

DATED _____ **2013**

SHANKS WASTE MANAGEMENT LIMITED (1)

and

COUNCIL OF THE CITY OF WAKEFIELD (2)

and

WAKEFIELD WASTE PFI LIMITED (3)

CONSTRUCTION SUB-CONTRACTOR'S

DIRECT AGREEMENT WITH THE COUNCIL

WALKER MORRIS

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BETWEEN

- (1) **SHANKS WASTE MANAGEMENT LIMITED** registered in England and Wales under company number 02393309, whose registered office is at Dunedin House, Auckland Park, Mount Farm, Bletchley, Milton Keynes, Buckinghamshire MK1 1BU (the "**Construction Sub-Contractor**");
- (2) **COUNCIL OF THE CITY OF WAKEFIELD** of Town Hall, Wood Street, Wakefield, West Yorkshire WF1 2HQ (the "**Council**") which expression shall include its permitted successors in title and assigns; and
- (3) **WAKEFIELD WASTE PFI LIMITED** registered in England and Wales under company number 08193325, whose registered office is at Dunedin House, Auckland Park, Mount Farm, Bletchley, Milton Keynes, Buckinghamshire MK1 1BU (the "**Contractor**").

BACKGROUND

- (A) By a contract of even date (the "**Project Agreement**"), the Council has appointed the Contractor to carry out in relation to the sites therein described as "the Sites" the design and construction of the works therein defined as "the Works", which expression has the same meaning in this Deed.
- (B) By a contract of even date (the "**Construction Contract**"), the Contractor has appointed the Construction Sub-Contractor to carry out in relation to the Sites the design and construction of the Works.
- (C) The Construction Sub-Contractor is obliged under the Construction Contract to give a warranty in this form in favour of the Council.

1. DEFINITIONS AND INTERPRETATION

- 1.1 Words and expressions used in this Deed and defined in the Project Agreement shall have the meaning ascribed to them in the Project Agreement, unless otherwise expressly provided herein.
 - 1.2 Unless the contrary intention appears a reference to a person includes its successors and assigns.
 - 1.3 All references to clauses are references to clauses of this Deed.
 - 1.4 All references to agreements, documents or other instruments include (subject to all relevant approvals) a reference to that agreement, document or instruments as amended, supplemented, substituted, novated or assigned.
 - 1.5 Any reference to a public organisation shall be deemed to include a reference to any successor to such public organisation or any organisation entity which taken over the functions or responsibilities of such public organisation.
 - 1.6 References to "**parties**" mean the parties to this agreement and references to a "**party**" mean one of the parties to this agreement and includes in each case their respective successors, transferees and assigns.
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- 1.7 Headings and sub-headings are for each of reference only and shall not be taken into consideration in the interpretation or construction of this agreement.
- 1.8 “**Person**” includes any individual, partnership, firm, trust, body corporate, government, governmental body, authority, emanation, agency or instrumentality, unincorporated body of persons or associations.
- 1.9 Any reference to any enactment, order, regulation or other similar instrument shall be construed as a reference to the enactment, order, regulation or instrument as amended or re-enacted.

2. OPERATIVE PROVISIONS

In consideration of the payment of one pound (£1.00) by the Council to the Construction Sub-Contractor, receipt of which the Construction Sub-Contractor hereby acknowledges:

3. CONSTRUCTION SUB-CONTRACTOR'S WARRANTY AND LIABILITY

- 3.1 The Construction Sub-Contractor warrants to the Council that:
- 3.1.1 it has carried out and will continue to carry out and complete its obligations under the Construction Contract in accordance with the Construction Contract; and
- 3.1.2 in the performance of its obligations under the Construction Contract it will exercise all the reasonable skill and care to be expected of a suitably qualified and competent contractor experienced in carrying out work similar to the Works in relation to developments of a similar size, scope and complexity as the Project,

provided that the Council shall only be entitled to make a claim against the Construction Sub-Contractor under this clause if the Project Agreement has terminated and shall not be entitled to do so during the Step-in Period or after the Construction Sub-Contract has been novated pursuant to this Deed.

