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**Handbook on Local Energy Supply Contracts**

**Sample Document: Local Energy Supply Contract with Finance**

**May 2014**

Dated the day of 2014

**[CLIENT]**

**[ESCO]**

**LOCAL ENERGY SUPPLY CONTRACT**

**(Full LESC for the design, construction and installation of energy equipment and supply of energy)**

**LOCAL ENERGY SUPPLY CONTRACT**

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**THIS ENERGY SUPPLY Contract** made the day of 2014 between:

1. **[ ]** having its registered office at [ ] (the "**Client**"); and
2. **[ ]** having registered office at [ ] (the “**ESCO[[1]](#footnote-2)**");

each a “**Party**” and collectively the “**Parties**”.

**WHEREAS:**

1. The Client is the owner of the Premises and is responsible for the management of the Premises including the procurement of Energy and energy supplies.
2. Pursuant to a public procurement process [DETAILS TO BE INSERTED] the Parties wish to enter this Agreement pursuant to which the ESCO agrees to [finance], design, construct, install, test and commission Energy supply equipment at the Premises and to supply Energy to the Agreed Connection Points within the Premises on the terms and conditions contained in this Agreement.

**NOW IT IS HEREBY AGREED** as follows:-

# Definitions and interpretation

* 1. The following words and expressions shall have the following meanings respectively:

 **“Acceptance Date”** means the date on which the Client has accepted Substantial Completion of the Works.

**“Actual Consumption”** means in respect of each Month the amount of energy consumed in kWh by the Premises in respect of the relevant month as measured by the Energy Meters in accordance with Clause 20.

**“Agreed Connection Points”** means the connection points (identified in Schedule 1) at which a Supply may flow between the ESCO’s facilities and the relevant parts of the Premises together with any new connection points agreed pursuant to the Energy Systems Modification Schedule and “Agreed Connection Point” shall be construed accordingly.

**“Agreement”** means this agreement between the ESCO and the Client including the attached Schedules.

 **“Applicable Laws”** means any and all statutes, laws, codes, rules, regulations, decrees, permits or orders as may be amended, repealed or updated from time to time concerning, relating to or having jurisdiction over the activities to be performed pursuant to this Agreement.

 **“Building Regulations”** means the Building Control Acts 1990 to 2007 and all subordinate legislation pursuant thereto (including for the avoidance of any doubt the Building Control (Amendment) Regulations 2014).

**"Business Day"** means a day when banks in Dublin are open for normal business.

**“Client Design Documents”** means the element of the Final Design Documents prepared by or on behalf of the Client as set out in Part 2 of Schedule 2.

**“Commencement Date”** means [ ].

**“Connection Date”** means the next Business Day following the Acceptance Date.

 “**Confidential Information”** means confidential and/or proprietary information including but not limited to systems, services or planned services, suppliers, data, financial information, computer software, processes, methods, knowledge, ideas, marketing promotions, current or planned activities, research, development and other information which should reasonably be considered to be confidential or commercially sensitive with respect to the information holder’s business or operations.

 **“Construction Regulations”** means the Safety, Health and Welfare at Work (Construction) Regulations 2006 to 2012.

**“Contract Year”** means each calendar year or part thereof during the Supply Period.

**“CPI”** means the Harmonised Index of Consumer Prices for Ireland published by the Central Statistics Office or any successor thereto.

**“De-Energisation”** means the movement of any switch, closing of any stop valve or any other step as a result of which no Energy can flow through to the Agreed Connection Point, and “De-Energise” and “De-Energised” shall be construed accordingly.

**“Discount”** means [ ]%.

**“Discountable Revenue”** means in respect of each Contract Year, the aggregate of the Monthly Payments in respect of all Months within the relevant Contract Year (or such other shorter period calculated on a proportionate basis in the event that the application of discount has been suspended during that Contract Year pursuant to Clause [11.5] of the Agreement).

**“Discountable Revenue Threshold”** means €[ ].

**“End Date”** means the earlier of:

##### [25][[2]](#footnote-3) years on and from the Commencement Date (subject to any agreed extension); or

##### the date when this Agreement is terminated pursuant to Clause 34.

**“Energisation”** means the movement of any switch or opening of any stop valve or any other step which enables Energy to flow through to the Agreed Connection Point, and “Energise” shall be construed accordingly.

**“Energy”** means heat.

**“Energy Meter(s)”** means the metering equipment, other measuring equipment and apparatus installed at an agreed location by the ESCO to measure the Supply made by the ESCO to the Client and which is capable of being read remotely by the ESCO.

“**Energy Requirement**” means [the Client’s actual Energy requirement during the any relevant one Hour period]; and

**“Energy Supply Deficit”** is the difference in kWh between the Energy actually supplied through the Agreed Connection Point during the one Hour period in which the Energy Failure occurred and the Heat Capacity multiplied by 1 hour.

**“Energy System”** means [the Equipment, [the Existing Equipment][[3]](#footnote-4), the Supply, the Agreed Connection Points and the Energy Meters].

 **"Environmental Incentives[[4]](#footnote-5)"** means all rights, credits (including tax credits), rebates, grants, benefits, reductions, offsets, and allowances and entitlements of any kind, howsoever entitled or named (including carbon credits and allowances), whether arising under national, European or international law, international treaty, trade association membership or the like, arising from the Works and the resulting reduction of energy usage at the Premises. Without limiting the foregoing, "Environmental Incentives" includes utility rebates or incentive programmes, green tags, renewable energy credits, tradable renewable certificates, portfolio energy credits, the right to apply for (and entitlement to receive) incentives under any state tax credit programme and grants from non-governmental organisations.

 For the avoidance of doubt “Environmental Incentives” shall not include any tax deductions which may arise under Section 82 of the Finance Act, 2012 as more particularly set out in Clause 18.2.

**“Equipment”** means the goods, materials and equipment to be installed at the Premises by the ESCO, as set out in Schedule 1 attached hereto, together with any and all additions and modifications made thereto during the Term.

**“Existing Equipment”** means the Client’s pre-existing energy supply equipment at the Premises as set out in Schedule 1.

**“Failed Service Credits[[5]](#footnote-6)”** means the credits accumulated by the Client as calculated in accordance with the Guaranteed Standards of Performance.

**“Failed Service Factor”** is [2][[6]](#footnote-7).

**“Final Design Documents”** means the final design documentation (including operating instructions) related to the Works as prepared by the ESCO [and the Client][[7]](#footnote-8) during its tender submission and set out in Schedule 2.

**“Fixed Monthly Payment[[8]](#footnote-9)”** means €[ ].

**“Force Majeure”** means any of the following events:

##### war;

##### revolution;

##### civil commotion;

##### labour disputes (save for disputes at the ESCO, its agents or Subcontractors);

##### floods;

##### hurricanes, similar storms or other actions of the elements;

##### acts of God or the public enemy;

##### vandalism;

##### restriction or restraints of governmental authorities whether State or local; or

##### acts of civil or military authorities

provided that for the purposes of this Agreement such events must be exceptional in nature such that they could not have been avoided or overcome by either Party exercising due and proper care and diligence.

**“Fuel”** means [ ][[9]](#footnote-10) and as more particularly specified in Schedule 2.

**“Guaranteed Standards[[10]](#footnote-11)”** means the guaranteed standards of performance for the Supply set out in the Guaranteed Standards of Performance set out in Schedule 6.

**“Hour”** means a complete hourly period commencing on the hour every hour.

**“Intellectual Property”** means any designs, formulas, patterns, devices, secret inventions or processes, copyrights, patents, database rights, moral rights, trademarks, service marks, domain names, know-how, utility model, unregistered design or other intellectual or proprietary rights or similar items of property.

**“Maintenance Schedule[[11]](#footnote-12)”** means the schedule of maintenance set out in Schedule 5.

**“Maintenance Days”** means the number of whole days specified in the Maintenance Schedule in each 12 month period of Supply as may be amended by agreement in writing between the Parties acting reasonably.

**“Margins of Error”** means in respect of the Energy Meter(s) a reading that is within +/- [5%] of actual Energy use over the normal design operating range of the Energy System (minimum use when operating to maximum use when operating).

**“Material Change”** shall include any change in or to the Premises whether structural, operational or otherwise in nature which could reasonably be expected to increase or decrease annual energy consumption at the Premises by at least 20% after adjustments for climatic variations. Actions by the Client which may result in a Material Change include but are not limited to the following:

##### manner of use of the Premises by the Client;

##### hours of operation for the Premises or for any Equipment or Existing Equipment operating at the Premises;

##### occupancy of the Premises;

##### structure of the Premises;

##### modification, renovation or construction at the Premises.

 **“Materials”** means any and all reports, data manuals and/or other materials (including without limitation all and any audio or audio visual recordings, transcripts, books, papers, records, notes, illustrations, photographs, diagrams) produced for the purposes of this Agreement.

**“Meter Examiner”** means, in respect of a dispute about the accuracy of any Energy Meter, an expert appointed on application of either Party by the President of Engineers Ireland from time to time.

**“Month”** means a calendar month.

**“Monthly Failed Service Credit”** means the aggregate amount of Failed Service Credits for a relevant Month which will be deducted from the Monthly Payment in accordance with Clause 24 and which shall not exceed [ ][[12]](#footnote-13) for any Month.

**“Monthly Payment”** means the monthly payment that may be payable by Client to the ESCO as calculated in accordance with Clause 23 for the provision of the Works and the Services from the Acceptance Date.

**“Monthly Traded Price[[13]](#footnote-14)”** means in respect of each relevant Month the average of the day ahead price in respect of the relevant Month as derived from the Platts Market Data.

**“Operations Manual”** means the operations and maintenance manual setting out the procedures for operating and maintaining the Equipment and/or Works prepared by the ESCO in both electronic and hard copy format.

**“Planning Permission”** means any detailed planning permission to be granted by the relevant planning authority for the Works in accordance with the terms of this Agreement.

**“Platts Market Data[[14]](#footnote-15)”** means the Platts daily market price data for oil available on www.platts.com.

**“Premises”** means the Client’s premises as more particularly described in Schedule 1.

 **“Relevant Legislation”** means any relevant environmental or energy related legislation that may be enacted during the Supply Period which has or may have a material impact on the ability of either Party to carry out its obligations under this Agreement.

 **“Retention Sum[[15]](#footnote-16)”** means [ ]% of the Works Sum which shall be paid in accordance with Clause 3.

 **“Services”** means the [the procurement of Fuel for the Equipment and the Existing Equipment], the operation and maintenance of the Energy System and the provision of the Supply at the Agreed Connection Points as more particularly described in Schedule 4.

 **“Snag List”** means minor items of the Works to be completed after Substantial Completion which do not prevent the Works and the Equipment from being used for the purpose for which they are intended and which will not prevent the issuance of applicable permits or certificates for such use.

 **“Substantial Completion”** means the Works have been completed to the extent that they can be used for their intended purpose notwithstanding those minor Works items noted on the Snag List.

**“Supply”** means the supply of Energy provided by the ESCO to the Client to the Agreed Connection Points.

**“Supply Period”** means the period from the Connection Date to the End Date.

**“Supply Price”** means €[ ]/kWh.

For the avoidance of doubt the Supply Price shall include but not be limited to the following non-energy related cost items:

##### cost of Fuel[[16]](#footnote-17);

##### Fuel transport costs[[17]](#footnote-18);

##### metering costs;

##### operational and maintenance costs;

##### heat generation and transmission losses; and

##### other reasonable costs that would have been incurred by the Client buying fossil fuel and converting it into Energy.

“**Supply Temperature**” means the leaving (flow) water temperature (°C) at the Client side of the Agreed Connection Point(s).

**“Target Completion Date”** means [ ].

**“Tax”** means any kind of tax, duty, levy or other charge whether or not similar to any in force at the execution date of this Agreement whether imposed by a local, governmental or other Tax Authority in the Republic of Ireland or elsewhere.

**“Tax Authority”** means any organisation or body in any country having authority in relation to Tax.

**“Term”** means the period from the Commencement Date to the End Date.

**“Unplanned Outage”** means a failure on the part of the ESCO to provide the Supply in circumstances other than those outlined in Clauses [12.6, 13.2, and 13.3].

 **“Variation Estimate”** means the ESCO’s detailed estimate of the impact to this Agreement of a variation to the Works, the Equipment and/or the Existing Equipment and/or an adjustment to the [Supply Price], [the Fixed Monthly Payment][[18]](#footnote-19), the Discountable Revenue Threshold and/or the Maximum Capacity requested by the Client or the ESCO in accordance with the provisions of Clause 30.1 or Clause 30.2 which shall include:

1. its proposal for implementing the variation to the Works, the Equipment and/or the Existing Equipment ;
2. a detailed estimate of cost to the ESCO of implementing the proposed variation;
3. any proposed extension of the Supply Period
4. any proposed adjustment to [the Fixed Monthly Payment][[19]](#footnote-20), the Supply Price, the Discountable Revenue Threshold and/or the Maximum Capacity; and
5. the programme for implementing the proposed variation.

