on suspension

For each Service that is suspended pursuant to an Enforcement Notice under clause 25.1.1:

25.3.1 the Contractor shall not after the date of suspension be entitled to make any Claim in connection with the provision of the Service that has been suspended during the period of the suspension provided always that the Contractor may claim payments for the Services (or any part) performed in accordance with this Agreement before the effective date of suspension; and

25.3.2 the Contractor shall not be entitled to any payment, and must not make any Claim, whatsoever in connection with the suspension.

25.4 Recommencement of Services

25.4.1 After issuing an Enforcement Notice under clause 25.1.1, Council may by written notice to the Contractor, direct the Contractor to either:

- (a) recommence performance of the suspended Services; or
- (b) submit a recommencement plan to the satisfaction of Council's Representative, within such period of time as is specified in the notice, which plan contains a description of the steps that the Contractor will take to rectify the circumstances that prompted the service of an Enforcement Notice and ensure that those circumstances do not reoccur.

25.4.2 If Council's Representative gives the Contractor a notice under clause 25.4.1 then the Contractor must comply with it.

25.4.3 If Council's Representative notifies the Contractor that it is satisfied with the recommencement plan submitted under clause 25.4.1(b) then the Contractor must fully implement and comply with that recommencement plan.

25.4.4 If Council's Representative notifies the Contractor that it is not satisfied with the recommencement plan submitted under clause 25.4.1(b) then the Contractor must promptly and in accordance with any directions of Council's Representative, review and correct the recommencement plan and resubmit it to Council's Representative and clause 25.4.3 and this clause 25.4.4 shall reapply.

- 25.4.5 If Services recommence pursuant to a notice given under clause 25.4.1, the Contractor shall be entitled to claim payment for those Services, in accordance with this Agreement, performed after the date of that notice.

26. Intellectual Property

26.1 Warranty

- 26.1.1 The Contractor warrants that:

- (a) the Contractor has or will have a right to use all Documentation produced by or on behalf of the Contractor for the purpose of the Services, including the right to use such items for the purpose of designing, constructing, operating, performing, maintaining, repairing, rectifying, adding to and altering the Services; and
- (b) any Documentation produced by or on behalf of the Contractor for the purpose of the Services will not infringe any Intellectual Property Rights.

- 26.1.2 The Contractor indemnifies Council from and against any Claim, Loss or liability brought against, suffered or incurred by Council arising out of, or in any way in connection with, any breach by the Contractor of the warranties under this clause 26.1.

26.2 Intellectual Property Rights

- 26.2.1 Council retains the Intellectual Property Rights in all documentation supplied by Council to the Contractor in relation to the Services or this Agreement. Council grants the Contractor a non-exclusive, royalty free, non-transferable licence to reproduce and use that documentation as necessary for the purpose of this Agreement. The Contractor must not reproduce, use or otherwise deal with that documentation, or allow any other person to do the same, for any other purpose. Council has the right to revoke this licence at any time by notice in writing to the Contractor.
- 26.2.2 Where the provision of the Services requires the Contractor to create any Documentation for Council (either solely or in conjunction with others) the Intellectual Property Rights in that Documentation vest in Council upon creation and the Contractor must do all things necessary to perfect such vesting.
- 26.2.3 The Contractor grants to Council a permanent, irrevocable, royalty free, non-exclusive licence (including the right to sub-licence) to use, produce, adapt or exploit the Intellectual Property Rights owned by the Contractor or any third party and which are associated with any Documentation that is not created for the purposes of the Services but is provided to Council under this Agreement, provided that Council does not on-sell or on-licence such Intellectual Property Rights to third parties and the Documentation is used only for purposes associated with this Agreement.
- 26.2.4 The obligations in this clause 26 continue after the expiry or termination of this Agreement.

