



## e-TOC AUCTION AGENCY AGREEMENT

**THIS AGREEMENT is made on:**

(Date to be inserted by NFPAS)

**BETWEEN:**

- (1) The party referred to below (the "**Principal**");
- (2) **NFPAS LIMITED**, a company incorporated in England and Wales with registered number 4334396, whose registered office is situated at Fourth Floor, Higham House, Higham Place, New Bridge Street West, Newcastle upon Tyne, NE1 8AN ("**NFPAS**").

**WHEREAS** the Principal has agreed to appoint NFPAS as its agent to invite bids, and to accept the highest bid, in relation to the Specified Certificates on the terms of an auction code and conditions of sale in accordance with the Terms of the Agreement (set out in the next pages) and NFPAS has agreed to accept such appointment.

### **PARTICULARS OF THE PRINCIPAL**

Name of Principal (Company name):.....

Registration number (if relevant): .....

Address: .....

.....

Telephone number: .....

Facsimile number: .....

Attention: .....

E-mail address: .....

### **CONTRACT FEE**

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provided that the minimum amount of the Contract Fee in respect of each Auction in which the Principal participates shall be £50 (in each case exclusive of any VAT).

**In Witness** this Agreement has been executed by or on behalf of the Principal and NFPAS on the date set out above.

Signed by: .....

Signed by:.....

Print name: .....

Print name: .....

For and on behalf of:.....

for and on behalf of **NFPAS LIMITED**

IT IS AGREED BY THE PRINCIPAL AND NFPAS as follows:

1. **DEFINITIONS AND INTERPRETATIONS**

1.1 **Definitions**

In this Agreement (including the first page and Recitals), unless the context otherwise requires, the following words and expressions shall bear the following meanings:

**"Act"** means the Energy Act 2004;

**"Agency"** means the Office of the Renewable Fuels Agency established under article 6 of the RTFO Order and section 125 of the Act, or any successor to such body from time to time;

**"Auction"** has the meaning given in the NFPAS e-TOC Auction Code;

**"Auction Date"** means the date on which the Auction is held;

**"Auction Period"** means the time periods within which bids may be submitted in respect of the sale of any Certificates as specified by NFPAS on the Auction Site from time to time;

**"Auction Site"** has the meaning given in the NFPAS e-TOC Auction Code;

**"Banking Day"** means any day other than: (a) Saturday or Sunday; (b) Christmas Day or Good Friday; or (c) a day which is a bank holiday under the Banking and Financial Dealings Act 1971 in any part of the United Kingdom;

**"Certificate"** means an "RTF certificate" as referred to in the RTFO Order, issued by the Agency to the Principal or otherwise registered in the name of the Principal in the Certificate Account;

**"Certificate Account"** means an "Account" as defined in the RTFO Order maintained by or on behalf of the Agency for the purposes of the RTFO Order;

**"Commencement Date"** means the date of this Agreement or such other date as may be agreed by the parties;

**"Contract Fee"** means the price specified on the front page of this Agreement;

**"Contract Year"** means each successive period commencing on 1 April and ending on 31 March in the next succeeding calendar year during the term of this Agreement, provided that the first Contract Year shall commence on the Commencement Date and the last Contract Year shall end on the Expiry Date or earlier termination of the contract term if occurring prior to 31 March in the current Contract Year;

**"e-TOC Conditions of Sale"** means the terms and conditions for the sale of Certificates issued under the RTFO Order as published by NFPAS from time to time;

**"Expiry Date"** means the date of termination of this Agreement under Clause 10 or such other date as the parties may agree;

**"Force Majeure"** means, any circumstances beyond the reasonable control of the affected party including without prejudice to the generality of the foregoing any act of God, act or regulation of any governmental or supra-national authority, war or national emergency, terrorist act, accident, epidemic, fire, riot, strike, lock-out, or other form of industrial action provided always that lack of funds or failure to pay shall not be interpreted as beyond the reasonable control of such party;

**"Liability Cap"** means, in respect of each Contract Year, the sum of £50,000;

**"Month"** means a calendar month;

**"NFPAS e-TOC Auction Code"** means the code of that name as published by NFPAS from time to time;

**"Obligation Period"** has the same meaning as "obligation period" in the RTFO Order;

**"Reserve Price"** means the price notified by the Principal pursuant to Clause 6.4 as the minimum at which Specified Certificates will be sold at an Auction;

**"RTFO Order"** means the Renewable Transport Fuel Obligations Order 2007 as amended by the Renewable Transport Fuel Obligations (Amendment) Order 2009;

**"Specified Day"** has the same meaning as "specified date" in the RTFO Order;

**"Specified Certificates"** means the Certificates notified to NFPAS by the Principal from time to time to be made available for sale under this Agreement; and

"**Successful Bidder**" has the meaning given in the NFPAS e-TOC Auction Code.