**“Works”** means the management, procurement, design, construction, installation, testing and commissioning works to be carried out by the ESCO at the Premises prior to the Connection Date as more particularly described in Schedule 3.

**“Works Sum[[20]](#footnote-21)”** means the sum of €[ ][[21]](#footnote-22) for the Works which shall be payable in accordance with Clause 3.

* 1. Clause headings do not form part of this Agreement and shall not be taken into account in the construction or interpretation of this Agreement.
	2. References to any statute or statutory provision will be construed as a reference to the same as it may have been, or may from time to time be, amended, modified or re-enacted.

# Part 1 – The Works

# The Works

* 1. The ESCO shall carry out the Works with all the skill, care, diligence, efficiency and professional conduct reasonably to be expected from a professional with the qualifications and experience suitable for the carrying out of the Works and in the appointment and monitoring of its agents, employees subcontractors and suppliers and shall do so in accordance with the Final Design Documents and the terms and conditions set out in this Agreement.
	2. The ESCO shall supervise and direct the Works and shall ensure that the completed Works are fit for their intended purpose and shall be responsible for all construction and installation means, methods, techniques, sequences and procedures and for coordinating all elements of the Works under this Agreement.
	3. The ESCO shall procure the Equipment together with all labour, personnel, tools, construction equipment and machinery, transportation and other facilities and services necessary for the proper execution and completion of the Works.
	4. Save as to the extent that may be required under the Final Design Documents or as may be otherwise required under this Agreement the ESCO shall carry out the Works in such a manner so as not to harm the structural integrity of the Premises or its operating systems. The ESCO shall without delay and at its own expense repair and restore to its original condition any damage to the Premises caused by the ESCO or its subcontractors or agents.
	5. The ESCO shall appoint the ESCO Representative who on the date of execution of this Agreement shall be [ ][[22]](#footnote-23). The ESCO may replace the ESCO Representative with a person of equivalent experience and expertise with the prior written consent of the Client which shall not be unreasonably withheld or delayed.
	6. In carrying out the Works the ESCO shall comply with its obligations under the Construction Regulations.
	7. The ESCO shall complete the Works in accordance with the Final Design Documents and Planning Permission and shall comply with all applicable legislation, regulations, guidelines, by-laws, standards and codes of practice including, but not limited to the Construction Regulations and the Building Regulations.
	8. [The ESCO warrants that it has carefully inspected and satisfied itself as to the accuracy and completeness of the Client Design Documents and has brought any error or omission in the Client Design Documents that it should reasonably have discovered during the tender process to the attention of the Client as soon as possible.]
	9. Where the subject matter of the Works (either in whole or in part) includes the construction of a building or other works to which the Building Control (Amendment) Regulations 2014 apply the Parties agree that the Client shall engage [ ] being a member of the ESCO’s design team to act as assigned certifier for the purposes of the Building Regulations and the ESCO warrants that they are suitably qualified and competent to so act.
	10. Where the subject matter of the Works (either in whole or in part) includes the construction of a building or other works which requires a certificate of compliance on completion under the Building Control (Amendment) Regulations 2014 the ESCO acknowledges that the Client shall not be obliged to accept the Works under Clause 10 until the relevant building control authority has entered the certificate of compliance on completion onto the register maintained under the Building Regulations.
	11. The ESCO acknowledges that as at the date of execution of this Agreement the Client has obtained the Planning Permission and further acknowledges that as and from the date of execution of this Agreement it shall be responsible for obtaining any amendments to any existing Planning Permission or any additional Planning Permission which is necessary to allow it to perform all obligations under this Agreement.
	12. Any application made by the ESCO to the relevant authority for Planning Permission shall be subject to the prior approval of the Client and the ESCO shall notify the Client of any meetings scheduled with any relevant authority in respect of any Planning Permission applications and the Client shall be entitled to attend such meetings with the ESCO and the relevant authority.
	13. The ESCO undertakes that upon installation the Equipment shall satisfy the up to date published Sustainable Energy Authority of Ireland energy efficiency criteria (Triple E Register or equivalent).
	14. [The Client hereby appoints the ESCO as [project supervisor for the construction stage and project supervisor for the design stage][[23]](#footnote-24) for the Works in accordance with the Construction Regulations and the ESCO hereby accepts the appointment which shall continue as long as the Client is required to have a [project supervisor for the construction stage and project supervisor for the design stage][[24]](#footnote-25) in place for the Works.
	15. The ESCO represents and warrants that it is and will continue to be competent to act as [project supervisor for the construction stage and project supervisor for the design stage][[25]](#footnote-26) for the Works and further represents and warrants that it will allocate sufficient resources to enable it to comply with the relevant requirements of the Construction Regulations.
	16. The ESCO acknowledges that it shall not be entitled to any additional costs, fees or expenses in acting as [project supervisor for the construction stage and project supervisor for the design stage][[26]](#footnote-27) for the Works and that all such costs, fees or expenses are deemed to be included in any payments made to it by the Client under this Agreement.
	17. The ESCO warrants and represents that the insurances required under Clause 43 include cover for its liability in respect of its role as [project supervisor for the construction stage and project supervisor for the design stage][[27]](#footnote-28) for the Works.][[28]](#footnote-29)

# Security for the Performance of the Works[[29]](#footnote-30)

* 1. On or before the Commencement Date the ESCO shall deliver to the Client a performance bond in the form set out in Schedule 8 executed with a surety approved by the Client.[[30]](#footnote-31)
	2. On or before the Commencement Date the ESCO shall deliver to the Client a parent company guarantee in the form set out in Schedule 8[[31]](#footnote-32).
	3. The Client shall not be obliged to make any payments to the ESCO under this Agreement until the ESCO has complied with its obligations under this Clause 3.

# Payment for the Works[[32]](#footnote-33)

* 1. The Client shall pay the ESCO the Works Sum in such amounts and at such intervals as set out in Schedule 3 or as may otherwise be agreed by the Parties in writing.
	2. No less than 5 (five) Business Days prior to each payment interval as set out in Schedule 3 the ESCO shall demonstrate to the reasonable satisfaction of the Client that the portion of the Works relating to that payment interval have been carried out and completed.
	3. The Client shall not be obliged to make any payment under Clause 4.2 either in whole or in part until such time as the ESCO can demonstrate to the Client’s reasonable satisfaction that the portion of the Works to which the requested payment relates have been completed.
	4. The Retention Sum shall become payable upon demonstration to the Client’s reasonable satisfaction that the ESCO has completed all items on the Snag List.
	5. Where the ESCO disputes the Client’s assertion that the Works (or any portion thereof) or any items on the Snag List have not been completed to its reasonable satisfaction it shall be entitled to refer the matter to the dispute resolution procedure under Clause 55 but shall continue to progress the Works and/or the Services as the case may be pending resolution of the dispute.

# Delay and Liquidated Damages

* 1. The Client shall be entitled to recover liquidated damages at the daily rate of €[ ] for each day completion of the Works is delayed beyond the Target Completion Date which shall be due and payable by the ESCO to the Client upon demand.
	2. If the ESCO is delayed in carrying out and completing the Works due to Force Majeure under Clause 37 or any negligent act or omission of the Client the ESCO shall be entitled to a reasonable extension to the Target Completion Date as may be agreed in writing between the Parties prior to the resumption of Work by the ESCO following the delay.
	3. Where the Parties cannot agree to an extension of the Target Completion Date under Clause 5.2 the matter shall be referred to dispute resolution in accordance with Clause 45.
	4. The Parties agree that it would be extremely difficult and impracticable under the presently known and anticipated facts and circumstances to fix with precision the actual damages the Client would incur in the event of any such delay, and that the liquidated damages identified in this Clause 3 are a good faith and reasonable estimate of the damages and loss the Client would suffer.
	5. The Parties acknowledge that any remedies under this Clause 3 shall not act as a sole right of recourse against the other Party and shall be in addition to any other remedies that may be available under this Agreement.

# Equipment Ownership[[33]](#footnote-34)

* 1. Title to the Equipment or any part thereof together with any materials, licenses, powers and privileges purchased and installed by the ESCO for the purpose of this Agreement shall remain vested in the ESCO but the Parties agree that [the Client shall have the option to purchase the Equipment]/[title to the Equipment shall pass to the Client][[34]](#footnote-35) for [€1]/[the current market value of the equipment calculated in accordance with the formula below]/[ an amount to be negotiated and agreed between the Parties acting in good faith][[35]](#footnote-36) upon the expiry of this Agreement or the current market value of the Equipment calculated in accordance with the formula below[[36]](#footnote-37) at the date of termination of this Agreement under the provisions of Clause 34 and Clause 35.

*[insert agreed formula/methodology for calculating value of equipment at end of contract – e.g. capital value of asset less depreciation (depreciation rate being calculated on basis of highest depreciation in first year, reducing in year 2, reducing further in year 3 and tailing off accordingly over remaining years)][[37]](#footnote-38)*

* 1. Where the Client exercises the option referred to in Clause 6.1 title to the Equipment shall pass to the Client immediately upon payment to the ESCO of the relevant amount.
	2. All additions to, changes, replacements, modifications, upgrades or alterations of the Equipment carried out during the term of this Agreement shall become part of the Equipment.

# Equipment Warranties

* 1. The ESCO hereby assigns to the Client all available manufacturer warranties relating to the Equipment (including warranties relating to spare parts used and installed when repair is necessitated by malfunction) and the ESCO shall deliver such written warranties to the Client as soon as is practicable.
	2. Where any defect or fault occurs in the Equipment during the Term the Client hereby grants the ESCO the authority to make all necessary manufacturer warranty claims in relation to the Equipment on behalf of the Client as soon as reasonably possible following the discovery of such defect or fault.

# ESCO Warranty

* 1. Without restricting any warranty or guarantee implied or imposed by law or contained in this Agreement the ESCO shall at its own expense rectify and make good any defect or fault that appears in the Works or the Equipment.
	2. The ESCO warrants and undertakes to the Client that materials and Equipment furnished under this Agreement will be of good and merchantable quality, fit for purpose and new unless otherwise required or permitted by this Agreement and that the Works will be free from faults and defects not inherent in the quality required or permitted.
	3. For the avoidance of doubt none of the provisions of the Sales of Goods Acts 1893 and 1980 shall be excluded or limited by the provisions of this Agreement.
	4. The ESCO warrants and undertakes that the Equipment and the Works will conform with the requirements of this Agreement and the Final Design Documents.
	5. The ESCO’s warranty excludes remedy for damage or defect to the extent caused by:
		1. abuse by the Client or any agent or employee of the Client;
		2. modifications made or authorised by the Client and not approved or executed by the ESCO or Subcontractors;
		3. improper or insufficient maintenance or operation by or on behalf of the Client that is not in accordance with this Agreement; or
		4. normal wear and tear under normal usage.
	6. If required by the Client the ESCO shall furnish satisfactory evidence as to the kind and quality of materials and Equipment and the recommended maintenance thereto to meet the requirements of this Clause 8 and if necessary shall update the Operations Manual accordingly.

# Testing and Commissioning

* 1. When the Works are nearing Substantial Completion the ESCO shall notify the Client no less than 5 (five) Business Days in advance in writing of the schedule for testing and commissioning of the relevant part of the Energy System and the Client and/or its nominee shall have the right to be present at any or all such testing and commissioning conducted by the ESCO and/or manufacturers of the Equipment.
	2. The ESCO shall ensure that it supplies all necessary documents, information, suitably qualified and experienced personnel, power, consumables and instruments required to carry out such testing and commissioning. The ESCO shall comply with all and any protocols as to testing and commissioning agreed with the Client from time to time.
	3. The ESCO shall correct any deficiencies in the Energy System that may be observed during the testing and commissioning procedures (including the pursuit of any manufacturer warranty claims as set out in Clause 7.2).
	4. The ESCO shall deliver a written report on the testing and commissioning of the Energy System to the Client and shall provide the Client with all appropriate testing and commissioning documentation (including testing and commissioning certificates) along with all operations and maintenance documentation for the Equipment to the Client on or before Substantial Completion of the Works.