26.3 Moral rights

The Contractor:

- 26.3.1 must ensure that it does not, and its contractors and subcontractors do not, infringe any Moral Right in carrying out the Services;
- 26.3.2 without limiting clause 26.3.1, must hold, or obtain, consents from all authors of any material created by or on behalf of the Contractor for the purpose of the whole or any part of the Services, including documents, software and data stored by any means, to use and adaptation by the Contractor, and Council, without restriction and without any requirement to attribute such material to its authors; and
- 26.3.3 indemnifies Council from and against any Claim or Loss brought against, suffered or incurred by Council arising out of, or in any way in connection with, any breach by the Contractor of its obligations under clause 26.3.1 or 26.3.2.

27. Confidentiality

27.1 Contractor's obligations

The Contractor must treat as confidential all information provided by Council, and must not use that information for any purpose other than for the purposes of this Agreement, or disclose or make public that information or any information in relation to the Services, except where:

- 27.1.1 Council has given consent, which consent may be given or withheld in Council's absolute discretion;
- 27.1.2 the Contractor is required to do so by Law or by a stock exchange;
- 27.1.3 the Contractor is required to do so in connection with legal proceedings relating to this Agreement;
- 27.1.4 it is for the purpose of obtaining professional advice in respect of the Services and the Contractor obtains an appropriate confidentiality undertaking; or
- 27.1.5 the information is already in the public domain other than through a breach of this Agreement.

27.2 Contractor's acknowledgement

The Contractor acknowledges that:

- 27.2.1 the terms of this Agreement are confidential; and
- 27.2.2 the provisions of this clause 26.3 survive the termination or expiry of this Agreement.

27.3 Commercially sensitive information

Council must treat as confidential all information provided the Contractor under this Agreement that is commercially sensitive, in that:

- 27.3.1 it discloses or would tend to disclose the Contractor's financing arrangements, financial modelling, cost structure or profit margins; or

27.3.2 if disclosed by Council, could reasonably be expected to place the Contractor at a substantial commercial disadvantage, whether at present or in the future,

and Council must not use that information for any purpose other than for the purposes of this Agreement, or disclose or make public that information, except where:

27.3.3 the Contractor has given consent, which consent may be given or withheld in the Contractor's absolute discretion;

27.3.4 Council is required to do so by Law;

27.3.5 Council is required to do so in connection with legal proceedings relating to the Agreement;

27.3.6 it is for the purpose of obtaining professional advice in respect of the Services and Council obtains an appropriate confidentiality undertaking; or

27.3.7 the information is already in the public domain other than through breach of this Agreement.

28. Assignment and Change In Control

28.1 Assignment by Contractor

Unless to a Related Body Corporate (as defined under the *Corporations Act 2001* (Cth)), neither party may assign nor transfer any or all of its rights or obligations under this Agreement without the prior written consent of the other party (acting reasonably).

28.2 Not Used

29. Conflict of Interest

29.1 Warranty

The Contractor warrants that no Conflict of Interest exists at the date of this Agreement.

29.2 Duty to inform

The Contractor must immediately inform Council upon becoming aware of the existence, or possibility, of a Conflict of Interest.

30. Notices

30.1 Delivery of notice

30.1.1 A notice or other communication given to a party under this Agreement must be in writing and in English, and must be delivered to the party by:

- (a) delivering it personally to the party;
- (b) leaving it at the party's address set out in the notice details;

- (c) posting it by prepaid post to the party at the party's address set out in the notice details; or
- (d) email to the party's email address set out in the notice details.

30.1.2 If the person to be served is a company, the notice or other communication may be served at the company's registered office.

30.2 Particulars for delivery

30.2.1 The notice details of each party are set out on page 1 of this Agreement under the heading 'Parties' (or as notified by a party to the other parties according to this clause).

30.2.2 Any party may change its address or email address by giving notice to the other parties.

30.3 Time of service

30.3.1 A notice or other communication is taken to be delivered:

- (a) if delivered personally or left at the person's address, upon delivery;
- (b) if posted within Australia to an Australian address:
 - (i) using express post, 2 Business Days after posting; and
 - (ii) using any other prepaid post, 6 Business Days after posting;
- (c) if posted to an address in a different country, 10 Business Days after posting; and
- (d) if delivered by email, at the time the email left the sender's email system, unless the sender receives notification that the email was not received by the recipient.