## 1.2 Interpretation

In this Agreement:

- 1.2.1 references in the singular shall include references in the plural and vice versa, and words denoting natural persons shall include corporations and any other legal entity and vice versa;
- 1.2.2 references to the word "including" are to be construed without limitation;
- 1.2.3 references to any statute or statutory instrument or any section of, or schedule to, or other provisions of a statute or statutory instrument shall be construed, at any particular time, as including a reference to any modification, extension or re-enactment thereof then in force and to all instruments, orders or regulations then in force and made under or deriving validity from such statute or provision (as the same may have been so modified, extended or re-enacted from time to time);
- 1.2.4 except to the extent that the context requires otherwise references to a particular Clause, Schedule or Appendix shall be references to that clause, or schedule in or appendix to this Agreement;
- 1.2.5 except to the extent that the context requires otherwise, any reference to "the Agreement" or "this Agreement" is a reference to it as amended, supplemented or novated from time to time and includes a reference to any document which amends, is supplemental to, novates or is entered into, made or given pursuant to or in accordance with any terms of it; and
- 1.2.6 the headings are inserted for convenience only and are to be ignored for the purposes of construction.

## 2. APPOINTMENT

The Principal appoints NFPAS as its agent to sell the Specified Certificates on its behalf in accordance with the provisions of this Agreement and NFPAS agrees to act in this capacity in accordance with the provisions of this Agreement. For the avoidance of doubt, the Principal understands and agrees that NFPAS shall be offering and providing similar services to other persons.

## 3. TERM OF APPOINTMENT

The appointment of NFPAS as agent pursuant to this Agreement shall commence on the Commencement Date and shall continue until the Expiry Date.

## 4. OBLIGATIONS OF NFPAS

NFPAS hereby agrees with the Principal:

### 4.1 Sale of Certificates

To carry out the function of agent for the Principal for the purpose of selling the Specified Certificates (and collecting payment therefore) on behalf of the Principal in accordance with the terms of this Agreement.

### 4.2 Auction

To invite bids for the sale of the Specified Certificates under the terms of the e-TOC Conditions of Sale by holding Auctions, which shall be held no later than 4 months after the date the Specified Certificates are made available to NFPAS for sale under the terms of this Agreement (or as otherwise agreed with the Principal), but may otherwise be held on such terms and at such times as NFPAS determines in its sole discretion and to maintain an Auction Site and to operate the NFPAS e-TOC Auction Code in respect of such Auctions.

### 4.3 Failure to hold Auction or Sale of Certificates

If an Auction is not held in respect of the Specified Certificates or the Specified Certificates are not sold within the 4 months referred to in Clause 4.2 the Principal may withdraw those Specified Certificates made available and NFPAS:

- 4.3.1 ~~shall transfer back to the Principal, or such other party as the Principal may direct, any Specified Certificates held by NFPAS on behalf of the Principal; and~~
- 4.3.2 agrees that no Contract Fee shall be payable in respect of such withdrawn Specified Certificates.

### 4.4 Description as Agent

To make a statement on the Auction Site that NFPAS acts as agent for the Principal (together with any other principal to whom NFPAS may, in its sole discretion, provide similar services from time to time) and that it makes sales of the Specified Certificates on behalf of the Principal.

4.5 **e-TOC Conditions of Sale**

To make any sale of the Specified Certificates pursuant to this Agreement as agent for the Principal and subject to the e-TOC Conditions of Sale.

4.6 **Changes to the NFPAS e-TOC Auction Code and the e-TOC Conditions of Sale**

That NFPAS may make changes, in its discretion, to the NFPAS e-TOC Auction Code or the e-TOC Conditions of Sale in respect of future Auctions in respect of Specified Certificates which have not yet been made available to NFPAS for sale. Any such revisions to the NFPAS e-TOC Auction Code or the e-TOC Conditions of Sale will be posted on the website of NFPAS. NFPAS shall notify the Principal of any change to either the NFPAS e-TOC Auction Code or the e-TOC Conditions of Sale which is material to the Principal. NFPAS shall not make any material changes to the e-TOC Conditions of Sale in relation to a Specified Certificate already made available to NFPAS for sale without the consent of the Principal, such consent not to be unreasonably withheld or delayed.

4.7 **Notification**

To notify the Principal within 3 Banking Days of the end of an Auction of the total number of Specified Certificates that have been sold to Successful Bidders on its behalf and the total amount payable by Successful Bidders to NFPAS in respect of the total amount of such Specified Certificates.

4.8 **Right to Rescind**

Not to exercise the right to rescind a sale under the NFPAS e-TOC Auction Code without the consent of the Principal.

4.9 **Withdrawal**

To withdraw, postpone or cancel the sale of the Specified Certificates from the Auction upon request by the Principal, provided such request is received no less than 3 days before the start of the Auction and upon request by the Principal to withdraw, postpone or cancel the sale of the Specified Certificates from the Auction upon being notified by the Principal of an error in the information provided relating to such Specified Certificates, provided such notification is received prior to the commencement of the Auction.

4.10 **Revocation of Certificates**

To remit all sums received from the Principal pursuant to Clause 6.1.7 to the Successful Bidder within 5 Banking Days of receipt.