# Substantial Completion and Acceptance of the Works

* 1. The ESCO will successfully achieve Substantial Completion of the Works by the Target Completion Date which shall only be extended by agreement in writing between the Parties or as otherwise provided herein.
	2. If the ESCO fails to achieve Substantial Completion of the Works by the Target Completion Date the Client shall have the right to terminate the Agreement in accordance with the provisions of Clause 34.2.1.
	3. When the ESCO believes that the Works have reached Substantial Completion it will submit a certificate of Substantial Completion and a Snag List to the Client in a form pre-agreed by the Client.
	4. If the Client agrees that the Works have achieved Substantial Completion it will accept the Works by signing the certificate of Substantial Completion and Snag List and returning both to the ESCO specifying the Acceptance Date within 10 (ten) Business Days and the ESCO shall promptly proceed to complete all items on the Snag List.
	5. If the Client does not agree that the Works have achieved Substantial Completion and/or that the Snag List is not complete or correct then the Client shall notify the ESCO in writing of any discrepancies within 10 (ten) Business Days. To the extent the ESCO does not dispute the discrepancies raised by the Client the ESCO shall:
		1. promptly and diligently correct the Works to conform to the description of the Works set forth herein and resubmit the certificate of Substantial Completion to the Client; and/or
		2. promptly complete all items on the Snag List.
	6. If the Client fails to respond to the ESCO within 10 (ten) Business Days of receipt of the certificate of Substantial Completion and Snag List the ESCO shall notify the Client of such failure. If such failure by the Client continues for a further 5 (five) Business Days following such additional notification the Client will be deemed to have agreed to, signed and returned the certificate of Substantial Completion and Snag List. In such circumstances the Acceptance Date shall be deemed to be the day following the expiry of 15 (fifteen) days from receipt by the Client of the certificate of Substantial Completion and Snag List.
	7. If the ESCO disagrees with any or all of the discrepancies raised by the Client under Clause 10.5 the ESCO shall notify the Client of a dispute which shall be referred to expert determination in accordance with Clause 56.
	8. The ESCO shall furnish the Operations Manual to the Client upon Substantial Completion of the Works and shall be responsible for keeping it up to date during the term of this Agreement to take account of any additions, changes, replacements, modifications, upgrades or alterations to the Equipment including any updated software.
1. **Training of Client Staff[[38]](#footnote-39)**

## The ESCO shall no later than 10 (ten) Business Days following Substantial Completion of the Works and again no later than 10 (ten) Business Days prior to the expiry of the Term provide training to the Client’s staff on the proper operation and maintenance procedures for the Equipment and/or Existing Equipment including any software replacement or upgrade.

## The training referred to in Clause 11.1 shall take place at the Premises at a time to be agreed by the Parties acting reasonably and the costs of such training shall be borne by the ESCO.

## If the ESCO adds to, changes, replaces, modifies, upgrades or alters any of the Equipment and/or the Existing Equipment in accordance with Clause 31 then it shall as soon as possible and at its own expense provide all necessary training to the Client’s staff on such addition, change, replacement, modification, upgrade or alteration to the Equipment and/or Existing Equipment including any upgraded software.

# Part 2 – Services & Supply

# Connection to the Supply

* 1. Subject to the terms of this Agreement the ESCO shall provide the Services to the Client from the Connection Date to the End Date.
	2. Each Party shall be responsible for its own facilities up to the Agreed Connection Points.
	3. Title to and risk in the Supply shall pass to the Client at the Agreed Connection Points.
	4. Subject to the terms of Clause 12.6 the ESCO shall ensure connection of the Supply to the Premises at the Agreed Connection Points and the Client shall be entitled to remain connected to the Supply at each Agreed Connection Point until the End Date.
	5. The Client shall use reasonable endeavours to:
		1. ensure that it uses the Energy System in accordance with such instructions and recommendations relating to the care, safety and use as may from time to time be advised in advance in writing by the ESCO;
		2. protect the Energy System from damage or injury if, due to an emergency, it is not possible or reasonable to contact the ESCO before acting; and
		3. not allow any person other than the ESCO or its authorised representatives to adjust, maintain, repair, replace, move, remove, alter or interfere with the Energy System save in an emergency where the Client may activate an isolation trip or isolation valve on the Energy System at or near the Agreed Connection Points.
	6. The ESCO shall not specify for use in the provision of the Supply any material known to be deleterious or an material not in accordance with the higher of Irish and European standards or codes of practice or, if no Irish or European standards or codes exist, the relevant British standards and codes of practice. The ESCO shall forthwith report to the Client Representative if it knows or has reason to suspect that any deleterious materials have been or are intended to be used in the provision of the Supply
	7. Without prejudice to any other rights available to the ESCO the ESCO may disconnect or reduce the Supply at any of the Agreed Connection Points in the event that:
		1. the Client makes changes to the Agreed Connection Points without the prior written consent of the ESCO;
		2. the Client damages the Agreed Connection Points;
		3. the Client is in default of this Agreement and the ESCO has De-Energised an Agreed Connection Point and such Agreed Connection Point has remained De-Energised for a period of at least three months continuously from the date of De-Energisation; or
		4. the Client is not in default of this Agreement and the ESCO has De-Energised an Agreed Connection Point and such Agreed Connection Point has remained De-Energised for a period of at least three months continuously from the date of De-Energisation and the Client has agreed to the disconnection of such Agreed Connection Point, such agreement not to be unreasonably withheld or decision thereon delayed.
		5. it is obliged to do so:

#### by law;

#### where it is necessary to do so for safety or to prevent injury or damage to person or property; or

#### where it is necessary to do so due to an event of Force Majeure.

# Energisation of Agreed Connection Points

* 1. The ESCO shall Energise the Agreed Connection Points for the duration of the Supply Period and when Energising the Agreed Connection Points it shall do so in accordance with good industry practice and otherwise in terms of this Agreement.
	2. The ESCO shall De-Energise the Agreed Connection Points or otherwise on the expiry or termination of this Agreement in accordance with Clause 34.
	3. The ESCO may De-Energise the Points of Supply forthwith:
		1. where it is obliged to do so by law;
		2. where it is necessary to do so for safety or to prevent injury or damage to person or property; or
		3. where it is necessary to do so due to an event of Force Majeure;
		4. in the event that the Client breaches its obligations pursuant to Clauses 12.5, or 23 under this Agreement following written notice to the Client of such breach and the Client has not remedied such breach within 10 (ten) Business Days of such notice;
		5. on any Maintenance Days in accordance with the Maintenance Schedule

#### and shall at all times act in accordance with good industry practice and the terms of this Agreement in relation to such De-Energisation.

* 1. If the Client has failed to remedy any breach notified under Clause 13.3.4 within the specified timeframe the ESCO may carry out any repairs, maintenance or reinstatement of the Agreed Connection Points and the Client shall pay to the ESCO on demand all properly vouched costs and expenses reasonably incurred by the ESCO in carrying out such repairs and maintenance

# Reconnection & Re-Energisation

* 1. If any Agreed Connection Points have been De-Energised or disconnected the ESCO shall effect Energisation or re-connection of the Agreed Connection Points as soon as:
		1. the circumstances giving rise to such De-Energisation or disconnection have been remedied to the ESCO’s reasonable satisfaction;
		2. the Client has paid such reasonable amount as the ESCO may require to cover the ESCO’s costs of the De-Energisation/Energisation or disconnection/reconnection where such De-Energisation or disconnection arises as a result of a default on the part of the Client of its obligations under this Agreement; and
		3. the Client pays such outstanding amounts to the ESCO where the Client is in default of its obligations under Clause 23.

# Guaranteed Standards & Failed Service Credits

* 1. Subject to the provisions of this Agreement the ESCO shall provide the Supply to the Agreed Connection Points in accordance with the Guaranteed Standards.
	2. In the event that the ESCO fails to meet the Guaranteed Standards the Client shall accumulate Failed Service Credits which the Client will deduct from the Monthly Payment in accordance with Clause 24 which shall be determined in accordance with the relevant rates set out in the Guaranteed Standards of Performance at Schedule 6.
	3. The Client shall not be entitled to Failed Service Credits where it is in material breach of its obligations under Clauses [ ].

# Unplanned Outages

* 1. In the event of an Unplanned Outage the ESCO shall notify the Client as soon as possible of:
		1. the interruption;
		2. the likely timescales for the re-establishment of the Supply using the best available information available at the time of notification.
	2. In the event of an Unplanned Outage which has a duration of over 24 hours the ESCO shall provide regular updates and shall arrange and attend regular meetings and provide such updates as may be reasonably required by the Client in order to keep the Client informed of progress.
	3. In the event of an Unplanned Outage the ESCO will re-establish the Supply to the Client as soon as reasonably practical.

# Existing Equipment & Backup Supply[[39]](#footnote-40)

* 1. In the event of any failure or unavailability (including Maintenance Days) of the Equipment the ESCO shall provide the Supply to the Client from the Existing Equipment and shall ensure that the failure or unavailability of the Equipment is rectified as soon as possible and in any event no later than 5 (five) Business Days from the occurrence of such failure or unavailability.

# Environmental Incentives

* 1. The Client shall own, and may assign or sell in its sole discretion, all right, title, and interest associated with the Environmental Incentives.
	2. The benefit of any tax rebates which may arise under Section 82 of the Finance Act[[40]](#footnote-41), 2012 shall be [awarded to the Client]/[shared equally between the Parties].
	3. The ESCO will provide to the Client such information in writing as the Client may reasonably require in respect of the environmental characteristics of the Supply in terms of the renewable energy used and the sustainability of its supply chain including without prejudice to the foregoing the ESCO’s annual sustainable biomass report[[41]](#footnote-42).

# Operation and Maintenance of the Energy System

* 1. The ESCO shall operate and maintain the Energy System in accordance with:
		1. good industry practice;
		2. the Law; and
		3. [ ][[42]](#footnote-43).

and nothing in this Agreement shall oblige the ESCO to operate the Energy System in any other manner.

* 1. The Client shall be responsible for all utilities connected to the Premises but where the ESCO requires any such utilities for the operation and maintenance of the Energy System it shall reimburse the Client in full for the use of such utilities.
	2. Subject to Clause 19.5 the ESCO shall be responsible for routine maintenance of the Energy System at its own expense and shall carry out such maintenance during the Maintenance Days. The ESCO shall be entitled to use the Maintenance Days for routine maintenance or for renewal, replacement or any other purpose for which is required for the efficient operation of the Energy System.
	3. Where the ESCO reduces or disconnects the Supply or De-Energises any of the Agreed Connection Points for the purposes of carrying out maintenance under the Maintenance Schedule it shall:
		1. use all reasonable endeavours to minimise such discontinuation or reduction;
		2. (except in the case of emergency or in respect of the prevention of damage to the Energy System) provide written notice to the Client before discontinuing/reducing the Supply; and
		3. use all reasonable endeavours following such a discontinuation or reduction of Supply or De-Energisation of the Agreed Connection Points to:

#### recommence the Supply or to increase the Supply as soon as reasonably practicable; and

#### where the Agreed Connection Points have been De-Energised to Re-Energise such Agreed Connection Points as soon as reasonably practicable and in accordance with good industry practice.

* 1. The Client shall pay to the ESCO (and shall indemnify the ESCO against) all reasonable costs and expenses incurred by the ESCO, including any related to investigation of the cause of any defect or malfunction, in providing spare or replacement components or carrying out any repairs to the Energy System where damage has been caused to the Energy System as a result of:
		1. works carried by, instructed by or permitted by the Client, its employees, agents and contractors without the ESCO’s consent; or
		2. any act or omission of the Client or the Client’s employees, agents or contractors or any third party (other than a third party which is an employee, agent or contractor of the supplier).

# Energy Meters

* 1. All Energy supplied by the ESCO to the Client shall be measured by the Energy Meters which shall be provided, installed, operated, maintained, repaired, replaced and renewed by or on behalf of the ESCO at its own expense.
	2. The ESCO shall at all times provide the Client or the Client Representative with access to the Energy Meters to verify the accuracy of the readings.
	3. The ESCO shall verify the accuracy of the meters at intervals of no greater than [ ][[43]](#footnote-44) months from the Acceptance Date and shall carry out at its own expense any recalibration or adjustment of the Energy Meters as may be necessary following such verification.
	4. Any reading which is within the Margins of Error shall be deemed to be an accurate record of the quantity of Energy supplied to the Client.
	5. Each Energy Meter shall be deemed to be accurate unless the accuracy of the relevant Energy Meter is disputed by notice in writing given by either Party to the other.
	6. Unless agreement is reached within ten (10) Business Days after the giving of a notice Clause 20.5 the matter shall be referred by either Party to the Meter Examiner whose report or findings shall be final and binding upon the Parties.
	7. If the Meter Examiner determines that the inaccuracy of the relevant Energy Meter is outside the prescribed Margins of Error a suitable adjustment shall be made in the invoices rendered by the ESCO and the Energy Meter found to be inaccurate shall be re-calibrated or replaced.
	8. The cost of such test and re-calibration or replacement under Clause 20.7 shall be paid by the ESCO unless it was found to be inaccurate by reason of any act or default of the Client and its employees, contractors and agents.
	9. If the Meter Examiner determines that the relevant Energy Meter is accurate within the agreed Margins of Error the Energy Meter shall be deemed to be accurate and the cost of testing the Energy Meter shall be paid by the Party which served the notice of dispute.

# Fuel Supply & Access[[44]](#footnote-45)

* 1. The ESCO shall procure all Fuel as necessary for the provision of the Supply and the Client shall provide such reasonable access to the Premises to facilitate the delivery of such Fuel and the ESCO shall be deemed to have satisfied itself as to the suitability and availability of such access provided by the Client.
	2. The ESCO shall only procure Fuel in accordance with the specification as set out in Schedule 2.
	3. Fuel may only be delivered to the Premises either by the ESCO or on its behalf at the following times:

[ ][[45]](#footnote-46)

* 1. The ESCO agrees that Fuel may not be delivered to the Premises either by the ESCO itself or on its behalf outside of the times specified in Clause 21.2 save for with the prior written agreement of the Client.