4. DOCUMENTS

- 4.1 In relation to all drawings, details, plans and other documents of any nature whatsoever and designs and inventions contained in them which have been or are hereafter provided by the Construction Sub-Contractor in the course of performing its obligations under the Construction Contract ("**Documents**") the Construction Sub-Contractor hereby grants (or, if such grant cannot legally take place until a later date, agrees to grant) to the Council with effect from the date of this Deed or in the case of Documents not yet in existence with effect from the creation thereof, an irrevocable royalty-free non-exclusive licence (such licence to remain in full force and effect notwithstanding the termination of the Construction Contract or determination of the employment of the Construction Sub-Contractor under the Construction Contract or the abandonment or completion of the Works or of its obligations under the Construction Contract or any dispute thereunder or hereunder) to use and to reproduce all Documents for any purpose whatsoever connected with the Works and such other purposes as are reasonably foreseeable including, but without limitation, the execution, completion, maintenance, letting, advertisement, modification, extension, reinstatement and repair of the Works (the "**Intellectual Property Rights**"). Such licence will carry the right to grant sub-licences and will be transferable to third parties. The Council will not use the Documents for any purpose other than that for which they were originally provided to it and other than for such other uses as are reasonably foreseeable, including, but without limitation, the execution, completion, maintenance, letting, advertisement, modification, extension, reinstatement and

repair of the Works, unless the Construction Sub-Contractor authorises such use and confirms that the Documents are suitable for it. The Construction Sub-Contractor will not grant to any third party the right to use any of the Documents save under any warranty it is obliged to give under the Construction Contract or hereunder or as otherwise required to enable it to fulfil its obligations under the Construction Contract.

- 4.2 The Construction Sub-Contractor agrees on reasonable request at any time and following reasonable written prior notice to give the Council or those authorised by it access to the Documents and to provide copies (including copy negatives and CAD disks) thereof at the Council's expense.
- 4.3 The Construction Sub-Contractor warrants to the Council that the Documents are its own original work and that in any event their use in connection with the Works will not infringe the rights of any third party.
- 4.4 The Council will not hold the Construction Sub-Contractor liable for any use it may make of the Intellectual Property Rights (set out in Clause 4.1 above) for any purpose other than that for which they were originally provided by it and other than for such other uses as are reasonably foreseeable.

5. INSURANCE

- 5.1 The Construction Sub-Contractor shall maintain insurances as required under, and upon the terms set out in, the Construction Contract.
- 5.2 As and when reasonably required by the Council the Construction Sub-Contractor will produce for inspection documentary evidence that the insurances referred to in Clause 5.1 are being properly maintained and that payment has been made in respect of the last preceding premium due thereunder.

6. NOTICES

Any notice to be given by any party hereunder will be sufficiently served if sent by hand, by facsimile transmission or by post to the registered office or if there is none the last known address of the party to be served. Any notice sent by hand will be deemed to be served on the date of delivery and any notice sent by facsimile transmission will be deemed to be served in full at the time recorded on the facsimile report sheet provided that if any notice sent by hand or facsimile is sent after 4.45 p.m. on any day it will be deemed to be served on the next working day. Any notice sent by post will be deemed to have been duly served at the expiration of forty eight (48) hours after the time of posting if the end of that period falls before 4.45p.m. on a working day and otherwise on the next working day.

7. ASSIGNMENT

Without prejudice to the provisions of Clause 11 (Step-In Rights), the benefit of and the rights of the Council under this Deed may be assigned by absolute legal assignment without the written consent of the Construction Sub-Contractor or the Contractor on two occasions only provided always that subsequent assignments shall be permitted with the consent of the Construction Sub-Contractor (such consent not to be unreasonably withheld or delayed) and the Council will notify the Construction Sub-Contractor and the Contractor in writing following any such assignment specifying the name and address of the assignee and the date of the assignment provided that the Council may only exercise its rights to assign under this Clause if the Project Agreement is to be assigned in accordance with the terms of the Project Agreement and the assignment takes place at the same time and to the same assignee as under

the Project Agreement. The Construction Sub-Contractor will not contend that any such assignee is precluded from recovering any loss resulting from any breach of this Deed (whatever the date of such breach) by reason only that that person is an assignee and not the original Council hereunder or by reason that the original Council or any intermediate assignee escaped any loss resulting from such breach by reason of the disposal of any interest in the Site or that the original Council or any intermediate assignee has not suffered any or as much loss.