**5. INDEMNITY**

The Principal hereby covenants with NFPAS to indemnify and keep NFPAS and its officers, employees, agents and sub-contractors fully indemnified against any and all damages, losses, costs (including reasonable legal costs), claims or expenses suffered by NFPAS, its officers, employees, agents or sub-contractors in respect of a breach by the Principal of the NFPAS e-TOC Auction Code or this Agreement or otherwise in the course of selling the Specified Certificates or carrying on the agency or its other obligations hereunder or in any contract collateral hereto (including for the avoidance of doubt any non recovery of Value Added Tax) save to the extent that the same has arisen as a direct result of the wilful default or negligence of NFPAS or its officers, employees, agents or sub-contractors or the failure by NFPAS to perform its obligations under this Agreement.

**6. OBLIGATIONS OF THE PRINCIPAL**

6.1 **Agreements**

The Principal hereby agrees with NFPAS:

6.1.1 **Availability of Certificates**

To identify to NFPAS those Specified Certificates which the Principal shall make available to NFPAS to sell under the Auction on its behalf and to identify to NFPAS:

- (A) the month and year in which the Specified Certificates were issued by the Agency;
- (B) the Obligation Period to which the Specified Certificates relate; and

- (C) any other information in respect of such Specified Certificates as NFPAS, acting reasonably, may require to operate the Auction or otherwise to discharge its obligations under this Agreement, on making the Specified Certificates available for sale in accordance with the terms of this Agreement.

**6.1.2 Correction of information**

To inform promptly NFPAS if such information is discovered to be incorrect.

**6.1.3 Sale of Certificates**

That NFPAS is authorised by the Principal to procure the sale of any Specified Certificates to the relevant Successful Bidder.

**6.1.4 Transfer of Certificates**

That if the Successful Bidder elects to receive the Specified Certificates from NFPAS rather than from the Principal and NFPAS has provided the Principal with evidence of such election:

- (A) to transfer the Specified Certificates to NFPAS for onward transmission to the Successful Bidder; and
- (B) that NFPAS is authorised by the Principal to procure the transfer of Specified Certificates to NFPAS and subsequently to the Successful Bidder and shall be authorised on behalf of the Principal to act for it in respect of requests for amendments to be made to the Certificate Account in respect of such Specified Certificates.

**6.1.5 Information to the Agency**

To provide to the Agency all information (which shall be true and accurate) where the Specified Certificates have not been issued by the Agency to the Principal at the Commencement Date, necessary for the issue of the Specified Certificates by the Agency to the Principal and, (ii) for the Specified Certificates to be transferred to the Successful Bidder (or to NFPAS where the Successful Bidder has elected to receive Specified Certificates from NFPAS), including the Obligation Period to which such Specified Certificates relate and the completion and submission to the Agency of the form of transfer required under the RTFO Order in respect of each Specified Certificate or such other form of notification as may be specified by the Agency from time to time.

**6.1.6 Revocation of Certificates**

That if any Certificates sold by NFPAS pursuant to this Agreement are revoked by the Agency (whether before or after the expiry or termination of this Agreement) after the Successful Bidder has made payment in respect of the Certificate and such payment has been remitted to the Principal pursuant to Clause 7.1.2 but prior to the Specified Day in respect of the Obligation Period to which the Certificate relates, the Principal must pay to NFPAS (within 3 Banking Days of receipt on an invoice from NFPAS) such amount required to refund the Successful Bidder.

**6.1.7 Access to Information**

That NFPAS shall have no obligation to disclose to the Principal any information concerning the Auction (including the number of or identity of bidders, the price bid by a bidder or the price paid by a Successful Bidder for one or more Certificates) other than as required pursuant to Clause 4.7 and 7.1.4.

**6.1.8 Intellectual Property**

That, and acknowledges that, all copyright, trade marks, and other intellectual property rights in and relating to the Auction, the Auction Site and the NFPAS e-TOC Auction Code are owned by NFPAS, Non-Fossil Purchasing Agency Limited or its or their third party licensors.

**6.1.9 Revocation Notice**

To notify NFPAS, or procure that the Agency notifies NFPAS, as soon as reasonably practicable in the event that any Certificate identified for sale in the Auction is or will be revoked. For the avoidance of doubt, and notwithstanding any other provision of this Agreement, NFPAS shall have no obligation to sell a revoked Certificate on behalf of the Principal.

**6.2 Acknowledgements**

The Principal hereby acknowledges that NFPAS will not be responsible for or liable for:

- 6.2.1 the validity, enforceability or effectiveness of the e-TOC Conditions of Sale;