# Maintenance[[46]](#footnote-47), Replacement and Handover of Equipment and Existing Equipment

* 1. Subject to Clause 19 the ESCO shall be responsible for the maintenance and upkeep of the Equipment [and the Existing Equipment] and is obliged to carry out any technical, administrative and management measures during the lifecycle of any item (including but not limited to any part, component, device, sub-system, functional unit, operating equipment or system which can be looked at discretely) of the Equipment [and/or the Existing Equipment] to maintain or restore its operative condition.
	2. The Client shall incur no cost for the maintenance, servicing or adjustment of the Equipment or the Existing Equipment provided however that when such need arises due to the negligence or misconduct of the Client or any employee or other agent of the Client then the Client shall be liable for the cost of such maintenance, servicing or adjustment insofar as such cost is not covered by any warranty or insurance proceeds.
	3. Upon the expiry of the Term of this Agreement the ESCO shall hand over the Energy System in a condition which can be regarded as secure and fully operational taking account of normal wear and tear. The condition of the Equipment and Existing Equipment shall be comparable to the condition which is generally to be expected of similar or equivalent equipment subject to comparable services, comparable service lives and proper maintenance in accordance with [ ][[47]](#footnote-48).
	4. Prior to handing over the Energy System the ESCO shall carry out a full re-commissioning[[48]](#footnote-49) of the Energy System and it shall correct at its own cost any deficiencies in the Energy System that may be identified during the re-commissioning procedure.
	5. In addition to the re-commissioning being carried out under Clause 22.4 the ESCO shall demonstrate to the Client’s reasonable satisfaction that the Energy System has been operated and maintained in accordance with all relevant manufacturer recommendations and good industry practice.
	6. The ESCO shall deliver a written report on the re-commissioning of the Energy System to the Client and shall provide the Client with all appropriate re-commissioning documentation (including re-commissioning certificates) along with all operations and maintenance documentation for the Equipment for the Equipment to the Client upon hand over of the Energy System.
	7. In addition to its maintenance obligations under this Agreement the ESCO undertakes to replace any item of Equipment and/or Existing Equipment at its own expense upon expiry of its life cycle during the Term of this Agreement. The ESCO acknowledges that the life cycle of any item of Equipment and/or Existing Equipment may expire prior to the end of the Term of this Agreement and has taken this into account in the preparation of the Final Design Documents.

# Part 3 – Payment

# Prices, charging and payment

* 1. From the Acceptance Date the Client shall pay to the ESCO the Monthly Payment in accordance with the terms of this Agreement.
	2. The ESCO shall invoice the Client monthly in respect of the previous Month showing the relevant Monthly Payment payable as calculated in accordance with Clause 24.
	3. Energy Meter readings shall be taken as proof of Actual Consumption unless any Energy Meter is found to be inaccurate in accordance with Clause 20.
	4. The ESCO shall read the Energy Meters on a monthly basis utilising a remote reading mechanism.
	5. The Client shall be entitled to access the Energy Meters for the purposes of verifying any readings provided by the ESCO.
	6. If an Energy Meter reading is unavailable the ESCO may invoice the Client based on the ESCO’s reasonable estimates which shall be supported by written evidence taking into account all relevant information including historical data relating to and any information available from the Energy Meters and the Client shall be entitled to request any additional evidence as it may reasonably require.
	7. Without limiting the operation of Clause 24 any subsequent accurate actual Energy Meter readings shall supersede the estimate and the difference between the original estimate and the subsequent actual reading shall be paid by the relevant Party within 10 (ten) Business Days of the date of the subsequent reading.

# Calculation of the Monthly Payment

* 1. The Monthly Payment in respect of each relevant Month shall be a sum calculated in accordance with the following formula:

***Monthly Payment = (Actual Consumption) x (Supply Price[[49]](#footnote-50)) + [Fixed Monthly Payment][[50]](#footnote-51) - Monthly Failed Service Credit***

# Indexation of [Supply Price], [Fixed Monthly Payment][[51]](#footnote-52) & Discountable Revenue Threshold

* 1. The Supply Price, [the Fixed Monthly Payment][[52]](#footnote-53) and the Discountable Revenue Threshold shall be indexed annually at the commencement of each Contract Year in accordance with the provisions of this Clause 25.
	2. [ ]% of [the Supply Price [the Fixed Monthly Payment][[53]](#footnote-54) and the Discountable Revenue Threshold shall be indexed by a percentage equal to the percentage increase in CPI for the year immediately preceding the relevant Contract Year.
	3. [ ]% of [the Supply Price] and the Discountable Revenue Threshold shall be indexed by a percentage equal to the percentage increase in the [Platts Market Data][[54]](#footnote-55) for the year immediately preceding the relevant Contract Year.

# Annual Discount

* 1. Where the Discountable Revenue for a particular Contract Year exceeds the Discountable Revenue Threshold the Client shall be entitled to the Annual Discount for that Contract Year.
	2. The Annual Discount shall be calculated as follows:

***Annual Discount = (Discountable Revenue) x (Discount)***

* 1. When calculating the Annual Discount for a particular Contract Year the Parties shall suspend the application of the Discount in respect of such periods within the relevant Contract Year where there is a Client default occurring.
	2. Except where otherwise provided in this Agreement the ESCO shall pay the Annual Discount to the Client within [28] Business Days after the end of the relevant Contract Year. If the ESCO fails to pay the Annual Discount within this timeframe the Client may deduct an amount equal to the Annual Discount from any future payments that may become due to the ESCO under this Agreement.

# Payment and interest

* 1. Payment of any invoices shall be made within 30 (thirty) Business Days of receipt by the relevant Party of a properly particularised valid VAT invoice.
	2. Any payment due by a Party to the other shall be made in Euro by electronic transfer to such bank account (located in the Republic of Ireland) as is specified by the other Party from time to time.
	3. If any payment to be made by a Party would become due on a day which is not a Business Day it shall be paid on the next Business Day.
	4. If a Party disputes any or all amount claimed by the other Party pursuant to this Agreement then the dissenting Party shall immediately provide the other Party a written notice together with reasons advising of the disputed amount.
	5. Upon the receipt of a notice under Clause 27.4 the Parties must firstly negotiate in good faith to try and resolve the matter within ten (10) Business Days. If the Parties are unable to resolve the matter within that period then the provisions of Clause 56 shall apply.
	6. If a Party fails to pay any amount payable by it under this Agreement on its due date interest shall accrue daily on the overdue amount and from the due date until the date of payment.
	7. Any interest accruing under this Clause shall be immediately payable on demand.

# Taxes

* 1. Except as otherwise provided in this Agreement (including in respect of the [Price]) each Party shall be responsible for payment of any Tax levied upon it.
	2. All amounts which are expressed to be payable under this Agreement by any Party which (in whole or in part) constitute the consideration for VAT purposes for any supply of goods or services shall be deemed to be exclusive of any VAT which is chargeable on that supply.
	3. If VAT is chargeable on any payment made to a Party under this Agreement that Party shall pay (in addition to and at the same time as paying the consideration for the supply) an amount equal to the amount of the VAT (and the supplier shall promptly provide an appropriate VAT invoice to that Party).

# Set Off

* 1. The Client shall be entitled to deduct from any payment it may be obliged to make to the ESCO an amount equal to any sum due and owing to the Client from the ESCO under the provisions of this Agreement.

# Part 4 – Miscellaneous

# Variations

* 1. Where the Client wishes to implement a Material Change at the Premises it shall notify the ESCO in writing as soon as practical and in any event no later than 15 (fifteen) business days before the Material Change is implemented and the ESCO shall deliver a Variation Estimate to the Client within 5 (five) days of receipt of such notice.
	2. Where the ESCO requires a material variation to the Works, the Equipment and/or the Existing Equipment and/or an adjustment to the Supply Price, [the Fixed Monthly Payment][[55]](#footnote-56), the Discountable Revenue Threshold and/or the Maximum Capacity due to:
		1. Force Majeure as set out in Clause 37; or
		2. the occurrence of a Material Change which has not been notified by the Client under Clause 30.1,

it shall submit a Variation Estimate to the Client.

* 1. As soon as practicable after receipt by the Client of a Variation Estimate under either Clause 30.1 or Clause 30.2 the Parties will meet to discuss and agree its contents (with or without modification) and in particular whether any costs that will be incurred by the ESCO as a result of such variation shall be recoverable:
		1. by way of an adjustment to [the Fixed Monthly Payment][[56]](#footnote-57), the Supply Price, the Discountable Revenue Threshold and/or the Maximum Capacity (either on a temporary basis or for the remainder of the Supply Period);
		2. by an extension of the Supply Period; or
		3. directly from the Client upon delivery by the ESCO of all relevant invoices and any other information as may reasonably be requested by the Client.
	2. Where the Parties agree to the final contents of the Variation Estimate following the discussions under Clause 30.2 they shall confirm their agreement in writing at the earliest opportunity and the variation to the Works, the Equipment and/or the Existing Equipment shall have effect from the date of such agreement.
	3. Where the Parties cannot agree to the final contents of the Variation Estimate the matter shall be referred to dispute resolution in accordance with Clause 45.

# Value Engineering

* 1. The ESCO may give the Client a written value engineering proposal that if adopted will either:
		1. adjust the Supply Price[[57]](#footnote-58);
		2. [adjust the Fixed Monthly Payment][[58]](#footnote-59);
		3. adjust the Discountable Revenue Threshold; and/or
		4. extend the Supply Period.
	2. The ESCO’s value engineering proposal shall include any proposed changes to this Agreement and/or the attached Schedules.
	3. The Client shall as soon as practicable notify the ESCO in writing of its acceptance or rejection of the ESCO’s value engineering proposal.
	4. Where the Client accepts the ESCO’s value engineering proposal this Agreement shall be amended accordingly and the ESCO shall implement the value engineering measures from such date as the Parties agree in writing.

# ESCO as Prime Contractor, Project Governance, Assignment & Subcontracting

* 1. The ESCO is deemed to be the prime contractor under this Agreement and the ESCO assumes full responsibility for the carrying out and completion of the Works and the performance of the Services and shall assume all the duties, responsibilities and obligations associated with the position of prime contractor.
	2. The ESCO as prime contractor hereby assumes liability for its employees, agents and subcontractors and undertakes that its employees, agents and subcontractors shall comply in all respects with the relevant terms of this Agreement to the extent that they are retained by the ESCO.
	3. The ESCO agrees to keep the Client Representative advised of any matter which may materially impact on the ESCO’s obligations under this Agreement and to comply with the reporting arrangements and governance protocols required by the Client from time to time. The roles and responsibilities of the parties are detailed in Schedule 7. The ESCO shall advise the Client in writing of any material alterations to its governance, Works and Services delivery and business continuity processes and procedures.
	4. The ESCO shall not assign and/or subcontract the benefit and/or burden of this Agreement in whole or in part to any third party without the prior written approval of the Client (such approval not to be unreasonably withheld or delayed and subject to the Client’s obligations at law) provided always that the ESCO shall remain primarily liable to the Client for the due performance of all of its obligations under this Agreement.
	5. The ESCO shall require its employees, agents and subcontractors to exercise due skill, care, diligence, efficiency and professional conduct in the carrying out of any obligations allocated, assigned or subcontracted by the ESCO to its employees, agents and subcontractors pursuant to its obligations under this Agreement
	6. The ESCO shall immediately remove from the Premises any employees, agents or subcontractors if the ESCO becomes aware that they are in breach of Clause 32.5 or upon the reasonable request of the Client.
	7. The ESCO shall procure that any agreement it enters into for the supply of Fuel for the purposes of this Agreement shall afford step-in rights to the Client in the event of termination of this Agreement for any of the circumstances outlined in Clause 34.2 and the ESCO shall provide the Client with a copy of all such fuel supply agreements (with any commercially sensitive terms redacted) within 10 (ten) Business Days of their execution.

# Suspension

* 1. The Client shall be entitled to suspend this Agreement upon written notice to the ESCO.
	2. If any suspension under Clause 33.1 lasts for more than 6 (six) months then either Party shall be entitled to terminate this Agreement with immediate effect upon delivery of written notice to the other subject to the provisions of Clause 35.
	3. If the Client fails to pay any amount due under to the ESCO under Clause 23 the ESCO may submit a written demand for payment to the Client notifying the Client of its intention to De-Energise the Agreed Connection Points and suspend the Agreement if the payment has not been made within 7 (seven) Business Days of the receipt of such written demand.
	4. A notice from the ESCO under Clause 33.3 shall specify:
		1. the grounds on which the ESCO intends to De-Energise the Agreed Connection Points; and
		2. the date on which the proposed De-Energisation and suspension is to begin.
	5. The ESCO shall immediately Re-Energise the Agreed Connection Points following payment by the Client of the outstanding amount being the subject of the written demand under Clause 33.3.
	6. If any suspension under Clause 33.3 lasts for more than 6 (six) months then either Party shall be entitled to terminate this Agreement with immediate effect upon delivery of written notice to the other subject to the provisions of Clause 35.