30.3.2 Despite clause 30.3.1, a notice or other communication which is received after 5.00pm or on a non-business day (each in the place of receipt), is taken to be delivered at 9.00am on the next business day in the place of receipt.

31. Disputes

31.1 Dispute resolution

31.1.1 In this clause:

- (a) **claimant** means, in respect of a Dispute, a party serving a Dispute Notice in respect of that Dispute;
- (b) **Dispute** means a dispute or difference between the Contractor and Council arising out of or in connection with this Agreement, including any situation for which this Agreement provides that this clause 31 applies, but excluding a dispute or difference between the Contractor and Council as to whether Council has validly terminated this Agreement under clause 22.2;
- (c) **Dispute Notice** means a notice served under clause 31.1.2;

- (d) **Expert** and **Expert Notice** have the meanings given to those terms in clause 31.3.2;
- (e) **Mediation Notice** means a notice under clause 31.2.1;
- (f) **Nominated Dispute** means a Dispute in respect of:
 - (i) a determination of the value of the Qualifying Increase in Costs (including the value of any Capital Contribution Amount) in respect of a Qualifying Change under clause 11.4;
 - (ii) the determination of a Variation Amount under clause 11.5, 11.6 or 11.7;
 - (iii) a dispute regarding the Fee payable for a Disputed Service under clause 12.6; and
 - (iv) in respect of a Dispute referred to in clauses 31.1.1(f)(i) or 31.1.1(f)(ii), the determination of how the Variation Amount so determined, shall be paid,or any other Dispute in respect of which Council's Representative has notified the Contractor in writing that the Dispute is to be deemed a Nominated Dispute for the purposes of this clause 31; and
- (g) **respondent** means, in respect of a Dispute, a party receiving a Dispute Notice in respect of that Dispute.

31.1.2 If a party considers that a Dispute exists they must promptly serve a written notice (**Dispute Notice**) on the other party, including or accompanied by full and proper particulars of the Dispute and the resolution of the Dispute suggested or required by the claimant.

31.1.3 The respondent:

- (a) may request reasonable further particulars regarding the Dispute the subject of the Dispute Notice; and
- (b) must, within 5 Business Days of the service of the Dispute Notice, provide a written response to the matters in the Dispute Notice.

31.1.4 If the parties have been unable to resolve the Dispute within 10 Business Days of the service of the Dispute Notice, the Dispute must be referred to the General Manager of Council and the chief executive officer or equivalent of the Contractor (**Senior Executives**) who must in good faith seek to resolve the Dispute within 20 Business Days of the date that the Dispute Notice was served.

31.1.5 Any resolution of the Dispute by the Senior Executives must:

- (a) take into account the material provided to each party in accordance with clause 31.1.1; and
- (b) be undertaken within 20 Business Days of the service of the Dispute Notice.

31.2 Mediation

31.2.1 If a Dispute that is the subject of a Dispute Notice is not resolved under clause 31.1 within the timeframe referred to in clause 31.1.5(b), either party may by written

notice served on the other party within 40 Business Days of the service of the relevant Dispute Notice require that the Dispute be dealt with by mediation.

31.2.2 If a Mediation Notice is served on a party in respect of a Dispute:

- (a) the parties must, within 5 Business Days after service of the Mediation Notice, agree on a mediator for the purposes of this clause;
- (b) if the parties cannot agree on a mediator within 5 Business Days after service of the Mediation Notice, the mediator must be nominated by the Chair of the Resolution Institute (ACN 008 651 232), or any other person authorised by the Chair to make the appointment, on the application of either party; *[Note: at the Pricing Date: the contact details of the Resolution Institute are: Level 2, 13-15 Bridge Street, Sydney NSW 2000; telephone: 02 9251 3366, email: infoaus@resolution.institute]*
- (c) within 15 Business Days (or such other period agreed in writing between the parties) after the agreement or nomination of the mediator under paragraph 31.2.2(b), the parties must:
 - (i) arrange for the appointment of the mediator (on terms satisfactory to the mediator) for the purposes of this clause; and
 - (ii) attend in person a preliminary conference before the mediator.