- 6.2.2 the failure of any Successful Bidder duly and punctually to observe or perform any of its obligations under the e-TOC Conditions of Sale; or
  - 6.2.3 the consequences of relying on any communication or document reasonably believed by NFPAS to be genuine and correct and in particular any such document provided by the Principal in respect of the information required under Clause 6.1.
- 6.3 **Warranties**
- The Principal warrants to NFPAS that to the best of its knowledge and belief:
- 6.3.1 it is the sole owner of the Certificates identified to NFPAS for sale in the Auction pursuant to Clause 6.1.1 and that it has an unrestricted right to transfer title to the Successful Bidder free from all third party rights or claims;
  - 6.3.2 the Specified Certificates have been issued to the Principal by the Agency or have otherwise been properly registered in the name of the Principal in the Certificate Account in accordance with the RTFO Order and that such Certificates have not been revoked and it knows of no reason by which such Certificates would be revoked in the future;
  - 6.3.3 it has paid in full any excise duty payable on the renewable transport fuel relating to the Specified Certificates; and
  - 6.3.4 the Specified Certificates relate to the Obligation Period identified by the Principal in accordance with Clause 6.1.1.
- 6.4 **Reserve Price**
- 6.4.1 Where the Principal wishes to specify a Reserve Price in relation to the sale of Specified Certificates, this Clause 6.4 shall apply.
  - 6.4.2 The Principal shall give NFPAS prior written notice of the proposed Reserve Price not less than 10 Banking Days before the Auction Date.
  - 6.4.3 NFPAS shall have the right to reject a proposed Reserve Price not less than 7 Banking Days before the Auction Date.
  - 6.4.4 If NFPAS rejects the proposed Reserve Price pursuant to Clause 6.4.3, it shall have no obligation to sell the Specified Certificates unless the Principal, by written notice to NFPAS given no less than 4 Banking Days before the Auction Date,
    - (A) revises the Reserve Price to a level acceptable to NFPAS; or
    - (B) withdraws the requirement for a Reserve Price.
  - 6.4.5 If the Principal does not revise the Reserve Price in accordance with Clause 6.4.4, NFPAS shall have no obligation to sell the relevant Specified Certificates on behalf of the Principal.
  - 6.4.6 If NFPAS does not reject the proposed Reserve Price pursuant to Clause 6.4.3 the proposed Reserve Price will become binding for the relevant Auction of the Specified Certificates.

## 7. FINANCIAL PROVISIONS

### 7.1 Obligations of NFPAS

NFPAS hereby agrees with the Principal:

#### 7.1.1 Invoicing the Successful Bidder

To send an invoice to the Successful Bidder for amounts payable under the e-TOC Conditions of Sale in respect of the Specified Certificates within 3 Banking Days of completion of the relevant Auction.

#### 7.1.2 Accounting for Sums Received

To pay to the Principal within 5 Banking Days of receipt of the total sum received by NFPAS in respect of the sale of Certificates pursuant to this Agreement in respect of each Auction or, if later, within 5 Banking Days of receipt of an invoice (including a VAT invoice) from the Principal in respect of the same provided that NFPAS shall be entitled to and shall set off any amounts due to NFPAS from the Principal under Clause 7.2 or otherwise under this Agreement from such payment (and NFPAS shall render an invoice (including a VAT invoice) in respect of such set-off amount in accordance with Clause 7.1.3 accordingly).

#### 7.1.3 VAT

To deliver to the Principal a VAT invoice in respect of any amount under this Agreement for which VAT is payable by the Principal.

**7.1.4 Failure of Successful Bidder to Pay or Disputes**

In the event that payment is not made by the Successful Bidder by the due date or there is a dispute:

- (A) To notify the Principal within 3 Banking Days of the due date of such non-payment or dispute and of the identity of the Successful Bidder;
- (B) To consult with the Principal within 5 Banking Days of the due date of such non-payment or of the dispute as to the action to be taken to recover from the Successful Bidder the total amount due under the e-TOC Conditions of Sale in respect of the Specified Certificates;
- (C) To keep the Principal informed of any material steps taken by NFPAS to recover such payments or settle the dispute;
- (D) To provide to the Principal all information it reasonably requests in connection with any action taken by the Principal for breach of contract;
- (E) Not to exercise the right of rescission contained in Clause 11(B) of the e-TOC Conditions of Sale in respect of the Specified Certificates without the consent of the Principal, such consent not to be unreasonably withheld or delayed;
- (F) Not to exercise the right to offer the Lot to an unsuccessful bidder contained in Clause 11(C) of the e-TOC Conditions of Sale in respect of the Specified Certificates without the consent of the Principal; and
- (G) If the Principal has transferred Specified Certificates to NFPAS pursuant to Clause 6.1.4 and such Specified Certificates have not been transferred to the Successful Bidder, to transfer back all the Specified Certificates to the Principal within fourteen Banking Days of the date the payment was due to be made, such transfer to be made at the discretion of the Principal.

Any amount recovered by NFPAS (including any interest) less the reasonably incurred costs and expenses of NFPAS in connection with any such recovery or dispute to the extent that NFPAS has not recovered the same from the Successful Bidder or any other parties participating in an Auction shall be remitted to the Principal. The provisions of this Clause 7.1.4, the e-TOC Conditions of Sale and the NFPAS e-TOC Auction Code are the full extent of NFPAS' obligations in relation to collecting sums due from the Successful Bidder unless otherwise agreed with the Principal.

**7.1.5 Interest**

Any amount due and properly payable by NFPAS to the Principal pursuant to this Agreement and remaining unpaid at the expiry of the relevant period for payment shall bear interest thereafter, such interest to accrue from day to day and to be compounded with monthly rests at a rate equal to the base lending rate of Barclays Bank plc for the time being and from time to time, from (but excluding) the date of expiry of any such period until (but excluding) the date upon which the amount due is actually received by the Principal whether before or after the date of any judgement.