# Termination

* 1. The Client shall be entitled to terminate the ESCO’s obligations under this Agreement at its election on 20 (twenty) Business Days’ notice to the ESCO.
	2. The Client shall be entitled to terminate this Agreement by written notice to the ESCO if:
		1. the ESCO fails to achieve Substantial Completion of the Works by the Target Completion Date;
		2. the ESCO commits any material breach of the terms hereof and fails to remedy same within 15 (fifteen) days after receipt of written notice of such breach having been served by Client; or
		3. the ESCO becomes bankrupt, or makes a composition or arrangement with creditors or has a winding up order made (except for the purposes of amalgamation or restructuring) or has a liquidator (provisional or otherwise), receiver, manager or examiner of its business or undertaking duly appointed.
	3. The right of the Client to terminate this Agreement shall be without prejudice to any other rights or remedy either Party may have in respect of the breach concerned or any other breach.

# Consequences of Termination[[59]](#footnote-60)

* 1. [If the Agreement is terminated under Clause 33.2, Clause 33.6 or Clause 34.1 the Client shall pay the ESCO an amount being the Fixed Monthly Payment multiplied by the number of whole months remaining under the Agreement at the time of such termination up to the End Date][[60]](#footnote-61).
	2. In addition to the amounts payable by the Client under Clause 35.1 the Client shall pay the ESCO:
		1. any outstanding payments due and payable by the Client to the ESCO under this Agreement at the date of such termination; and
		2. the ESCO’s reasonably and properly incurred vouched disconnection costs supported by such written evidence as may be requested in writing by the Client.
	3. Any amounts payable under Clauses 35.1 and/or 35.2 shall be paid within 30 (thirty) Business Days of the date of termination of the Agreement.
	4. Upon termination of this Agreement under Clause 34.2.1, Clause 34.2.2 or Clause 34.2.3 the Client shall pay the ESCO:
		1. [the current market value of the Equipment at the date of such termination calculated in accordance with the formula set out in Clause 6.1 less the aggregate amount of all Monthly Payments made by the Client to the ESCO under this Agreement up to the date of termination (which shall be deemed to be zero if the difference is a negative number);][[61]](#footnote-62)
		2. where the Agreement is terminated in accordance with Clause 34.2.3 any reasonable disconnection costs upon delivery of all relevant invoices and any other information as may reasonably be requested by the Client; and
		3. any outstanding payments due and payable by the Client to the ESCO under this Agreement at the date of such termination.

Such payment will be made within 60 (sixty) Business Days of the date of such termination of the Agreement.

* 1. The ESCO shall remove all employees, staff, subcontractors and other persons for whom the ESCO is responsible under this Agreement together with any plant, equipment, machinery, tools and other property of the ESCO from the Premises in an orderly manner as soon as reasonably possible following termination or expiry of this Agreement and shall ensure that those parts of the Premises from which the ESCO removes its plant, equipment, machinery, tools and other property are left in a clean and tidy condition.
	2. If requested, the ESCO shall, upon the termination of this Agreement for any reason or prior to the expiry of the Agreement, promptly furnish such anonymised information relating to the terms and conditions of the employment of all persons carrying out the Works and/or performing the Services as may be required by the Client. The ESCO agrees to the Client releasing any such anonymised information to third party tenderers for the purposes of any procurement competition for the carrying out of the Works and/or performance of the Services upon expiry of the Agreement or earlier termination of this Agreement for whatever cause.

# [Funder Step-In][[62]](#footnote-63)

* 1. The Client hereby binds and obliges itself upon request by the ESCO to execute in self-proving form a step-In undertaking in favour of a funder in a form subject to the Client’s reasonable approval (which approval shall not be unreasonably withheld or delayed) and return the same to the ESCO as quickly as reasonably practicable after its receipt by the Client and in any event within 10 Business Days of such receipt under declaration that such request may be made on more than one occasion provided always that not more than one step-in undertaking shall be current in force at any time.
	2. The Client shall not exercise its rights to terminate this Agreement without first having given the funder 28 Business Days’ notice (“Funder Default Notice”) of its intention to terminate. The Client shall be required in the Funder Default Notice to state the nature of the breach and shall set out either the period for remedying the breach (which period shall be reasonable bearing in mind the nature of the breach). The funder may at its own option and expense within 28 Business Days of the service of the Funder Default Notice deliver to the Client a deed of covenant binding the funder or such other party nominated by the funder (which party shall be another substantial and reputable party who has an established and successful track record of carrying out and completing obligations similar to those to be provided pursuant to this Agreement) to comply with the ESCO’s obligations in terms of the Agreement on the same terms as this Agreement mutatis mutandis as if such person had originally been named as the ESCO.
	3. If a deed of covenant is duly completed, executed and delivered pursuant to Clause 36.2 the Client shall continue to perform its obligations under the Agreement.
	4. Should the funder fail to deliver a deed of covenant pursuant to Clause 36.2or, if having delivered a deed of covenant, fails to remedy the relevant breach within the period of time specified in the Funder Default Notice (which period shall run from the date of delivery of the deed of covenant pursuant to Clause 36.2), nothing herein shall prevent the Client from exercising its rights to determine the Agreement after respectively, the expiration of the Funder Default Notice, or the expiry of the said period.

# Force Majeure

* 1. Notwithstanding any other provisions of this Agreement, neither Party shall be liable to the other for any non-performance or delay in the performance of this Agreement due to Force Majeure
	2. In the event of any failure, interruption or delay in the performance of either Party’s obligations (or of any of them) resulting from Force Majeure the affected Party shall promptly notify the other Party in writing specifying:
		1. the nature of the Force Majeure event;
		2. the anticipated delay in the performance of obligations;
		3. the action proposed to minimise the impact of the Force Majeure event; and

the affected Party shall not be liable or have any responsibility of any kind for any loss or damage thereby incurred or suffered by the other Party provided always that the affected Party shall use all reasonable efforts to minimise the effects of the same and shall resume the performance of its obligations as soon as reasonably possible after the removal of the cause.

* 1. If the Force Majeure event continues for 60 (sixty) days either Party may terminate at 10 (ten) days’ written notice. In circumstances where the ESCO is the affected Party the Client shall be relieved from any obligation to make payments under this Agreement save to the extent that payments are properly due and payable for obligations actually fulfilled by the ESCO in accordance with the terms and conditions of this Agreement.

# Intellectual Property Rights

* 1. Neither Party shall acquire any interest in the Intellectual Property of the other Party by virtue of this Agreement.
	2. The ESCO warrants that it owns or is licensed to use all Intellectual Property necessary for the carrying out of the Works and the performance of the Services and that such Intellectual Property does not infringe, misappropriate, dilute or otherwise violate the rights of any third party.
	3. The ESCO hereby indemnifies the Client from any and all third party Intellectual Property claims against the Client relating to the use by the ESCO or the Client of any Intellectual Property necessary for the carrying out of the Works and the performance of the Services under this Agreement.
	4. The Client grants to the ESCO a royalty-free non-exclusive licence (but with no right to grant sub-licences save for with the prior written consent of the Client) to use the Client’s pre-existing Intellectual Property rights during the currency of this Agreement to the extent necessary to enable the ESCO to fulfil its obligations under this Agreement.
	5. The ESCO undertakes that all and any necessary consents and/or licences for any software, instrument, modality or methodology are obtained and in place before use for the purposes of this Agreement and shall ensure that the Client shall be vested with all such necessary rights to enable the Client to enjoy the benefit of the Works and the Services.
	6. The ESCO shall waive or procure a waiver of any moral rights subsisting in copyright produced under or in connection with the performance of this Agreement.
	7. The ESCO hereby acknowledges and confirms that all intellectual property rights, title and interest in the Materials (or any part or parts thereof) shall vest in the Client. For the avoidance of doubt the ESCO hereby assigns to the Client all intellectual property rights, title and interest it may be deemed by law to have in the Materials (including by way of present assignment of future copyright).
	8. Upon the expiry or termination of this Agreement for whatever reason the ESCO shall immediately deliver up to the Client all Materials prepared up to the date of expiry or termination and the ESCO may retain one paper copy of the Materials in its legal files for the purpose of and only to the extent necessary for ensuring compliance with its obligations under this Agreement.

# Licences, Permits, Approvals & Coordination

* 1. The Client shall provide reasonable assistance to the ESCO in obtaining all necessary licences, permits and approvals for the performance of its obligations under this Agreement and the ESCO shall bear the cost of obtaining all such permits and approvals.
	2. For the avoidance of doubt the ESCO acknowledges that nothing in this Agreement shall imply or import or be deemed to imply or import any obligation on the Client to introduce or propose any legislative or regulatory reform for the purpose of enabling the ESCO to obtain any necessary licences, permits or approvals as the case may be.
	3. Without prejudice to the ESCO’s obligation to obtain all necessary licences, permits and approvals under Clause 39.1 the ESCO confirms that as at the date of execution of this Agreement it has obtained all necessary planning permission[[63]](#footnote-64) in connection with the Works.
	4. The ESCO shall coordinate the activities of the its employees, subcontractors, equipment installers and service providers with those of the Client, its employees and agents.

# Client Representative

* 1. The Client hereby nominates [ ][[64]](#footnote-65) as the “Client Representative” who will have the authority to act on the Client’s behalf in carrying out the Client’s obligations under this Agreement and shall act as first point of contact for the ESCO.

# Tax Clearance Certificates in relation to Public Sector Contracts

* 1. The ESCO will comply with all relevant obligations referred to in Section 1095 of the Taxes Act (Tax clearance certificates in relation to public sector contracts) and will provide the Client with an appropriate Tax Clearance Certificate referred to in that Section and will comply with all relevant obligations under the scheme referred to in that Section.
	2. In the event of any of the foregoing obligations not being complied with or actions not being undertaken or in the event of non-continuation of compliance by the ESCO, the Client may suspend or refuse to make payments under this Agreement until such date as the ESCO demonstrates to the Client’s satisfaction that the ESCO is fully in compliance with Section 1095 of the Taxes Act.

# Limitation on Liability & Indemnity

* 1. The Client shall not be liable to the ESCO for any special, indirect, consequential, remote, punitive or exemplary loss or loss of profit or revenue, loss of use or similar damages suffered by the ESCO arising out of, under or in connection with this Agreement.
	2. The ESCO hereby irrevocably indemnifies and holds harmless the Client from and against any costs, claims, demands, damages, expenses, losses, liabilities, fines, proceedings, actions, charges, penalties directly or indirectly suffered and/or incurred by the Client which arise out of, in connection with, in consequence upon or relate to:
		1. the performance and/or non-performance by the ESCO of its obligations under this Agreement; and/or
		2. the acts, errors, omissions, recklessness or negligence of the ESCO or its officers, contractors, subcontractors, employees, agents or personnel.
	3. The liability of the ESCO arising out of, under or in connection with this Agreement other than in respect of personal injury or death shall not exceed [ ] for [any one claim]/[each and every claim] in any one calendar year.
	4. The ESCO shall have no liability in respect of proceedings issued by the Client arising out of, under or in connection with this Agreement after the expiration of [ ] years from the expiry of the Supply Period.
	5. Except as otherwise expressly provided by this Agreement, all remedies available to either Party for breach of this Agreement are cumulative and may be exercised concurrently or separately, and the exercise of any one remedy shall not be deemed an election of such remedy to the exclusion of other remedies.

# Insurances

* 1. From the date of execution of this Agreement and throughout the Term the ESCO shall maintain in full force and effect and at its own expense the following insurances from a reputable insurance company with a place of business in Ireland or the United Kingdom and licensed to write business in Ireland:
		1. Professional Indemnity Insurance of €[ ] million ( million euro) for each and every claim for 6 (six) years after the Acceptance Date;
		2. Public and Products Liability Insurance of €[ ] million ( million euro) for each and every claim for the Term of this Agreement; and
		3. Employer’s Liability Insurance of €[ ] million ( million euro) for each and every claim for the Term of this Agreement.
	2. Upon the Client’s request the ESCO shall immediately provide documentary evidence satisfactory to the Client to show that the insurance policies required under this clause are being maintained.
	3. The ESCO shall immediately inform the Client in writing upon any change to its insured status.

# No Agency

* 1. The ESCO will at all times be an independent contractor and nothing in this Agreement will be construed (and the ESCO will not hold out its relationship) as constituting a partnership, joint venture, representation, agency or employer and employee relationship between the Client and the ESCO or any of the ESCO’s or its Subcontractors’ employees.