31.2.3 The parties acknowledge and agree that:

- (a) the mediator must conduct a mediation in relation to the Dispute in accordance with Resolution Institute Mediation Rules (**Rules**);
- (b) they must abide by the Rules;
- (c) they may be represented by legal counsel at the mediation;
- (d) they must use their reasonable endeavours to achieve the resolution of the Dispute at the mediation; and
- (e) the place of any mediation will be Sydney, unless the parties otherwise agree.

31.2.4 Each party must:

- (a) bear its own costs in respect of the mediation; and
- (b) share equally the costs of the mediator (including the cost of any expert assistance retained by the mediator).

31.2.5 Any mediation under this clause 31.2 will be conducted on a without prejudice basis.

31.3 Expert determination of Nominated Disputes

31.3.1 This clause 31.3 only applies in respect of a Nominated Dispute that:

- (a) is the subject of a Dispute Notice; and
- (b) is not resolved within 20 Business Days of the service of the Dispute Notice.

- 31.3.2 Notwithstanding that a Mediation Notice may have been served in accordance with clause 31.2, a party may by written notice (**Expert Notice**) served on the other party require the Dispute to be the subject of a determination by an expert (**Expert**) in accordance with this clause 31.3.
- 31.3.3 An Expert Notice may not be served in respect of a Dispute after the date that is 40 Business Days after the service of a Dispute Notice in respect of that Dispute.
- 31.3.4 The Expert must:
- (a) be agreed between and jointly appointed by Council and the Contractor within 15 Business Days after the receipt of the Expert Notice, otherwise this clause 31.3 will no longer apply to the Dispute;
 - (b) at the outset confirm with the parties whether they have agreed that the determination of the Expert should be final and binding, and if they have so agreed provide a letter to each party stating that the determination will be final and binding;
 - (c) invite and receive, if made, submissions from Council and the Contractor;
 - (d) act as an expert and not as an arbitrator;
 - (e) proceed in any manner as the expert thinks fit without being bound to observe the rules of natural justice or the rules of evidence;
 - (f) not accept verbal submissions unless both parties are present;
 - (g) on receipt of a written submission from one party, ensure that a copy of such submission is given promptly to the other parties;
 - (h) take into consideration all documents, information and other material which the parties give the Expert and which the Expert, in its reasonable opinion, considers relevant;
 - (i) not be expected or required to obtain or refer to any other documents, information or materials (but may do so if the Expert so wishes);
 - (j) provide written reasons for its decision; and
 - (k) act with expedition.
- 31.3.5 Council and the Contractor must enter into an agreement with the Expert setting out the terms of the Expert's fees, which unless otherwise agreed are to be shared equally between Council and the Contractor.
- 31.3.6 The decision of the Expert is final and binding if:
- (a) the parties so agree;
 - (b) the amount claimed in the Dispute is less than \$200,000 in total (exclusive of GST and exclusive of legal costs and interest);
 - (c) within 10 Business Days after the Expert notifies the parties of its decision, neither party served a written notice on the other party objecting to the decision of the Expert and proposing to commence litigation and the Dispute remains unresolved; or

- (d) a party has within 10 Business Days after the Expert notifies the parties of its decision, served a written notice on the other party objecting to the decision of the Expert and proposing to commence litigation, the party serving that notice has not commenced proceedings within 30 Business Days of the date of that notice and the Dispute remains unresolved.

31.4 Proceedings

- 31.4.1 If a Dispute is not resolved under 31.2 or 31.3, either party may commence proceedings for the resolution of that Dispute, provided that no proceedings may be commenced:
 - (a) in the period within 40 Business Days of the service of the relevant Dispute Notice; or
 - (b) if a Mediation Notice has been served in accordance with clause 31.2, within the period of 30 Business Days following the service of the Mediation Notice.
- 31.4.2 Nothing in this clause 31 will otherwise affect the right of a party to institute proceedings to enforce payment due under this Agreement or otherwise in respect of a Dispute.