**7.1.6 Payment**

Payment of any amount due to the Principal under this Agreement shall be by direct bank transfer to such bank account in the United Kingdom as the Principal shall notify to NFPAS from time to time.

**7.2 Obligations of the Principal**

The Principal agrees:

**7.2.1 Contract Fee**

To pay the Contract Fee together with any VAT within 5 Banking Days of receipt of an invoice unless such amount has been deducted or set-off by NFPAS in accordance with Clause 7.2.3.

**7.2.2 VAT**

To pay to NFPAS within 3 Banking Days of a written request (including a VAT invoice, where applicable) all amounts becoming due from time to time in respect of the sale of Specified Certificates on account of VAT (or any tax in substitution therefore) to the extent that such amounts have not been previously paid by the Principal to NFPAS or deducted by NFPAS from the monies held by it on behalf of the Principal and to deliver to NFPAS a VAT invoice in respect of any amount under this Agreement for which VAT is payable by NFPAS, including the amount notified by NFPAS to the Principal pursuant to Clauses 4.7 or 7.1.2.

**7.2.3 Set-Off**

To allow NFPAS to deduct or set-off any amount due to NFPAS under this Agreement against monies received by NFPAS in respect of the sale of Certificates.

**7.2.4 Monies Received**

That nothing in this Agreement shall render NFPAS liable to account for monies due in respect of the sale of Specified Certificates which have not been transferred by the Principal to the Successful Bidder (or to NFPAS for onwards transmission to the Successful Bidder) unless NFPAS:

- (A) instructed the Principal to transfer some or all of the Specified Certificates to the Successful Bidder; or
- (B) transferred some or all of the Specified Certificates to the Successful Bidder in accordance with Clause 6.1.4,

without first receiving full payment for such Specified Certificates.

**7.2.5 Payment**

Payment of any amount due to NFPAS under this Agreement shall be by direct bank transfer to such bank account in the United Kingdom as NFPAS may notify to the Principal from time to time. Any such payment shall be made free of any restrictions or conditions and withholding (except to the extent required by law) on account of any other amount, whether by way of set-off or otherwise.

**7.2.6 Repayments**

To pay to NFPAS within 10 Banking Days of demand such amount required by NFPAS in order that NFPAS may return to a Successful Bidder monies paid by the Successful Bidder to NFPAS that are determined or agreed between NFPAS and the Successful Bidder, acting reasonably, not to have been properly due from the Successful Bidder.

**7.2.7 Defaults and disputes**

To pay an amount representing the reasonable costs and expenses of NFPAS in respect of action taken under Clause 7.1.4 unless such amount has been deducted or set off by NFPAS in accordance with such Clause provided that:

- (A) NFPAS has first taken all reasonable endeavours to recover any such amount from the Successful Bidder or any other parties participating in an Auction; and
- (B) The Principal shall pay such amount to the extent that NFPAS has not recovered the same from the Successful Bidder or any such parties participating in an Auction.

**7.2.8 Title**

Ownership of and title to the Lot purchased by the Successful Bidder shall remain with the Principal and shall not pass to the Successful Bidder until the Successful Bidder has made payment in full to NFPAS of the total amount due under the e-TOC Conditions of Sale.

**8. LIABILITY**

**8.1 Exclusion of Liability**

Without prejudice to the NFPAS e-TOC Auction Code, neither NFPAS nor its officers, agents or sub-contractors will be liable for any loss of profit or goodwill or for indirect or consequential loss (including any loss arising out of any liability of the Principal to any other person) resulting from negligence or any other tort or any breach of contract on the part of NFPAS or any of its officers, employees, agents or subcontractors arising out of any act, event or circumstance or series of acts, events or circumstances relating to this Agreement or otherwise in the course of selling the Specified Certificates and all conditions, warranties or other terms whatsoever inconsistent with the provisions of this sub-clause are hereby expressly excluded.

## 8.2 **Limitation of Liability**

Subject to Clauses 8.3, 8.4 and 8.5, the aggregate liability of NFPAS, its officers, employees and agents and sub-contractors to the Principal arising out of any act, omission, event or circumstance or series of acts, omissions, events or circumstances relating to this Agreement, the sale of the Specified Certificates or with respect to any other matters contemplated herein shall in no circumstances, in respect of any Contract Year, exceed the Liability Cap. Subject to Clauses 8.3, 8.4 and 8.5, the aggregate liability of the Principal, its officers, employees and agents and sub-contractors to NFPAS arising out of any act, omission, event or circumstance or series of acts, omissions, events or circumstances relating to this Agreement, the sale of the Specified Certificates or with respect to any other matters contemplated herein shall in no circumstances, in respect of any Contract Year, exceed the Liability Cap.

## 8.3 **No claims against employees**

The officers and employees of either party shall have no liability to the other party arising from or in connection with this Agreement and neither party will make any claims against any of them save in the case of fraud, fraudulent misrepresentation or any other criminal activity.

## 8.4 **Liability for Death or Personal Injury**

Nothing in this Agreement shall exclude or limit liability for death or personal injury resulting from negligence.