8. COUNCIL'S REMEDIES

- 8.1 The rights and benefits conferred upon the Council by this Deed are in addition to any other rights and remedies it may have against the Construction Sub-Contractor including without prejudice to the generality of the foregoing any remedies in tort (subject to any applicable limitations thereto in the Construction Contract).
- 8.2 The Construction Sub-Contractor shall have no greater liability under this Deed than it would have had if the Council were named as joint employer with the Contractor under the Construction Contract and in the event of any breach of this Deed shall be entitled in any action or proceedings by the Council to rely on any limitation of the Construction Contract to raise the equivalent rights in defence of liability, excluding any claims of set off or counterclaim, as it would have against the Contractor under the Construction Contract had the Council been named as joint employer with the Contractor under the Construction Contract. Notwithstanding anything herein contained, the Construction Sub-Contractor shall not be liable to the Council for any breach or breaches of Clause 3 (Construction Sub-Contractor's Warranty and Liability) hereof which is or are the subject matter of arbitration or litigation proceedings commenced against the Construction Sub-Contractor unless such proceedings are commenced before the expiry of twelve (12) years from the Completion Date in respect of the entire Works.

9. INSPECTION OF DOCUMENTS

The Construction Sub-Contractor's liabilities under this Deed will not be in any way reduced or extinguished by reason of any inspection or approval of the Documents, or attendance at site meetings or other enquiry or inspection which the Council may make or procure be made for its benefit or on its behalf.

10. PRIORITY OF DIRECT AGREEMENTS

- 10.1 Notwithstanding any other provision of this Deed, any notice served by the Agent in accordance with the Funder Direct Agreement shall have priority over any notice served by the Council in accordance with the terms of this Deed.
- 10.2 The Council acknowledges that the Construction Sub-Contractor shall not be in breach of its obligations under this Deed for failing to comply with a notice issued by the Council if such failure is due to the Construction Sub-Contractor complying with a notice issued by the Agent under the Funder Direct Agreement.

11. STEP-IN RIGHTS

- 11.1 The Construction Sub-Contractor will not exercise or seek to exercise any right which may be or become available to it to discontinue or suspend the performance of any duties or obligations under the Construction Contract (which shall not include the exercise by the Construction Sub-Contractor of its statutory right to suspend the carrying out of the Works under the Housing Grants (Construction and Regeneration) Act 1996) or terminate or treat as

terminated or repudiated the Construction Contract or its employment under it without first giving to the Council, not less than 28 days' prior written notice specifying the Construction Sub-Contractor's ground for terminating or treating as terminated or repudiated the Construction Contract or its employment under it or discontinuing or suspending its performance thereof and stating the amount (if any) of monies outstanding under the Construction Contract. Within such period of notice:

- 11.1.1 if the Project Agreement has been or is to be terminated the Council may give written notice to the Construction Sub-Contractor that the Council will thenceforth become the employer under the Construction Contract to the exclusion of the Contractor and thereupon the Construction Sub-Contractor will admit that the Council is such employer and the Construction Contract will be and remain in full force and effect as if the Construction Contract had been entered into between the Construction Sub-Contractor and the Council notwithstanding any of the said grounds; and
 - 11.1.2 if the Council has given such notice as aforesaid or under Clause 11.3 below, the Council will as soon as practicable thereafter remedy any outstanding breach by the Contractor which properly has been included in the Construction Sub-Contractor's specified grounds and which is capable of remedy by the Council (which for the avoidance of doubt includes payments of any amounts owed by the Contractor to the Construction Sub-Contractor); and
 - 11.1.3 if the Council has given such notice as aforesaid or under Clause 11.3 below, the Council will from the service of such notice become responsible for all sums properly payable to the Construction Sub-Contractor under the Construction Contract accruing due after the service of such notice but the Council will in paying such sums be entitled to the same rights of set-off and deduction as would have applied to the Contractor under the Construction Contract.
- 11.2 Notwithstanding anything contained in this Deed and notwithstanding any payments which may be made by the Council to the Construction Sub-Contractor, the Council will not be under any obligation to the Construction Sub-Contractor nor will the Construction Sub-Contractor have any claim or cause of action against the Council unless and until the Council has given written notice to the Construction Sub-Contractor pursuant to Clause 11.1.1 or Clause 11.3 of this Deed.
- 11.3 The Construction Sub-Contractor further covenants with the Council that if the Project Agreement is terminated, the Construction Sub-Contractor will, if requested by the Council, by notice in writing and subject to Clause 11.1.2 and Clause 11.1.3, accept the instructions of the Council to the exclusion of the Contractor in respect of the Works upon the terms and conditions of the Construction Contract and will if so requested enter into a novation agreement whereby the Council is substituted for the Contractor under the Construction Contract provided the Construction Sub-Contractor will not be obliged to carry out any Works until all outstanding monies that are properly due and payable and notified have been paid by the Council, and the terms of such novation agreement shall require the Construction Sub-Contractor to provide a collateral warranty to the Contractor permitting the Contractor to claim against the Construction Sub-Contractor for breaches of the Construction Sub-Contract that occurred prior to the date of the novation agreement.
- 11.4 The Contractor acknowledges that the Construction Sub-Contractor will be entitled to rely on a notice given to the Construction Sub-Contractor by the Council under Clause 11.3 as conclusive evidence that the Project Agreement has been terminated by the Council.

- 11.5 The Council may by notice in writing to the Construction Sub-Contractor appoint another person to exercise its rights under this Clause 11 subject to the Council remaining liable to the Construction Sub-Contractor as guarantor for its appointee in respect of its obligations under this Deed.
- 11.6 The Contractor hereby agrees that it will not take any steps which would hinder the Council from exercising its rights under this Deed and confirms that the rights of the Council in Clause 11.1 and 11.3 override any obligations of the Construction Sub-Contractor to the Contractor under the Construction Contract.

12. CONTRACTOR'S ACKNOWLEDGEMENT

The Contractor has agreed to be a party to this Deed for the purposes of acknowledging that the Construction Sub-Contractor shall not be in breach of the Construction Contract or any warranty to the Contractor by complying with the obligations imposed upon it under this Deed and that the Contractor agrees in particular with the provisions of Clause 11 (Step-In Rights) hereof.

13. VARIATION OF CONSTRUCTION CONTRACT

The Contractor and the Construction Sub-Contractor each agree that they will not, without the prior written consent of the Council, amend, modify or waive any material provision of the Construction Contract.

14. APPLICABLE LAW AND JURISDICTION

This Deed and any non-contractual obligations arising out of or in connection with it will be construed in accordance with English law and be in all respects subject to the exclusive jurisdiction of the English courts

15. THIRD PARTY RIGHTS

The parties to this Deed do not intend that any of its terms will be enforceable by virtue of the Contracts (Rights of Third Parties) Act 1999 by any person not a party to it.

IN WITNESS of which this document is executed as a Deed and is delivered on the date first stated above.

Executed as a deed by)
SHANKS WASTE MANAGEMENT)
LIMITED acting by its director/attorney)
_____ :)

Signature of director/attorney

Signature of witness

Name of witness

Address of witness

.....

Occupation of witness

THE COMMON SEAL of)

THE COUNCIL OF THE CITY OF WAKEFIELD)

was affixed to this Deed in the)

presence of:)

.....

Authorised Signatory

Executed as a deed by)
WAKEFIELD WASTE PFI LIMITED)
acting by its director/attorney)
_____ :

Signature of director/attorney

Signature of witness

Name of witness

Address of witness

.....

Occupation of witness