31.5 Give effect to certain documents

Any mediation under clause 31.2 or expert determination under clause 31.3:

- 31.5.1 must as far as is reasonably practical give effect to this Agreement;
- 31.5.2 where the Dispute is in relation to the Services, have regard to the impact on the timing, feasibility and cost of the Services; and
- 31.5.3 may not determine to vary any Services in a manner that will not comply with any Approval or other Law, or in a manner that would not be a Permitted Variation under clause 11.

31.6 Urgent relief

Nothing in this clause 31 prejudices the right of a party to seek urgent injunctive or declaratory relief for any matter in connection with this Agreement.

31.7 Performance

- 31.7.1 Despite the existence of a Dispute, each party must continue to perform its obligations under this Agreement.
- 31.7.2 The existence of a Dispute will not prejudice either party's right to terminate this Agreement for any reason.

32. General

32.1 Law and jurisdiction

This Agreement will be governed by and construed according to the law in force for the time being in the State of NSW, Australia, and the parties irrevocably and unconditionally submit to the exclusive jurisdiction of the courts of NSW and any courts entitled to hear appeals from those courts.

32.2 Giving effect to this Agreement

Each party must do anything (including execute any document), and must ensure that its employees and agents do anything (including execute any document), that the other party may reasonably require to give full effect to this Agreement.

32.3 Waiver of Rights

A right may only be waived in writing, signed by the party giving the waiver, and:

- 32.3.1 no other conduct of a party (including a failure to exercise, or delay in exercising, the right) operates as a waiver of the right or otherwise prevents the exercise of the right;
- 32.3.2 a waiver of a right on one or more occasion does not operate as a waiver of that right if it arises again; and
- 32.3.3 the exercise of a right does not prevent any further exercise of that right or of any other right.

32.4 Consents

Where in this Agreement Council is required to give agreement or consent then, except where otherwise expressly provided, Council's consent may be given or withheld or given with conditions in Council's unfettered discretion.

32.5 Operation of this Agreement

- 32.5.1 This Agreement contains the entire agreement between the parties about its subject matter and any previous understanding, agreement, representation or warranty relating to that subject matter is replaced by this Agreement and has no further effect.
- 32.5.2 If this Agreement is inconsistent with any other document or agreement between the parties, this Agreement prevails to the extent of the inconsistency.
- 32.5.3 Unless expressly stated to the contrary, any right that a person may have under this Agreement is in addition to, and does not replace or limit, any other right that the person may have.
- 32.5.4 Any provision of this Agreement which is unenforceable or partly unenforceable is, where possible, to be severed to the extent necessary to make this Agreement enforceable, unless this would materially change the intended effect of this Agreement.
- 32.5.5 Despite the fact that the RFT was a request for tenders invited by a number of councils severally, this Agreement relates only to the arrangements between the Contractor and Council, and indeed neither party has any rights, interests, duties or obligations in respect of any other council under this Agreement.

32.6 Operation of indemnities

- 32.6.1 Each indemnity in this Agreement survives the expiry or termination of this Agreement.
- 32.6.2 A party may recover a payment under an indemnity in this Agreement before it makes the payment in respect of which the indemnity is given.

- 32.6.3 No indemnity given in this Agreement will derogate from a party's rights under this Agreement or at common law.

32.7 Relationship of the parties

- 32.7.1 In carrying out its obligations under this Agreement, the Contractor is and at all times will be an independent contractor and no relationship of employment or partnership arises between the parties or between Council and any employee, agent or consultant of the Contractor, as a consequence of this Agreement.
- 32.7.2 The Contractor is not an agent and does not have any authority to and must not purport to bind Council to any agreement or otherwise hold itself out as an agent of Council
- 32.7.3 The Contractor agrees that it is solely liable for all remuneration, claims and other entitlements payable to the Contractor's Staff.