## 8.5 **Exclusion Prohibited by Law**

Nothing in this Agreement is intended to limit or exclude any liability on the part of NFPAS or the Principal where and to the extent that applicable law prohibits such exclusion or limitation.

## 8.6 **Benefits of Limitation of Liability**

The Principal acknowledges and agrees that NFPAS holds the benefit of Clauses 8.1 to 8.4 for itself and as trustee and agent for and on behalf of and for the benefit of its officers, employees, agents and sub-contractors.

## 9. **FORCE MAJEURE**

### 9.1 **Suspension for Force Majeure**

If either party (the "**Affected Party**") is materially prevented, hindered or delayed from performing any of its obligations under this Agreement by reason of an event of Force Majeure, such obligations of the Affected Party and any corresponding or related obligations of the other party shall remain in effect but shall be suspended without liability for a period equal to the duration of the event of Force Majeure provided that:

9.1.1 as soon as reasonably practicable after the start of the event of Force Majeure the Affected Party notifies the other party in writing of the act, event or circumstance relied on, the date on which such act, event or circumstance commenced, the effect of the event of Force Majeure on the Affected Party's ability to perform its obligations under the Agreement; and

9.1.2 the Affected Party continues to use its reasonable endeavours to perform its obligations under the Agreement.

### 9.2 **Notification**

Immediately after the end of the event of Force Majeure the Affected Party shall notify the other party in writing that the event of Force Majeure has ended and shall resume performance of its obligations under this Agreement. For the avoidance of doubt, neither party shall be released from any of its obligations under this Agreement as a result of an event of Force Majeure, and this Agreement shall, subject to Clause 3, 10 and 11, remain in effect for the duration of an event of Force Majeure.

## 10. **TERMINATION**

### 10.1 **Rights of Termination**

Either Party may terminate this Agreement upon:

10.1.1 the occurrence of an Event of Default in respect of the other Party;

10.1.2 giving not less than, in the case of the Principal, twelve months' or in the case of NFPAS, 30 days' notice to the other Party; or

10.1.3 this Agreement being suspended by reason of Clause 9.1 for a continuous period of not less than 30 Banking Days.

## 10.2 Event of Default

**"Event of Default"** means the occurrence at any time in respect of either party (the **"defaulting party"**) of any of the following events, (the **"non-defaulting party"** being NFPAS where the defaulting party is the Principal, or the Principal where the defaulting party is NFPAS):

- 10.2.1 if the defaulting party defaults in the performance of any of its material obligations under the Agreement and in the case of a default which is, in the opinion of the non-defaulting party (acting reasonably), capable of remedy such default continues unremedied at the expiry of 30 days following the date on which the non-defaulting party shall have given notice thereof to the defaulting party; or
- 10.2.2 on the defaulting party failing to pay (other than by inadvertent error in funds transmission which is discovered by the defaulting party, notified to the non-defaulting party and corrected within 4 Banking Days of such notification) any amount due from it pursuant to the terms of the Agreement and such default is unremedied at the expiry of the period of 7 Banking Days immediately following receipt by the defaulting party of written notice from the non-defaulting party of such non-payment; or
- 10.2.3 on the occurrence of any of the following in respect of the defaulting party:
  - (A) passing a resolution for the defaulting party's winding-up (other than for the purpose of and followed by a solvent reconstruction or amalgamation) or summoning a meeting to pass any such resolution; or
  - (B) the defaulting party having a petition for a winding-up order presented against it and such petition is not dismissed within 30 days; or
  - (C) any step is taken to appoint an administrator in relation to the defaulting party and such step is not dismissed within 30 days; or
  - (D) a receiver, administrative receiver, receiver and manager or similar officer being appointed by any person of all or any part of the defaulting party's property, assets or undertaking; or
  - (E) the defaulting party making a proposal for a voluntary arrangement as defined in section 1 of the Insolvency Act 1986; or
  - (F) the defaulting party entering into any other arrangement with its creditors or any of them; or
  - (G) the defaulting party being unable to pay its debts for the purposes of section 123 of the Insolvency Act 1986 or any distress, execution or other process being levied upon the whole or a substantial part of the defaulting party's assets; or
  - (H) a proposal or threat to do any of the above acts or things being made or an event analogous to the aforesaid occurring in whatever jurisdiction,

if within 7 days of a request by the non-defaulting party the defaulting party has not provided to the non-defaulting party a guarantee of performance of the obligations of the defaulting party under the Agreement in such form and amount as the non-defaulting party (acting reasonably) may require.

## 10.3 Termination for Change in Law

If as a result of any change of law after the date of this Agreement NFPAS will suffer or incur additional costs or expenses in respect of the performance of this Agreement, or the performance of this Agreement will otherwise be rendered materially different than as at the date of this Agreement, NFPAS may notify the Principal of a proposed revision to the Contract Fee (the **"Revised Contract Fee"**) and shall provide details of such additional costs or expenses or the materially different performance (as appropriate) and any steps taken by NFPAS to mitigate any such additional costs and expenses. The Principal shall notify NFPAS within 10 Banking Days of such notification whether or not it agrees to the Revised Contract Fee. If the Principal agrees to the Revised Contract Fee, the Revised Contract Fee shall replace the Contract Fee from the date that the relevant change takes effect (or such other date agreed between the parties), applying pro-rata to the remaining part of the current Contract Year (if appropriate). If the Principal does not agree to such Revised Contract Fee this Agreement will continue unamended in relation to the same and either party may terminate this Agreement on giving the other party 28 days' notice.