# Representations and Warranties

* 1. The ESCO warrants, represents and undertakes to the Client that:
		1. it has all requisite power, authority, licences, permits, and franchises, corporate or otherwise, to execute and deliver this Agreement and perform its obligations hereunder;
		2. its execution, delivery and performance of this Agreement have been duly authorised by or are in accordance with its organic instruments and this Agreement has been duly executed and delivered for it by the signatories so authorised and it constitutes its legal, valid, and binding obligation;
		3. its execution, delivery and performance of this Agreement will not breach or violate, or constitute a default under any contract, lease or instrument to which it is a party or by which it or its properties may be bound or affected;
		4. it has not received any notice, nor to the best of its knowledge is there pending or threatened any notice, of any violation of any Applicable Laws, which would materially and adversely affect its ability to perform hereunder;
		5. before commencing performance of this Agreement it shall have provided proof and documentation of required insurance pursuant to this Agreement;
		6. it shall make available, upon reasonable request by the Client, all documents relating to its performance under this Agreement, including all contracts and subcontracts entered into;
		7. the Works will meet or exceed the provisions set out in the Works Schedule; and
		8. the Equipment is or will be compatible with all other mechanical and electrical systems, subsystems, or components with which the Equipment interacts, and that, as installed, neither the Equipment nor such other systems, subsystems, or components will materially adversely affect each other as a direct or indirect result of Equipment installation or operation.
	2. The Client warrants, represents and undertakes to the ESCO that it shall provide all access to the Premises reasonably required by the ESCO to carry out its obligations under this Agreement. The ESCO shall be granted immediate access to the Premises to make emergency repairs or corrections as it may in its discretion determine are needed.

# Change in Law

* 1. Where a change in Relevant Legislation occurs or is about to occur either Party may give the other written notice of its opinion as to any adjustment of the Supply Price [and/or the Fixed Monthly Payment][[65]](#footnote-66) necessitated by the change in Relevant Legislation.
	2. The Parties shall meet within 10 (ten) days of the written notice referred to in Clause 46.1 to discuss and agree any of the proposed changes set out in the notice and in the absence of such agreement the Parties shall refer the matter to dispute resolution in accordance with Clause 54.

# Confidentiality

* 1. This Agreement creates a confidential relationship between the ESCO and the Client and both Parties acknowledge that in carrying out their duties and obligations under this Agreement each will have access to Confidential Information of the other.
	2. Each of the Parties to this Agreement agrees to hold confidential all information, documentation and other material received, provided or obtained arising from their participation in this Agreement and shall not disclose same to any third party unless authorised in writing by the other Party except to:
		1. its professional advisers subject to the provisions of this Clause 47;
		2. as may be required by law;
		3. as may be necessary to give effect to the terms of this Agreement subject to the provisions of this Clause 47; or
		4. in the case of the Client by request of any person or body or authority whose request the Client or persons associated with the Client (including but not limited to the Legislature and/or the Executive and/or the Civil Service) considers it necessary or appropriate to so comply.
	3. Neither Party shall disclose any Confidential Information to any third party unless authorised in writing by the other Party. The ESCO may only make copies of Confidential Information where necessary for the performance of the Services.
	4. Upon cessation of the Works and/or Services, termination or expiration of this Agreement or upon either Party’s written request, each Party shall return or destroy to the other Party all Confidential Information in their control and the ESCO shall erase any Confidential Information held by it in electronic form. The ESCO shall furnish a certificate to that effect as soon as possible if requested by the Client in writing.
	5. The ESCO undertakes to comply with all reasonable directions of the Client with regard to the use and application of all and any Confidential Information and shall execute the Confidentiality Agreement simultaneously with the execution of this Agreement.
	6. The obligations in this Clause 47 will not apply to any Confidential Information:
		1. in the ESCO’s possession (with full right to disclose) before receiving it from the Client;
		2. which is or becomes public knowledge other than by breach of this clause;
		3. is independently developed by the ESCO without access to or use of the Confidential Information; or
		4. is lawfully received from a third party (with full right to disclose).
	7. The ESCO undertakes to comply with all directions as to local security arrangements deemed reasonably necessary by the Client including, if required, completion of documentation under the Official Secrets Act, 1963 and comply with any vetting requirements of the Client including by police authorities.
	8. The ESCO acknowledges that the security of the State and its information is of paramount importance to the Client. Accordingly the ESCO confirms that it will, from time to time, during the currency of this Agreement as may be requested by the Client submit full personal details (including those of Subcontractors) of persons assigned to provide the Works and/or the Services (or any part thereof) under this Agreement. The ESCO further acknowledges that checks may be carried out in relation to all such personnel by police authorities and the ESCO shall comply with all reasonable directions of the Client arising therefrom.
	9. In circumstances where the Client is subject to the provisions of the Freedom of Information Acts, 1997 and 2003, then in the event of the Client receiving a request for information related to this Agreement, the Client shall consult with the ESCO in respect of the request. The ESCO shall identify any information that is not to be disclosed on grounds of commercial sensitivity, and shall state the reasons for this sensitivity. The Client will consult the ESCO about this sensitive information before making a decision on any Freedom of Information request received.
	10. The terms of this Clause 47 shall survive expiry, completion or termination for whatever reason of this Agreement for any reason.

# Waiver

* 1. Failure of either Party to enforce or exercise at any time or for any period any term of this Agreement does not constitute and shall not be construed as a waiver of such term and shall not affect that Party’s right to enforce such term or any other term contained in this Agreement at a later date.

# Notice

* 1. Any notice required or permitted hereunder shall be deemed sufficient if given in writing and delivered personally or sent by registered or certified mail to the address shown below or to such other persons or addresses as are specified by similar notice.

To the ESCO: Attention: [ ]

Include copy to: [ ]

To the Client: Attention: [ ]

Include Copy to: [ ]

# Severability

* 1. The invalidity or unenforceability of any term of or any right arising pursuant to this Agreement shall not adversely affect the validity or enforceability of the remaining terms and rights.

# Cooperation

* 1. Each Party will cooperate with and assist the other Party, its advisors, consultants, legal advisors, employees, agents, and representatives at all times during the Term of this Agreement.
	2. Conflicts, Registrable Interests and Corrupt Gifts
	3. The ESCO confirms that it has carried out a conflicts of interest check and is satisfied that it has no conflicts in relation to the Works and/or Services and its obligations undertaken under this Agreement. The ESCO hereby undertakes to advise the Client forthwith should any conflict or potential conflict of interest come to its attention during the currency of this Agreement and to comply with the Client’s directions in respect thereof.
	4. Any registrable interest involving the ESCO (and any Subcontractor or agent as the case may be) and the Client, the Ceann Comhairle (Speaker), any member of the Government, any member of the Oireachtas or their relatives must be fully disclosed to the Client immediately upon such information becoming known to the ESCO and to comply with the Client’s directions in respect thereof to the satisfaction of the Client. The terms “registrable interest” and “relative” shall be interpreted as per section 2 of the Ethics in Public Office Act, 1995 (as amended).
	5. The ESCO shall not offer or agree to give any public servant or civil servant any gift or consideration or commission of any kind as an inducement or reward for doing or forbearing to do or for having done or forborne to do any action in relation to the obtaining or execution of this or any other public contract.
	6. Any breach of Clause 51.5 or the commission of any offence by the ESCO, any subcontractor, agent or employee under the Prevention of Corruption Acts, 1889 to 2005 shall entitle the Client to terminate this Agreement forthwith and to recover the amount of any loss resulting from such cancellation, including but not limited to recovery from the ESCO of the amount or value of any such gift, consideration or commission.

# Media

* 1. No media releases, public announcements or public disclosures relating to this Agreement or its subject matter, including but not limited to promotional or marketing material, shall be made by the ESCO without the prior written consent of the Client.

# Entire Agreement and Priority of Documents

* 1. This Agreement when executed together with all Schedules attached hereto or to be attached hereto as provided for by this Agreement together with the Invitation to Tender shall constitute the entire contract between both Parties and supersedes and replaces any previous agreements, arrangements or understandings between the Parties in respect of the subject matter hereof.
	2. In the event of any conflict or discrepancy between the provisions of this Agreement and/or the Schedules attached hereto or to be attached hereto and/or the Invitation to Tender the following priority of documents shall apply (in descending order):
		1. this Agreement
		2. the Schedules
		3. [ ]
	3. This Agreement may not be amended or modified except by a written agreement signed by both Parties.

# Pay and Conditions of Employment

* 1. The ESCO shall ensure that the rates of pay and the conditions of employment, including pension contributions, comply with all applicable law. This applies to workers who are posted workers (within the meaning of Directive 96/71/EC of the European Parliament and the Council of the 16 December 1996 concerning the posting of workers in the framework provision of services), except that the ESCO’s obligation to make pension contributions under registered employment agreements does not apply to posted workers who already contribute, or whose contributions are paid, to a supplementary pension scheme established in another member state of the European Union.
	2. The ESCO shall keep proper records showing the wages and other sums paid to and the time worked by each worker, deductions from each worker’s pay and their disposition, and pension and other contributions made in respect of each worker, and shall produce these records for inspection and copying by any persons authorised by the Client whenever required by the Client.
	3. The ESCO undertakes to observe, in relation to the employment of workers on the Site, the Safety, Health and Welfare at Work Act, 2005 and all employment law including the Employment Equality Act 1998, the Industrial Relations Acts 1946 to 2004, the National Minimum Wage Act 2000, and regulations, codes of practice and legally binding determinations.
	4. The Client may seek information under this Clause 54 only for the purpose of ensuring the obligations referred to herein in respect of workers have been properly discharged. All documents and records received under this Clause 54 shall be returned to the person providing them or destroyed if the Client is satisfied that the relevant employer has complied with legal obligations to workers.
	5. If the ESCO has not complied with this Clause 54 the Client shall (without limiting its other rights or remedies) be entitled to estimate the amount that should have been paid to workers and contributions that should have been made on their behalf, and the Client may deduct the estimated amount from any payment due to the ESCO until the Client is satisfied that all proper amounts have been paid.
	6. If the ESCO does not comply with this Clause it shall pay to the Client any costs the Client incurs in investigating and dealing with such non-compliance.

# Dispute Resolution

* 1. Subject to the provisions of Clause 56 if a dispute or difference arises between the Parties with regard to or in connection with this Agreement, such dispute shall be referred in writing to senior members of each of the Client and the ESCO who will use good faith efforts to resolve such dispute within 30 (thirty) days of such referral.
	2. If the Parties are unable to resolve the matter within the thirty (30) day period in Clause 55.1 the Client and the ESCO will attempt to resolve the dispute in question by mediation. Any such mediation will be conducted by a mediator to be mutually agreed upon between the Parties or in the absence of such agreement upon the request of either Party to be appointed by the President for the time being of Engineers Ireland. If a settlement of the dispute is not achieved through the mediation process within three months either Party may refer the dispute to arbitration in accordance with Clause 55.3.
	3. Where the Parties are unable to resolve any dispute which may arise under or in connection with this Agreement either through good faith efforts or mediation as set out in Clauses 55.1 and 55.2 either Party may by provision of notice in writing refer the matter to arbitration. The final decision of who will act as arbitrator will be mutually agreed upon between the Parties or in the absence of such agreement the decision as to who to appoint as will be referred upon the request of either Party to the President for the time being of Engineers Ireland. Every such reference shall be deemed to be a submission to arbitration within the meaning of the Arbitration Act 2010 or any statutory amendment therefore for the time being in force.

# Expert Determination

* 1. Where a dispute arises under or in connection with this Agreement in relation to:
		1. [ ][[66]](#footnote-67);

the Parties agree in the first instance to use good faith efforts to resolve the dispute within 30 (thirty) days as set out in Clause 55.1. If the dispute is not resolved in that time then either Party may submit the matter to an independent expert for determination.

* 1. Where a matter is to be referred to an independent expert under this Agreement for determination, the independent expert shall be an independent engineer (or other person with relevant expertise) agreed upon by the Parties, or, if agreement is not reached within five days of either Party giving notice to the other that it wishes to refer a matter to an independent expert, such independent engineer or other person with relevant expertise will be nominated by the President for the time being of Engineers’ Ireland upon the request of either Party.
	2. The Parties are entitled to make submissions to the independent expert (including oral submissions) and will provide (or procure that others provide) the independent expert with all such assistance and documents as the independent expert may reasonably require for the purpose of reaching a decision. Each Party shall with reasonable promptness supply each other with all information and give each other access to all documentation and personnel as the other Party reasonably requires to make a submission under this clause.
	3. The Parties agree that the independent expert may in its reasonable discretion determine such other procedures to assist with the conduct of the determination as it considers appropriate.
	4. The independent expert shall act as an expert and not as an arbitrator. The independent expert's decision shall be final and binding on the Parties in the absence of fraud or manifest error.
	5. Each Party shall bear its own costs in relation to the reference to the independent expert. The independent expert's fees and any costs it properly incurs in arriving at its determination (including any fees and costs of any advisers appointed by the independent expert) shall be borne by the Parties in equal shares or in such proportions as the independent expert shall direct.
	6. Pending final resolution of any dispute under this Agreement the ESCO will proceed diligently with the performance of its duties and obligations under this Agreement and the Client will continue to make payments of all undisputed amounts in accordance with this Agreement. Any disputed calculation will not take effect until final determination of the dispute in accordance with Clause 45 or 56 (as appropriate).