32.8 Costs, expenses and stamp duty

- 32.8.1 Subject to clause 32.8.3, each party must pay its own legal costs and expenses in relation to the negotiating, preparation and execution of this Agreement and other documents referred to in it, unless expressly stated otherwise.
- 32.8.2 The Contractor must:
- (a) pay any stamp duty (including all fines and penalties except those arising from the default of another party) in respect of this Agreement and any transactions contemplated under this Agreement or otherwise arising out of, or incidental to, this Agreement; and
 - (b) in a timely manner attend to stamping of all documents in connection with this Agreement which require stamping and to pay all duty on or before the due date for payment.
- 32.8.3 The Contractor must indemnify Council against and must pay on demand the amount of any duty (together with any related fines, penalties or interest) that is payable on or in relation to this Agreement or any document, dealing or instrument contemplated by it.
- 32.8.4 A party which has an obligation to do anything under this Agreement must perform that obligation at its cost unless expressly stated otherwise. In particular, except as expressly provided in this Agreement, the Contractor is responsible for all costs and expenses of complying with its obligations, duties and responsibilities (express or implied) under this Agreement and:
- (a) unless a particular clause expressly states that Council shall pay the costs, losses and expenses of or incurred by the Contractor in respect of or arising from any process, action, inaction, document or instrument contemplated or required by that clause, the Contractor shall have no Claim against Council for any such costs, losses or expenses;
 - (b) the Contractor releases Council absolutely from any Claim by or liability to the Contractor for any such costs, losses or expenses; and
 - (c) this clause applies, without limitation, to the provision of documents, information or the taking of action at the request or direction of Council or Council's Representative.

32.9 Amendment

This Agreement may only be amended, supplemented or varied by another document signed by the parties.

32.10 Survival of termination

All clauses which are by their nature intended to operate or continue to operate after the termination or expiration of this Agreement will survive the termination or expiration of this Agreement including clauses 1, 3.4, 4.8, 4.9 4.10, 5.2, 9, 14, 15, 17.5, 18, 19, 20, 22, 24, 26, 26.3, 32.

32.11 Attorneys

Each person who executes this Agreement on behalf of a party under a power of attorney declares that he or she is not aware of any fact or circumstance that might affect his or her authority to do so under that power of attorney.

32.12 No fetter of discretion

32.12.1 Nothing in this Agreement fetters or limits the statutory capacities or statutory discretions of Council acting as an Authority.

32.12.2 The Contractor agrees that Council is not liable for, and releases Council from, any Loss, Claim, obligation or duty arising from, and, subject to the provisions of this Agreement and the provisions of any applicable Law, costs incurred in connection with, Council's exercise of its functions and powers acting as an Authority.

32.12.3 The Contractor must not interfere with the valid operations and functions of Council as an Authority.

32.13 Acknowledgment

The Contractor acknowledges and agrees that:

32.13.1 receipt or review of, or consultation or comments regarding, or failure to review or comment on, any application, plan, instrument, document, specification or anything else, or participating in consultation forums and co-ordination groups, in respect of the Services by Council or Council's Representative does not:

- (a) impose or create any duty, liability or obligation on Council or Council's Representative;
- (b) release, limit, reduce, alter or affect the Contractor's duties, liabilities, obligations or responsibilities in any way; or
- (c) waive, prejudice or limit Council or Council's Representative's rights;

32.13.2 none of Council or Council's Representative owe or incur any duty, liability or obligation to the Contractor to review any application, plan, document, specification or anything else in respect of the Services for completeness, errors, omissions or compliance with the requirements of this Agreement or otherwise;

32.13.3 no Direction of Council or Council's Representative will operate to relieve the Contractor of its other obligations or liability under this Agreement or modify the Contractor's status as an independent contractor;

- 32.13.4 the liabilities, duties and obligations of the Contractor are not reduced because of any delay by any Authority;
- 32.13.5 Council is not liable, nor responsible, for the conduct of any Authority including any delay by an Authority; and
- 32.13.6 to avoid doubt, where this Agreement provides for Council or Council's Representative to issue a certification or an Endorsement, the issue of the certificate or Endorsement is not proof of performance.