## 10.4 Survival of Rights on Termination

Termination of the Agreement shall be without prejudice to any accrued rights or obligations of the parties up to the date of termination and the provisions of Clause 11 shall remain in full force and effect notwithstanding termination.

#### 10.5 **Specified Certificates on Termination**

If the termination of this Agreement has effect during an Auction Period, the sale of Specified Certificates in respect of such Auction shall proceed in accordance with the terms of this Agreement.

Subject to the terms of this Agreement, NFPAS agrees on termination to transfer back to the Principal or such other party as the Principal may direct any Specified Certificates held by NFPAS which have not been sold pursuant to the terms of this Agreement.

### 11. **CONFIDENTIALITY AND ANNOUNCEMENTS**

#### 11.1 **General Restriction**

Subject to the exceptions provided in Clause 11.2, neither of the parties shall, at any time prior to or within 2 years after the termination or expiry of this Agreement, without the prior written consent of the other, divulge or suffer or permit its officers, employees, agents or sub-contractors to divulge to any person (other than to any of its or their respective officers or employees who require the same to enable them properly to carry out their duties) any of the contents of this Agreement or any commercially confidential information relating to the negotiations concerning the same or any commercially confidential information which may come to a party's knowledge in the course of such negotiations or otherwise concerning the operations, contracts, commercial or financial arrangements or affairs of the other party.

#### 11.2 **Exceptions**

The restrictions imposed by Clause 11.1 shall not apply to the disclosure of any information:

- 11.2.1 which now or hereafter comes into the public domain otherwise than as a result of a breach of an undertaking of confidentiality or which is obtainable with no more than reasonable diligence from sources other than the parties hereto;
- 11.2.2 which is required by law to be disclosed to any person who is authorised by law to receive the same under the RTFO Order, section 125B of the Act or the Hydrocarbon Oil Duties Act 1979;
- 11.2.3 which is required to be disclosed by the regulations of any recognised exchange upon which the share capital of the party making the disclosure is or is proposed to be from time to time listed or dealt in;
- 11.2.4 to a court, arbitrator or administrative tribunal in the course of proceedings before it to which the disclosing party is a party;
- 11.2.5 to the Agency and otherwise in accordance with the provisions of the RTFO Order, section 125B of the Act or the Hydrocarbon Oil Duties Act 1979;
- 11.2.6 to any consultants, banks or advisers to the disclosing party;
- 11.2.7 from any party to any instrument or agency of Government or the European Union having jurisdiction in respect of inter-state commerce, competition or energy;
- 11.2.8 to the Agency, the Scottish Ministers, the Secretary of State or to the Department of Enterprise, Trade and Investment ("DETI") and their respective agents to enable the Agency, DETI, the Scottish Ministers or the Secretary of State to monitor developments concerning the production and supply of renewable transport fuel or to enable the Agency to discharge its duties under the RTFO Order; and
- 11.2.9 by NFPAS to any person as to the total number of Certificates (or Certificates of a particular type) that have been sold to Successful Bidders in any Auction and the total amount payable by Successful Bidders to NFPAS in respect of such Certificates or details of any Certificate that has been revoked; and
- 11.2.10 by NFPAS to its sub-contractors to the extent required to enable such sub-contractor to carry out NFPAS' obligations under this Agreement and who shall be made aware by NFPAS of its obligations under this Agreement and shall be required by NFPAS to observe the same restrictions on the use of the confidential information as are contained in this Clause 11.

#### 11.3 **Disclosure to Third Parties**

Before any party hereto discloses any information in any of the circumstances described in Clause 11.2.6 (other than to legal advisers), it shall

- 11.3.1 notify the other party of its intention to make such disclosure; and
- 11.3.2 procure the execution and delivery to that party of an undertaking executed by the person to whom the disclosure is proposed to be made being in the same terms mutatis mutandis as the undertakings contained in this Clause, but excluding Clause 11.2.6.

**11.4 Announcements**

- 11.4.1 Subject to Clause 11.4.2, neither party shall issue public announcements regarding this Agreement without first having obtained prior approval of a copy of the announcement from the other party (such approval not to be unreasonably withheld or delayed).
- 11.4.2 The restrictions imposed by Clause 11.4.1 shall not apply to the disclosure of any information which is required to be disclosed by the regulations of any recognised exchange upon which the share capital of the party making the disclosure is or is proposed to be from time to time listed or dealt in.

**12. MISCELLANEOUS**

**12.1 Dispute Resolution**

This Agreement shall be governed by and construed in accordance with English law and each party agrees that the Courts of England shall have exclusive jurisdiction to settle any disputes which arise out of or in connection with this Agreement and both parties waive any objection to proceedings being brought in the English courts on the ground of venue or on the grounds that the proceedings have been brought in an inconvenient forum.

