



Dated 2018

The Council of the Borough of Milton Keynes

And

AmeyCespa (MK) SPV Limited

Deed of Variation of Project Agreement

in relation to Residual Waste Treatment Contract

Deed of Variation No 1 – Project Agreement

Dated **2018**

Parties

- (1) **The Council of the Borough of Milton Keynes** of Civic Offices, 1 Saxon Gate East, Central Milton Keynes, MK9 3EJ (the **Authority**); and
- (2) **AmeyCespa (MK) SPV Limited** (Company registration number 08538424) whose registered office is at the Sherard Building, Edmund Halley Road, Oxford OX4 4DQ (the **Contractor**);

Together, the **Parties**, or singularly a **Party**.

Introduction

- (A) The Authority has appointed the Contractor under the Project Agreement.
- (B) The Acceptance Longstop Date has been reached and the Acceptance Certificate has not been achieved.
- (C) The Contractor confirms that the Installation is capable of enabling the Contractor to provide the Services in accordance with the Project Agreement and achieving the Base Case.
- (D) The Parties acknowledge and agree that resilience must be demonstrated before the full Capital Sum is released and also that the Authority will not pay the Capital Sum and continue to pay the Commissioning Waste Rate.
- (E) The Parties have agreed a solution whereby the Authority will pay the Capital Sum and proceed to the Service Commencement Date but with monies withheld by way of retention (or on demand bond equivalent) pending agreed resilience tests being passed.
- (F) The Parties have agreed to vary the Project Agreement in the manner set out below.

Agreed terms

1 Definitions and interpretation

- 1.1 The definitions and provisions as to interpretation in the Project Agreement apply in this Deed unless the context requires otherwise.
- 1.2 The following additional definitions shall apply:

Deed means this Deed of Variation to the Project Agreement;

Project Agreement means the contract and all its schedules between the Authority and the Contractor dated 26 June 2013 for (amongst other things) the design, construction, installation, commissioning, rectification of defects, operation and maintenance of the Facility and the provision of the Services;

Works and Operating Sub-Contract means the contract dated 26 June 2013 [as amended by []] between the Contractor and the Works and Operating Sub-Contractor for obtaining necessary Consents, carrying out the design, construction, installation, commissioning, rectification of defects, operation and maintenance of the Installation and providing the Services as defined therein.

1.3 **Interpretation**

In this Deed, except where the context otherwise requires:

- 1.3.1 the masculine includes the feminine and vice-versa;
- 1.3.2 the singular includes the plural and vice-versa;
- 1.3.3 a reference to any clause, sub-clause, paragraph, Schedule, recital or Annex is, except where expressly stated to the contrary, a reference to such clause, sub-clause, paragraph, Schedule, recital or Annex of and to this Deed;
- 1.3.4 any reference to any enactment, order, regulation or other similar instrument shall be construed as a reference to the enactment, order, regulation or instrument (including any EU instrument) as amended, replaced, consolidated or re-enacted;
- 1.3.5 a reference to a person includes firms, partnerships and corporations and their successors and permitted assignees or transferees;
- 1.3.6 headings are for convenience of reference only;
- 1.3.7 words preceding "include", "includes", "including" and "included" shall be construed without limitation by the words which follow those words;
- 1.3.8 any obligation on a Party to do any act matter or thing includes, unless expressly stated otherwise, an obligation to procure that it is done; and
- 1.3.9 Subject to any express provisions to the contrary, the obligations of either Party are to be performed at that Party's own cost and expense.

1.4 **Schedules**

The Schedules to this Deed form part of this Deed.

2 **Acceptance Certificate**

A partial acceptance certificate has been issued by the Independent Certifier on [] 2018 which confirms the Acceptance Tests which have been passed on that date ("Partial Acceptance Certificate"). The Partial Acceptance Certificate is appended at Schedule [] to this Deed of Variation.

3 **Variation of the Project Agreement**

- 3.1 With effect from the date of this Deed, the Authority and the Contractor acknowledge and agree that the Project Agreement and Schedules shall be varied as follows:

3.1.1 Schedule 1 (Definitions) shall be added or amended as follows

Acceptance Longstop Date	The definition shall be deleted and replaced by: <i>13th March 2020</i>
Resilience Tests	Add a new definition as follows: <i>The tests set out as such in Schedule 11, Part 2A of the Project Agreement.</i>
Retention Bond	Add a new definition as follows: <i>The duly executed and delivered bond in the form set out in Schedule 35 of the Project Agreement</i>
Retention Payment Date	Means the date when the Independent Certifier has issued the Acceptance Test Certificate in relation to the Installation.
Services Commencement Date	The definition be deleted and replaced by: <i>14th March 2018</i>

3.2 **Service Commencement**

3.2.1 Clause 21.1.3 shall be deleted and replaced with:

21.1.3 *Services Commencement shall occur on the Services Commencement Date. For the avoidance of doubt, from the Services Commencement Date, the Base Price per Tonne for Band 1 (BP₁) (£0 per tonne) as defined in the Payment Mechanism shall apply (subject to any variations or adjustments which are subsequently made by agreement or determination in accordance with the contract).*

3.3 **Payment of the Capital Sum and Retention**

3.3.1 The parties agree that the Capital Sum Drawdown Conditions have not been satisfied by the Acceptance Longstop Date (as such date was defined prior to this Deed of Variation).