# Governing Law

* 1. This Agreement shall be governed by and confirmed in all respects in accordance with the laws of Ireland.

Schedule 1 – Premises, Equipment & Agreed Connection Point(s)

1. **Premises[[67]](#footnote-68)**

[ ]

1. **Equipment[[68]](#footnote-69)**

[ ]

1. **Existing Equipment[[69]](#footnote-70)**

[ ]

1. **Agreed Connection Points**

[ ]

*Incorporate an inventory/schedule of the Equipment being installed by the ESCO (including any energy meters) together with a similar inventory/schedule of the Existing Equipment that the ESCO may also be operating and maintaining.*

*Also, a plan outlining the agreed connection points where the Supply is provided into the Premises by the ESCO should be incorporated here together with a plan of where the Equipment being installed is to be located on the Premises.*

Schedule 2 – Final Design Documents & Fuel Specification

1. ESCO design documents:

[ ]

1. Client design documents:

[ ]

1. Energy System Modification Schedule:

Note: the Existing Equipment modification schedule should be considered here – what modification or upgrade of the Existing Equipment may be required to accommodate the new Equipment being installed by the ESCO.

1. Fuel Specification:

[ ]

Schedule 3 – The Works[[70]](#footnote-71)

*Incorporate description of the Works in as much detail as possible – or else set out in detail in payment schedule below*

Payment Schedule for Works[[71]](#footnote-72):

|  |  |  |  |
| --- | --- | --- | --- |
|  | Works Phase – Payment Interval[[72]](#footnote-73) | Payment Interval Amount | Cumulative Amount |
|  | Construction | € | € |
|  | Installation | € | € |
|  | Testing | € | € |
|  | Commissioning | € | € |
|  | Snag List | € | € |
|  | Retention |  |  |
|  | Total |  | € |

Schedule 4 – The Services

*Provide a description of the ongoing operational, maintenance and metering services together with any other services to be performed by the ESCO during the term of the agreement.*

Schedule 5 – Maintenance Schedule

*Set out the schedule of when planned maintenance is to be carried out and whether this applies to the Existing Equipment as well as the newly installed Equipment (depending on what is agreed between the parties). The maintenance regime adopted must ensure the well-being of the Energy System and avoid cutting corners. Where CHP is being utilised the timing of all minor and major overhauls should be clearly set out here – consider whether a major overhaul is to be carried out prior to the conclusion of the agreement.*

*The Parties should consider how ESCO will be reimbursed for maintenance of Existing Equipment that may be required over and above routine maintenance as set out in this schedule (if the ESCO is assuming maintenance responsibility for the Existing Equipment) – this could be done by way of hourly rates for additional maintenance that would be tendered by the ESCO.*

Schedule 6 – Guaranteed Standards of Performance[[73]](#footnote-74)

*This schedule is to be populated with a table of the technical standards of performance required by the Client from the ESCO e.g. temperature of hot water at Agreed Connection Points, voltage of electricity supply at Agreed Connection points etc. A Failed Service Credit amount should be set out against each – for example, if the temperature of hot water being delivered at an Agreed Connection Point is to be 82degC then a €/degC shortfall amount (or other ‘penalty’ amount) can be inserted here – this may also be set out on a weekly/monthly/seasonal basis as required.*

1. **Guaranteed Standards of Performance:**
	1. The ESCO shall provide the Supply in accordance with the Guaranteed Standards of Performance as tabulated below and shall ensure that during the relevant seasonal operating times:
		1. The Energy Capacity will be continuously available; and
		2. The Supply Temperature will be continuously maintained to the temperature demanded by the Client’s building management system (BMS) up to the Maximum Supply Temperature.
	2. The Guaranteed Standards of Performance will not apply during a pre-agreed Maintenance Day as set out in the Maintenance Schedule.

|  |  |  |
| --- | --- | --- |
| **Season** | **Winter:** 1 September to 31 May | **Summer:** 1 June to 31 August |
| **Operating Times** | Monday – Friday 06:00 to 20:00 Saturday 07:00 to 14:00  | 06:00 to 18:00 Monday – Friday 07:00 to 14:00 Saturday |
| **Energy Capacity** | 400 kW | 100 kW |
| **Maximum Supply Temperature** | 82°C | 70°C |

1. **Energy Failure:**
	1. An “Energy Failure” shall be deemed to have occurred when the following conditions occur simultaneously over a one Hour period at an Agreed Connection Point:
		1. The Client’s Energy Requirement is equal to or below the Energy Capacity;
		2. The Supply Temperature is below the Maximum Supply Temperature (or some other lower temperature if requested by the Client BMS)[[74]](#footnote-75); and
		3. The Client’s Energy Requirement is not being met.
	2. [If an Energy Failure occurs during the same one Hour period at more than one Connection Point, each such Energy Failure will be considered to be a separate and additional Heat Failure.][[75]](#footnote-76)
	3. The Parties acknowledge that an Energy Failure may occur even if the Client has obtained a supply of Energy through a source other than the Agreed Connection Point such as through its independent back-up boilers.
	4. A failure to achieve the Guaranteed Standards of Performance may occur even though the Client has itself obtained an independent supply of Energy.
2. **Failed Service Credits:**
	1. The ESCO is entitled to one Hour grace period in each calendar day up to an aggregate limit of 10 (ten) grace periods in a Month.
	2. A Failed Service Credit shall apply for each Energy Failure that occurs beyond the one Hour grace period on a given calendar day.
	3. [Where an Energy Failure occurs at more than one Agreed Connection Point during that one Hour grace period a Failed Service Credit will apply for any the separate and additional Energy Failure.][[76]](#footnote-77)
	4. Failed Service Credits shall be calculated in the following manner:

***Failed Service Credit (€) = Energy Supply Deficit x Supply Price x Failed Service Factor***

1. **Energy Failure Monitoring:**
	1. The BMS must incorporate the facility to monitor, log and report on any Energy Failures. The following parameters must be monitored:
		1. The flow and return temperatures at each Agreed Connection Point;
		2. The flow rate at each Agreed Connection Point;
		3. From the above compute the energy flow; and
		4. Where a heat exchanger is used the secondary side of the Agreed Connection Point will be used.
	2. The Energy Supply Deficit will be established using the difference between average Supply Temperature set point over the relevant one Hour period and actual average Supply Temperature over the relevant one Hour period in conjunction with the measured flow rate and the specific heat capacity of water.
	3. The BMS must log each Hour in which an Energy Failure occurs and calculate the Energy Supply Deficit for each applicable Hour.
	4. The BMS must log all readings and calculations, and keep these for 12 months. Both parties will be entitled to verify readings and BMS values from time to time.

Schedule 7 – Roles & Responsibilities[[77]](#footnote-78)

Schedule 8 – Performance Security

**[Performance Bond][[78]](#footnote-79)**

**THIS BOND** made the day of 2014 between:

1. **[ ]** having its registered office at [ ] (the "**ESCO**");
2. **[ ]** having registered office at [ ] (the “**Surety**"); and
3. **[ ]** having registered office at [ ] (the “**Client**"); and

each a “**Party**” and collectively the “**Parties**”.

**WHEREAS:**

1. The Client and the ESCO have or will enter into an agreement to[finance, design, construct, install, test and commission energy supply equipment at [ ] and to supply energy to agreed connection points within the premises ] (the “Agreement”).
2. The ESCO has agreed to furnish a performance bond to the Client.
3. Terms defined in the Agreement have the same meaning in this Bond.

**IT IS AGREED AS FOLLOWS:**

1. If the ESCO’s engagement under the Agreement is terminated under Clause 34.2 of the Agreement the Surety will, subject to this Bond, pay the Client any amount for which the ESCO is liable under the Agreement.
2. If the ESCO breaches the Agreement the Surety will, subject to this Bond, pay the Client any amount for which the ESCO is liable to the Client as damages for breach of the Agreement, as established under the Agreement, taking into account all sums due to the ESCO under the Agreement.
3. The liability of the Surety under this Bond will not exceed €[ ] and will reduce by [ ]% on the Acceptance Date.
4. No alteration in the Agreement or in the extent or nature of the works to be done or services to be performed under it, and no allowance of time under the Agreement, and no forbearance or forgiveness concerning the Agreement by the Client, will in any way release the Surety from liability under this Bond.
5. The Surety will be released from its liability under this Bond [ ] days after the [Acceptance Date]/expiry of the Agreement] except in relation to any breach by the ESCO or termination that has occurred before that date, written notice (including particulars of the breach or termination) of which has been given to the Surety earlier than 4 weeks after this expiry date.
6. The ESCO undertakes to the Surety to perform its obligations under the Agreement. This undertaking does not limit any rights or remedies of the Client or the Surety.
7. The Client may, but is not required to, provide to the Surety a copy of any notice that the Client gives to or receives from the ESCO under Clause 34 of the Agreement.
8. The decision of a court or arbitrator in a dispute between the Client and the ESCO will be binding on the Surety as to all matters concerning a breach of the Agreement, termination under the Agreement, and the ESCO’s liability.
9. If the Surety is called on to pay the Client’s loss following a termination under Clause 34.2 of the Agreement, the Surety may suggest a completion energy services contractor to the Client, provided the proposed completion energy services contractor is acceptable to the Client.
10. The Surety will not be liable under this Bond for a breach or termination caused solely and directly by war, invasion, act of foreign enemies, hostilities (whether war is declared or not), terrorism, civil war, rebellion, revolution, or military or usurped power.
11. The Client may assign the benefit of this Bond, without the Surety’s or the ESCO’s consent, by giving written notice to the Surety.
12. This Bond is governed by and construed according to Irish law and the parties submit to the jurisdiction of the Irish courts to determine all matters concerning it.
13. Money payable by the Surety under this Bond will be paid in euro in Ireland.
14. The Surety appoints

Name of Agent:

Address of Agent:

as its agent for service of legal proceedings. The Surety confirms that the named agent has been irrevocably appointed and the failure of the agent to notify the Surety

IN WITNESS whereof this deed was executed on the day and year first herein written.

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| GIVEN under the common seal of**the ESCO** | \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_Director/Company Secretary |
| \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_Print name |
| \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_Director |
| \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_Print name |

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| GIVEN under the common seal of**the Surety** | \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_Director/Company Secretary |
| \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_Print name |
| \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_Director |
| \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_Print name |

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| GIVEN under the common seal of**the Client** | \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_Director/Company Secretary |
| \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_Print name |
| \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_Director |
| \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_Print name |

**[Parent Company Guarantee][[79]](#footnote-80)**

**THIS GUARANTEE** made the day of 2014 between:

1. **[ ]** having its registered office at [ ] (the "**ESCO**");
2. **[ ]** having registered office at [ ] (the “**Guarantor**"); and
3. **[ ]** having registered office at [ ] (the “**Client**"); and

each a “**Party**” and collectively the “**Parties**”.

**WHEREAS:**

1. The Client and the ESCO have or will enter into an agreement to[finance, design, construct, install, test and commission energy supply equipment at [ ] and to supply energy to agreed connection points within the premises ] (the “Agreement”).
2. The Guarantor has agreed to guarantee the ESCO’s performance of the Agreement.
3. Terms defined in the Agreement have the same meaning in this Guarantee.

**IT IS AGREED AS FOLLOWS:**

# Guarantee

The Guarantor irrevocably and unconditionally:

* 1. guarantees to the Client that the ESCO will punctually perform all its obligations under the Agreement; and
	2. undertakes to the Client to fully perform the ESCO’s obligations under the Agreement if the ESCO fails to perform them.

# Indemnity

If the ESCO’s obligations under the Agreement or the Guarantor’s obligations under Clause 1 above are or become void or unenforceable then, as between the Guarantor and the Client (but without affecting the ESCO’s obligations), the Guarantor will as principal obligor indemnify the Client against any resulting loss and be liable to the Client for the same amount as the Guarantor would have been liable for if the obligations had not been void or unenforceable.

# ESCO’s failure to perform

* 1. If the ESCO goes into liquidation, administration, examinership or receivership or becomes subject to any other form of insolvency proceedings, or if the ESCO’s obligation to complete the Works is lawfully terminated under Clause 34.2 of the Agreement, any such event will be conclusive evidence, for the purposes of this Guarantee, that the ESCO has failed to perform the Agreement.
	2. The decision of a court or arbitrator or an agreement between the ESCO and the Client will be binding on the Guarantor in relation to any failure by the ESCO to perform the Agreement.

# Guarantee is in Addition to Other Security

The Guarantor’s obligations are in addition to and independent of any other security the Client may at any time hold for the ESCO’s obligations under the Agreement.

# Continuing guarantee

The Guarantor’s liability will continue until the ESCO has performed all its obligations in full, and will not be satisfied or diminished by any payment or recovery of an amount due from the ESCO to the Client.