**12.2 Entire Agreement**

This Agreement, together with agreements referred to herein, represents the entire understanding, and constitutes the whole agreement, in relation to its subject matter and supersedes any previous agreement between the parties with respect thereto and without prejudice to the generality of the foregoing excludes any warranty, condition or other undertaking implied at law or by custom.

**12.3 No other Representation**

Each party confirms that, except as provided in this Agreement and without prejudice to any liability for fraudulent misrepresentation, neither party has relied on any representation or warranty or undertaking which is not contained in the Agreement or any document referred to in it or which was made by the other party who is not a party to this Agreement and neither party shall have any remedy in respect of misrepresentation or untrue statement made by the other party (whether innocently or negligently) unless and to the extent that a claim lies in respect of any express representation or warranty or undertaking which is contained in this Agreement.

**12.4 Notices**

- 12.4.1 Any notice, approval, consent or other communication to be given by one party to the other under, or in connection with the matters contemplated by this Agreement shall be addressed to the recipient and sent to the address or facsimile number or e-mail address (where specified) of such other party given for the purpose and marked for the attention of the person so given or to such other address and/or facsimile number and/or e-mail address and/or marked for such other attention as such other party may from time to time specify by notice given in accordance with this Clause to the party giving the relevant notice or communication to it.
- 12.4.2 Any notice or other communication to be given by any party to the other, or in connection with the matters contemplated by, the Agreement shall be in writing in the English language and shall be given by letter delivered by hand or sent by first class prepaid post (airmail, as appropriate, if overseas) or facsimile, or sent by electronic mail and shall be deemed to have been received:
  - (A) in the case of delivery by hand, when delivered; or
  - (B) in the case of first class prepaid post, on the second day following the day of posting or (if sent overseas by airmail, as appropriate,) on the fifth day following the day of posting; or
  - (C) in the case of facsimile, on acknowledgement of the addressee's facsimile receiving equipment (where such acknowledgement occurs before 1700 hours on the day of acknowledgement) and in any other case on the day following the day of acknowledgement; or

(D) in the case of notice given by electronic mail, when the communication is first stored in the recipient's electronic mail box. The place of receipt of email will be deemed to be the postal address nominated by the recipient for the service of notices.

12.4.3 The particulars for notices of communications to be given to the Principal, until otherwise notified, are set out in the first page of this Agreement and the particulars for notices of communications to NFPAS, until otherwise notified, are:

Address: 4th Floor  
Higham House  
Higham Place  
New Bridge Street West  
Newcastle-upon-Tyne  
NE1 8AN

Telephone Number: 0191-245 7330

Facsimile Number: 0191-245 7331

Attention: Commercial Director

Email address: admin@nfpas.co.uk

## 12.5 Counterparts

This Agreement may be executed in counterparts and by the parties to it on separate counterparts, each of which when so executed and delivered shall be an original, but with the counterparts shall together constitute one and the same instrument.

## 12.6 Waiver

No delay by or omission of any party in exercising any right, power, privilege or remedy under this Agreement shall operate to impair such right, power, privilege or remedy or be construed as a waiver thereof. Any single or partial exercise of any such right, power, privilege or remedy shall not preclude any other or future exercise thereof or the exercise of any other right, power, privilege or remedy. The rights and remedies provided in this Agreement are cumulative and not exclusive of any rights and remedies provided by law.

## 12.7 Variation

No variation to this Agreement shall be effective unless made in writing and signed by or on behalf of the Principal and NFPAS.

## 12.8 Assignment and Transfer

Subject to Clause 12.9, neither party may transfer or assign any of its rights or obligations under this Agreement nor enter into any sub-contracted relationships with any person relating to the performance of its obligations under this Agreement or delegate the performance of any of its obligations under this Agreement without in any case the prior written consent of the other party, such consent not to be unreasonably withheld, with the exception that the Principal reserves the right to assign its rights or obligations under this Agreement by way of security to a bank or financial institution upon giving 14 days' notice to NFPAS.

## 12.9 Agent

The Principal agrees that NFPAS may appoint any person (including Non-Fossil Purchasing Agency Limited) as its agent or contractor to perform all or any of its obligations or exercise all or any of its rights under this Agreement and may subcontract performance of this Agreement to such persons as it sees fit but shall at all times remain liable to the Principal in relation to all such obligations.

## 13. MISCELLANEOUS

### 13.1 Third Party Rights

No term of this Agreement is enforceable under the Contract (Rights of Third Parties) Act 1999 by a person who is not a party to this Agreement.

### 13.2 Relationship of the Parties

Nothing in this Agreement shall create, or be deemed to create, a partnership or the relationship of employer and employee between the parties hereto.

### 13.3 Severance

In the event that any provision of this Agreement (other than Clause 13.4) shall be void or unenforceable by reason of any provision of applicable law, it shall be deleted and the remaining provisions hereof shall continue in full force and effect and if necessary, be so amended as shall be necessary to give effect to the spirit of this Agreement so far as possible.

13.4 **Law**

This Agreement shall be governed by, and construed in all respects in accordance with, English law.