3.3.2 Pursuant to Clause 45.10.2, the Authority has elected to pay the Capital Sum less a retention and pursuant to clause 45.11.3 the Parties have agreed the sum of £10,524,330.42 as the “Retention Amount”.

3.3.3 The Authority accepts the Retention Bond in lieu of the Retention Amount subject to the provisions of clause 6 of this Deed of Variation.

3.3.4 The Authority shall pay the Capital Sum to the Capital Sum Account (as provided in clause 2.5 of the Direct Agreement) in accordance with Clause

45.11.7 save that for the purposes of that Clause the words “within five (5) Business Days following the date of determination or agreement by the Parties of the Retention Amount” shall be replaced with “on [] March 2018”.

3.3.5 A draft invoice for the Capital Sum as agreed between the Parties and the Facility Agent is attached at Schedule 8 to this Deed of Variation

3.4 If the Retention Payment Date has not occurred by the Acceptance Longstop Date (as amended by this Deed) , the provisions of Clause 45.11.13 shall apply as amended below:

45.11.13 if the Independent Certifier has not issued the Acceptance Test Certificate for the Installation by the Acceptance Longstop Date, the Authority may (in addition to making a demand under the Retention Bond for the full amount) at its discretion:

(a) *terminate this Contract and the provisions of Clause 66 (Termination on Contractor Default) and Clause 67 (Compensation for Contractor Default) shall in such circumstances apply; or*

(b) *Extend the Acceptance Longstop Date.*

4 Commissioning Period Performance Framework and Annual Plans

4.1 The Commissioning Period Performance Framework (set out in Part B2 of Schedule 2 to the Project Agreement (Authority’s Requirements)) shall continue to apply from the Services Commencement Date until the earlier of the Acceptance Longstop Date and the Retention Payment Date and from such time, the Retention Payment Date the Performance Management Framework shall apply in full to the earlier of the Termination Date or the Expiry Date.

4.2 The Annual Lifecycle and Maintenance Plan to apply from the Services Commencement Date to [31st March 2019] is attached in Schedule 2 to this Deed.

4.3 The Contractor shall submit any proposed changes or amendments to the Service Delivery Plan for review pursuant to Schedule 9 (Review Procedure) of the Project Agreement within six (6) weeks from the Services Commencement Date.

5 Schedule 11 of the Project Agreement – Acceptance Tests

5.1 New Part 2A shall be added to Schedule 11 of the Project Agreement entitled “the Resilience Tests” and Schedule 1 to this Deed of Variation shall be incorporated therein.

5.2 Schedule 11 of the Project Agreement shall be amended as follows: In paragraph 4.5 delete “not used” and add the words

“Either the tests in paragraphs 4.6 to 4.12 or at the Contractor’s election the Resilience Tests”

After paragraph 4.14 add the words:

“The tests in 4.1 to 4.4 and in 4.13 and 4.14 shall be passed whether the Tests in 4.6 to 4.12 or the Resilience Tests are applied”

5.3 Save as varied herein, the Parties confirm that the Project Agreement shall otherwise continue with full force and effect.

6 Retention Bond

6.1 The Contractor has provided an on demand bond to the Authority ("Retention Bond") for the Retention Amount.

6.2 The form of the Retention Bond is set out in schedule 7 of this Deed and shall form a new Schedule 35 to the Project Agreement.

6.3 There shall be added to the Project Agreement a new Clause 45.13 as follows

45.13.1 The Contractor has provided a bond to the Authority in the Retention Amount and in the form set out in a new Schedule 35 to the Project Agreement which shall be added to the Project Agreement.

45.13.2 The Contractor acknowledges and accepts that the Retention Bond is an on-demand bond provided in lieu of a cash retention and the Contractor shall not take any action, steps or proceedings whether under the Contract, in common law or in equity to prevent the Authority from making a successful demand under the Retention Bond in accordance with its terms.