# Guarantor’s liability not impaired

The Guarantor’s liability under this Guarantee is as principal obligor and not merely as surety. Neither the Guarantor’s liability under this Guarantee nor the Client’s rights under it will be affected by any of the following, whether or not known to any of the Parties:

* 1. the ESCO’s obligations under the Agreement being or becoming illegal, invalid or unenforceable, if it would not be illegal for the Guarantor to fulfil the obligation;
	2. bankruptcy, insolvency, liquidation, examinership, dissolution, amalgamation, winding up, reorganisation or any similar proceeding concerning the ESCO;
	3. change in the status, function, control or ownership of the ESCO;
	4. death or incapacity of the ESCO;
	5. amendment to the Agreement or change to the works to be done under it (whether or not the amendment or change increases the Guarantor’s liability);
	6. time being given to the ESCO;
	7. a concession, arrangement, waiver or other indulgence being granted or made or agreed to be granted or made by the Client;
	8. anything that the Client or the ESCO do or fail to do, including without limitation: (1) asserting or pursuing (or failing or delaying to assert, perfect or enforce) rights or remedies or (2) giving security or releasing, modifying, or exchanging security or (3) having or incurring any liability;
	9. assignment of the benefit of the Agreement;
	10. whole or partial discharge (whether of the ESCO’s obligations or security for them or otherwise) or arrangement made on the faith of payment, security or other disposition that is avoided or must be repaid on bankruptcy, liquidation or otherwise;
	11. rights against third parties that the Client may have relating to performance of the ESCO’s obligations;
	12. a reduction in, or other arrangement relating to, the ESCO’s liability to the Client as a result of an arrangement or composition under the Companies (Amendment) Act, 1990 or any similar provision; or
	13. any other act, event, fact, circumstance, rule of law, or omission.

# Guarantor not to claim against or in competition with the Client

For as long as the ESCO has actual or contingent obligations or liability under the Agreement, the Guarantor shall not:

* 1. be entitled to share in the Client’s rights under the Agreement or any other rights or security of the Client; or
	2. in competition with the Client, seek to enforce any rights concerning the Guarantor performing or having obligations under this Guarantee;

and if the Guarantor receives money from the ESCO in relation to a payment of the Guarantor under this Guarantee, the Guarantor will hold the money in trust for the Client as long as the Guarantor has any liability (contingent or otherwise) under this Guarantee.

# No preconditions upon Client

The Client may enforce this Guarantee without exercising rights against the ESCO or anyone else.

# Assignment

The Client may assign the benefit of this Guarantee without the Guarantor’s or ESCO’s consent. The Client shall give notice to the Guarantor within 28 days after any assignment.

# Partial invalidity

If at any time any part of this Guarantee is or becomes illegal, invalid or unenforceable, the rest of this Guarantee will remain legal, valid and enforceable.

# Law and Jurisdiction

This Guarantee is governed by and construed according to Irish law and the parties submit to the jurisdiction of the Irish courts to determine all matters concerning it.

# Notices

Any communication given in connection with this Guarantee must be in writing and delivered to, or sent by pre-paid registered post to the relevant party’s address at the top of this Guarantee, or the Guarantor’s agent’s address in Clause 13 below, or another address notified in writing by the relevant party. Pre-paid registered post is taken to have been received 2 days after it was sent.

# Agent for Service

The Guarantor appoints

[Name of Agent]

[Address of Agent]

as its agent for service of legal proceedings. The Guarantor confirms that the named agent has been irrevocably appointed and the failure of the agent to notify the Guarantor of receipt of a document will not invalidate any proceedings or the service of the document.

# Representations and Warranties

The Guarantor represents and warrants to the Client that:

* 1. the execution, delivery and performance of this Guarantee by the Guarantor has been duly and validly authorised by all requisite corporate action by the Guarantor and
	2. this Guarantee is the Guarantor’s legal, valid and binding obligation in accordance with its terms and
	3. no approval or consent from any governmental entity or any other person or entity is required in connection with the execution, delivery or performance of this Guarantee by the Guarantor.

IN WITNESS whereof this deed was executed on the day and year first herein written.

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| GIVEN under the common seal of**the ESCO** | \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_Director/Company Secretary |
| \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_Print name |
| \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_Director |
| \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_Print name |

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| GIVEN under the common seal of**the Guarantor** | \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_Director/Company Secretary |
| \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_Print name |
| \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_Director |
| \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_Print name |

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| GIVEN under the common seal of**the Client** | \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_Director/Company Secretary |
| \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_Print name |
| \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_Director |
| \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_Print name |

*[End of Schedule]*

IN WITNESS whereof this deed was executed on the day and year first herein written.

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| GIVEN under the common seal of**the Client** | \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_Director/Company Secretary |
| \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_Print name |
| \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_Director |
| \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_Print name |

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| GIVEN under the common seal of**the ESCO** | \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_Director/Company Secretary |
| \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_Print name |
| \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_Director |
| \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_Print name |

1. Consider whether “ESCO” is appropriate title. [↑](#footnote-ref-2)
2. To be determined during tender stage [↑](#footnote-ref-3)
3. If ESCO assuming responsibility for O&M of existing energy equipment (e.g. fossil fuel boiler) [↑](#footnote-ref-4)
4. Bidders should be aware of provisions of Finance Act 2012 on tax relief for high efficiency CHP (if CHP being proposed). [↑](#footnote-ref-5)
5. Tendered by ESCO [↑](#footnote-ref-6)
6. To be tendered by the ESCO [↑](#footnote-ref-7)
7. Will be tailored to meet requirements of each case – e.g. Client may have design of structural elements (e.g. of boiler house) prepared by its own design team (Client Design Documents) but the ESCO will have to produce the design and determine the size/capacity of the plant being installed. [↑](#footnote-ref-8)
8. To be tendered by ESCO – will be cost of ESCO’s finance and capital – will be deleted if Client is financing [↑](#footnote-ref-9)
9. If biomass then will be procured by ESCO – if gas (for CHP) then consider whether Client will retain responsibility for procuring [↑](#footnote-ref-10)
10. Can be stipulated by Client and tendered by ESCOs as part of bid [↑](#footnote-ref-11)
11. Provided by ESCO as part of bid [↑](#footnote-ref-12)
12. To be bid by ESCO [↑](#footnote-ref-13)
13. Definition to be reviewed and updated [↑](#footnote-ref-14)
14. Indexation benchmark to be finalised and confirmed after consultation [↑](#footnote-ref-15)
15. Delete if Client not financing [↑](#footnote-ref-16)
16. Delete if Client procuring fuel (e.g. gas for CHP) [↑](#footnote-ref-17)
17. Delete if Client is procuring fuel (e.g. gas for CHP) [↑](#footnote-ref-18)
18. Delete as appropriate depending on whether Client is financing [↑](#footnote-ref-19)
19. Delete as appropriate depending on whether Client is financing [↑](#footnote-ref-20)
20. Delete if Client not financing [↑](#footnote-ref-21)
21. Tendered by ESCO – cost of design, installation, testing and commissioning of plant. Does not include capital cost of plant as this is addressed through the Fixed Monthly Payment [↑](#footnote-ref-22)
22. Name to be inserted [↑](#footnote-ref-23)
23. Amend text in square brackets as appropriate where ESCO is acting as PSCS and/or PSDP under Construction Regulations [↑](#footnote-ref-24)
24. Amend text in square brackets as appropriate where ESCO is acting as PSCS and/or PSDP under Construction Regulations [↑](#footnote-ref-25)
25. Amend text in square brackets as appropriate where ESCO is acting as PSCS and/or PSDP under Construction Regulations [↑](#footnote-ref-26)
26. Amend text in square brackets as appropriate where ESCO is acting as PSCS and/or PSDP under Construction Regulations [↑](#footnote-ref-27)
27. Amend text in square brackets as appropriate where ESCO is acting as PSCS and/or PSDP under Construction Regulations [↑](#footnote-ref-28)
28. Clauses 3.9 to 3.12 inclusive are to be included if the ESCO is carrying out the role of PSCS and/or PSDP under the Construction Regulations. [↑](#footnote-ref-29)
29. Delete where ESCO is financing [↑](#footnote-ref-30)
30. Delete if ESCO providing a parent company guarantee [↑](#footnote-ref-31)
31. Delete if ESCO providing a performance bond [↑](#footnote-ref-32)
32. Delete if Client is not financing and payment for capital element is through the Fixed Monthly Payment [↑](#footnote-ref-33)
33. Clause can be deleted if Client financing [↑](#footnote-ref-34)
34. Delete as appropriate depending on whether title to Equipment is to pass automatically at end of contract or at the election of the Client. [↑](#footnote-ref-35)
35. Delete as appropriate if title to the Equipment is to pass at the election of the Client. [↑](#footnote-ref-36)
36. Consider withholding/deducting a percentage from the current market value where the agreement is terminated due to ESCO breach. [↑](#footnote-ref-37)
37. Agreed mechanism should take account of new equipment added during the term of the agreement – this should be depreciated separately. [↑](#footnote-ref-38)
38. Clause may be rendered unnecessary if ESCO is assuming full operational and maintenance responsibility – would be deleted and marked ‘not used’. [↑](#footnote-ref-39)
39. Clause can be deleted if ESCO not assuming any responsibility for operation of Existing Equipment [↑](#footnote-ref-40)
40. Tax deductions for high efficiency CHP from biomass – inclusion of this clause should incentivise high efficiency biomass CHP. [↑](#footnote-ref-41)
41. Envisages biomass as fuel source. [↑](#footnote-ref-42)
42. Insert any other industry standards if necessary/applicable. [↑](#footnote-ref-43)
43. Insert appropriate frequency [↑](#footnote-ref-44)
44. Delete if Client is procuring fuel [↑](#footnote-ref-45)
45. Insert agreed days/times when fuel may be delivered to the Premises [↑](#footnote-ref-46)
46. The final makeup of this clause will depend on the ESCO’s maintenance responsibilities which will vary on project by project basis. [↑](#footnote-ref-47)
47. Insert relevant standard. [↑](#footnote-ref-48)
48. Client may wish to consider asking the ESCO to procure an independent end-to-end condition survey [↑](#footnote-ref-49)
49. Supply price comprises ESCO’s cost of fuel, maintenance costs and efficiency of boiler [↑](#footnote-ref-50)
50. Fixed monthly price comprises ESCO’s fixed costs – capital and financing – delete if Client is financing [↑](#footnote-ref-51)
51. Delete as appropriate depending on whether Client is financing [↑](#footnote-ref-52)
52. Delete as appropriate depending on whether Client is financing [↑](#footnote-ref-53)
53. Delete as appropriate depending on whether Client is financing [↑](#footnote-ref-54)
54. To be confirmed [↑](#footnote-ref-55)
55. Delete if Client is financing [↑](#footnote-ref-56)
56. Delete if Client is financing [↑](#footnote-ref-57)
57. Delete if utilising CHP [↑](#footnote-ref-58)
58. Delete if Client is financing [↑](#footnote-ref-59)
59. Drafting note: ensure consistency with Clause 6 (Equipment Ownership) when options chosen and relevant deletions have been made. [↑](#footnote-ref-60)
60. Delete if Client is financing [↑](#footnote-ref-61)
61. Delete if Client is financing [↑](#footnote-ref-62)
62. Delete if not applicable [↑](#footnote-ref-63)
63. Amend if Client obtaining planning permission [↑](#footnote-ref-64)
64. To be confirmed. [↑](#footnote-ref-65)
65. Delete if Client is financing [↑](#footnote-ref-66)
66. Set out specific areas where expert determination may be required e.g. quality of supply (Note: metering disputes by default are addressed by the Meter Examiner). [↑](#footnote-ref-67)
67. Insert a description (and attach a plan) of Client’s premises [↑](#footnote-ref-68)
68. Details of Equipment capacity in kW (as tendered and installed) should be set out here. [↑](#footnote-ref-69)
69. Details of Existing Equipment capacity in kW should be set out here. [↑](#footnote-ref-70)
70. Description of works being carried out by ESCO to be inserted here – e.g. installation of biomass CHP boiler etc. [↑](#footnote-ref-71)
71. Indicative table only – delete if Client is not financing and capital element of works is paid through the Fixed Monthly Payment [↑](#footnote-ref-72)
72. Set out milestone dates if applicable/possible [↑](#footnote-ref-73)
73. Indicative table – to be tailored to Client’s needs in each case. For example, may include provisions relating to quality of supply such as WFQA or DN standards for biomass, power density for electricity. [↑](#footnote-ref-74)
74. Information Note Only: the basis for this is that if the temperature leaving the Agreed Connection Point is below the BMS setpoint, then this indicates that the Client’s heat requirement is not being met. [↑](#footnote-ref-75)
75. Will only apply where there are several Agreed Connection Points, e.g. in a district heating system – delete if not applicable [↑](#footnote-ref-76)
76. Will only apply where there are several Agreed Connection Points, e.g. in a district heating system – delete if not applicable [↑](#footnote-ref-77)
77. The parties shall discuss and agree their respective roles and responsibilities which shall be incorporated into a RACI matrix to be set out at this Schedule. [↑](#footnote-ref-78)
78. Delete if adopting a PCG or if ESCO financing [↑](#footnote-ref-79)
79. Delete if adopting a performance bond or if ESCO financing [↑](#footnote-ref-80)