32.14 Acknowledgments – representations

- 32.14.1 The Contractor acknowledges that except as expressly stated in this Agreement Council makes no warranty or representation as to whether any waste, including Delivered Material, has or does not have any or any particular Characteristic from time to time and the Contractor must make its own estimation for the purposes of this Agreement.
- 32.14.2 The Contractor acknowledges and agrees that:
 - (a) no representation or warranty either express or implied is, has been or will be made by Council under or in respect of the Tender Documents; and
 - (b) statements by Council, the Contractor or any other person (whether contained within the Tender Documents or otherwise) prior to the date of this Agreement, or otherwise made in relation to the Services at any time:
 - (i) are not binding on Council;
 - (ii) do not commit Council to any action or position in respect of any matter; and
 - (iii) do not waive, fetter, limit or otherwise affect any right, discretion, power or privilege of Council;
- 32.14.3 any representation, communication and prior agreement in relation to the subject matter of the Tender Documents are merged in and superseded by this Agreement; and
- 32.14.4 the Tender Documents may not be used as an aid to the interpretation of any provision of this Agreement in a way which would limit, reduce or waive any right of Council.

32.15 Disclosed Information

- 32.15.1 This clause 32.15 only applies to Disclosed Information that was disclosed prior to the date of this Agreement.
- 32.15.2 The Contractor acknowledges and agrees that:
 - (a) prior to the date of this Agreement and for the purposes of entering into this Agreement it has:
 - (i) carefully examined the terms of this Agreement and all Disclosed Information;
 - (ii) examined, and relied solely upon its own independent assessment, skill and expertise and made inquiries in respect of, all information

(including Disclosed Information) available to a competent contractor or operator upon the making of all reasonable inquiries relevant to the risks, contingencies and other circumstances having an effect on their obligations under this Agreement; and

- (iii) examined any land made available by Council for the performance of the Services, and its surroundings;
- (b) no representation, guarantee or warranty (either express or implied) is, has been or will be made by Council in relation to the Disclosed Information, and in particular and without limitation, no representation, guarantee or warranty is, has been or will be made by Council that the Disclosed Information:
 - (i) is reliable, complete, current, accurate, suitable, comprehensive, adequate or correct;
 - (ii) represents the opinion of Council or any other person at any time;
 - (iii) contains all information held by or available to Council or any other person at any time; or
 - (iv) can be relied on by the Contractor or any other person;
- (c) the Disclosed Information:
 - (i) may be incomplete, inaccurate or incorrect; and
 - (ii) may not be relied upon by the Contractor or any other person,
 - (iii) and no recourse may be had against Council in respect of any Disclosed Information;
- (d) Council has not and is not obliged to:
 - (i) verify the currency, reliability, adequacy, accuracy, correctness, suitability, comprehensiveness or completeness of the Disclosed Information;
 - (ii) disclose any information to the Contractor even if that information materially affects or contradicts any information that the Contractor already has;
 - (iii) update any information disclosed to the Contractor; or
 - (iv) give the Contractor notice if it becomes aware of any inaccuracy, incompleteness or change in the information disclosed to the Contractor;
- (e) Disclosed Information may not have been prepared for the purpose of this Agreement or with the Contractor or any other person in the position of the Contractor in mind or for the purpose of the Services;
- (f) any opinions expressed in any Disclosed Information are opinions given at the date that the opinion was formed and may have ceased, or may in the

future cease, to be appropriate or correct in the light of subsequent facts, circumstances, knowledge or attitudes; and

- (g) the Disclosed Information may not be used as an aid to the interpretation of any provision of this Agreement.