45.13.3 The Retention Bond shall not be released until the release criteria set out in the bond apply.

45.13.4 If the credit rating, or Financial Strength Rating if the Retention Bond issuer is an insurance organisation, of the issuer of the Retention Bond falls below ["AA-" (and where outside the UK the relevant sovereign rating is AA+)] for long-term debt by Standard & Poor's (or an equivalent rating from such other equivalent rating agency) or if the Retention Bond becomes invalid or unenforceable for any reason, the Authority may instruct the Contractor to replace within 14 days the Retention Bond with a new Retention Bond (materially in the form set out in Schedule 35) issued by a bank or other surety with a credit rating (or Financial Strength Rating if the issuer is an insurance organisation) of at least "A-" for long-term debt by Standard & Poor's (or an equivalent rating from such other equivalent rating agency).

45.13.4 If the Contractor does not provide a replacement Retention Bond within the required time under clause [45.13.3] or the credit rating the Authority may withhold as cash security any payment which is otherwise due or becomes due to the Contractor under this Contract until the earlier of the date on which the amount of such withholding equals the required value of the Retention Bond and the date on which the Contractor provides a replacement Retention Bond from an issuer with the required credit rating provided that in determining any liability due to the Authority under the Retention Bond which has not been replaced, monies withheld by the Authority pursuant to this clause will be off-set against the amount of the Retention Bond such that taken together the amount of any monies retained and the bond amount will not exceed the original amount of the Retention Bond which has not been replaced.

7 **Consent of the Authority to vary the Works and Operating Sub-Contract**

7.1 The Authority hereby consents to the variation of the Works and Operating Sub-Contract in the form appearing at Schedule 3 to this Deed.

8 **Further Assurance**

The Parties to this Deed agree that they shall execute and deliver all necessary documents and do all necessary acts and things in order to give full effect to this Deed.

9 **Disputes**

The Parties agree that this Deed and any dispute or claim arising out of, under or in connection with this Deed or any non-contractual obligation arising in connection with this Deed shall be resolved in accordance with clause 59 (Dispute Resolution) and Schedule 22 (Dispute Resolution Procedure) of the Project Agreement.

10 **General**

10.1 Nothing in this Deed confers or purports to confer any rights on any person pursuant to the Contracts (Rights of Third Parties) Act 1999.

10.2 If any provision of this Deed is held to be void, illegal or unenforceable in any jurisdiction it will be deemed severable from the remaining provisions which will remain in full force and effect.

10.3 This Deed may not be varied except by an agreement in writing signed by duly authorised representatives of the Parties to this Deed.

10.4 Termination of this Deed shall not affect the continuing rights of the Authority and the Contractor under any provision of this Deed which is expressed to survive termination or which is required to give effect to such termination or the consequences of such termination and such rights shall continue in full force and effect notwithstanding termination of this Deed.

11 **Counterparts**

11.1 This Deed may be executed in any number of counterparts, each of which when executed shall constitute a duplicate original, but all the counterparts shall together constitute the one agreement.

11.2 Transmission of an executed counterpart of this Deed (but for the avoidance of doubt not just a signature page) shall take effect as delivery of an executed counterpart of this Deed. If this method of delivery is adopted, without prejudice to the validity of the agreement thus made, each Party shall provide the others with the original of such counterpart as soon as reasonably possible thereafter.

11.3 No counterpart shall be effective until each Party has executed and delivered at least one counterpart.

This Deed has been executed as a deed and is delivered on the date stated at the beginning of it.

The Common Seal of

The Council of the Borough of Milton Keynes

was affixed to this Deed

in the presence of

Authorised Officer

Signed as a deed by

for and on behalf of

AmeyCespa (MK) SPV Limited

in the presence of a witness:

Signature of witness:

name:

address:

occupation:

Schedule 1
Resilience Tests

Schedule 2

Annual Lifecycle and Maintenance Plan

Schedule 3

Form of variation of the Works and Operating Sub-Contract

To be completed by Amey Cespa

Schedule 4

Bank release of Direct Agreement

Acknowledgement by the Senior Lenders consenting this Deed of Variation and releasing all security

The Lenders agree to the amount and VAT stated in the draft invoice attached at Schedule []

Lenders to agree that provided Capital Sum paid in full by [], they raise no objection to the parties entering the Deed of Variation, agreeing the Retention Amount and accepting a bond in lieu, the Resilience Tests nor the Service Commencement Date.

Lenders release all security over the Facility and Assets and confirm that the Senior Debt Discharge Date has occurred under the Direct Agreement

Schedule 5

Partial Acceptance Certificate issued by the Independent Certifier on []

Schedule 6

Independent Certifiers agreement to vary its appointment to reflect the amended Acceptance Tests (including the introduction of the new Resilience Tests)

Schedule 7
Retention Bond

Schedule 8

Draft Invoice for the Capital Sum