32.15.3 The Contractor warrants and represents that:

- (a) it has understood the limitations of the Disclosed Information and in particular acknowledges its understanding that:
 - (i) the Disclosed Information may not, and has not, been expressly or impliedly represented to provide comprehensive information, including in relation to the current, historical or future Characteristics of Delivered Material; and
 - (ii) any assessment of or statement about any Characteristic of any Delivered Material may or may not be correct and is not a representation or warranty made by Council;
- (b) it has obtained its own independent and professional advice and opinions on all matters relating to the Services and the Disclosed Information including financial, accounting, tax, engineering, environmental, legal, technical advice and opinions and the Characteristics of the Delivered Material;
- (c) it has satisfied itself as to:
 - (i) the suitability of the Disposal Facility for any particular use, including the carrying out of the Services;
 - (ii) the Characteristics of the Delivered Material;
 - (iii) the nature, extent, cost and timeframes for carrying out any part of the Services by it and or any other person; and
- (d) it has carried out independently all relevant tests, enquiries, investigations and analysis it regards as necessary to acquaint itself with and verify to its satisfaction:
 - (i) all aspects of the Services;
 - (ii) any Characteristics of the Delivered Material;
 - (iii) the contents, correctness and sufficiency of the Disclosed Information; and
 - (iv) all information which is relevant to the risks, contingencies and other circumstances related to the Services.

32.15.4 The Contractor releases Council from, and indemnifies Council against:

- (a) any Claim (whether at law or in equity) by the Contractor; or
- (b) any obligation, duty or liability to the Contractor in respect of any Loss or Claim whatsoever suffered or incurred by the Contractor,

arising out of or in any way in connection with the Disclosed Information, including in respect of:

- (c) the provision of, or the purported reliance upon, or use of the Disclosed Information, to or by the Contractor or any other person to whom the Disclosed Information is disclosed or a failure by Council to provide any information, data or documents to the Contractor;
- (d) any negligence by or on behalf of Council (the Contractor specifically acknowledges and agrees that any duty of care that Council may otherwise have owed to the Contractor is specifically excluded and released);
- (e) any misrepresentation, misleading conduct, omission, inaccuracy, incompleteness or other defect in any Disclosed Information; or
- (f) the Disclosed Information being relied upon or otherwise used in the preparation of any information or document, including (to the extent permitted by law) any information or document which is “misleading or deceptive” or “false or misleading” within the meaning of those terms in sections 18 and 29 of Schedule 2 of the *Competition and Consumer Act 2010* (Cth), or any equivalent provision of State or Territory legislation.

32.16 GIPA

32.16.1 Notwithstanding any other provisions of this Agreement, the Contractor acknowledges and agrees that under the *Government Information (Public Access) Act 2009* (NSW) Council may be required to publicly disclose information about this Agreement. As at the date of this Agreement, none of the disclosure obligations require the disclosure of:

- (a) the commercial-in-confidence provisions of a contract;
- (b) any matter that could reasonably be expected to affect public safety or security; or
- (c) information which would be exempt from disclosure if it were the subject of an application under the *Government Information (Public Access) Act 2009* (NSW).

32.16.2 The Contractor may at any time nominate any items that it considers are confidential and why, so as to assist Council in determining what items to disclose.

32.16.3 Without limiting or affecting any of the other rights that Council may have to receive information from the Contractor under this Agreement, pursuant to section 121 of the *Government Information (Public Access) Act 2009* (NSW), the Contractor must within 5 Business Days of receiving a written request from Council, provide Council with immediate access to the following information contained in records held by the Contractor:

- (a) information that relates directly to the performance of the Services;
- (b) information received by the Contractor from Council to enable it to provide the Services.

32.16.4 For the purposes of clause 32.16.3, information does not include:

- (a) information that discloses or would tend to disclose the Contractor's financing arrangements, financial modelling, cost structure or profit margins;
- (b) information that the Contractor is prohibited from disclosing to Council by provision made by or under any Act; or

- (c) information that, if disclosed to Council, could reasonably be expected to place the Contractor at a substantial commercial disadvantage in relation to Council, whether at present or in the future.

32.17 Not used

32.18 Warranty regarding solvency

32.18.1 Each party represents and warrants that there are no reasonable grounds to suspect that it will not be able to pay its debts as and when they become due and payable.

32.18.2 The representation and warranty in this clause will be deemed to be repeated by the Contractor and Council on each day from the date of this Agreement until the earlier of:

- (a) the end of the Term; and
- (b) the expiration or earlier termination of this Agreement,

with reference to the facts and circumstances subsisting at that date.

32.19 Counterparts

This Agreement may be executed in any number of counterparts all of which taken together constitute one instrument.