

GUIDANCE NOTES FOR OPERATION AND MAINTENANCE AGREEMENT

1. Introduction

This document is to be used in circumstances where an entity (the “Service Provider”) is to provide services to a third party. Such circumstances may include maintenance of boiler and related heating equipment.

2. Summary of Key Terms

Set out below is a summary of the key terms of the Services Agreement. This is a brief synopsis of those terms and is not a substitute for reading the terms themselves in detail. This document must be carefully tailored to the individual circumstances of each transaction.

Clause reference	Comment
Recitals	Names and details of contracting parties to be inserted here.
Clause 1 – Definitions and Interpretation	This clause sets out the meanings of each of the defined terms used in the agreement. Note that the definition of “Effective Date” needs to be completed to reflect the commercial terms.
Clause 2 – Duration and Supply of Services	This clause sets out the period of time for which the Service Provider will be responsible for the operation and maintenance of the customer’s biomass heating equipment. Clause 2.1 should be amended to reflect the commercial agreement between the parties.
Clause 3 – General Obligations of the Service Provider	This provision sets out the general obligations on the Service Provider. Note that Clauses 3.2 and 3.3 place restrictions on the Service Provider performing services for competitors without the client’s consent. As per drafting note in respect of these provisions, these should only be included where such a restriction reflects the commercial agreement. Obviously, it is not ordinarily in the interests of the Service Provider to enter into such a restriction unless it is compensated by way of a higher price for delivering the Services.
Clause 4 – General Obligations of the Client	This clause sets out the obligations placed upon the Client. These include providing access to the Service Provider, taking precautions to protect health and safety and providing assistance with materials and accurate information required by the Service Provider in order for it to provide the services. This also includes the delivery and storage of sufficient and appropriate fuel.

<p>Clause 5 – Service Charges and Payments</p>	<p>This provision sets out that the client will pay the Service Provider service charges monthly in arrears. Note that this also includes “Additional Costs”, being the face value of spare parts ordered.</p> <p>Clause 5.6 deals with late payment of amounts due.</p> <p>Clause 5.7 permits the Service Provider to increase the price of the Services when it is due to an act or omission of the client. Apart from in accordance with Clause 5.7, service charges may only be revised on a 12 monthly basis.</p> <p>Clause 5.9 – if parties are unable to agree any price increase in accordance with Clause 5.8, either party may terminate the agreement by giving six months’ notice. Until such termination date, the existing prices shall apply.</p> <p>Clause 5.10 – this provision permits the Service Provider to increase the service charges by an amount equal to the increase in the Retail Price Index.</p>
<p>Clause 6 – Failure to provide services in accordance with the terms of the agreement</p>	<p>Clause 6.1 sets out a requirement on the Service provider to deliver monthly service level reports.</p> <p>Clause 6.2 is drafted to provide two options. Careful consideration should be given as to which is the most appropriate option in each circumstance and the alternate option should be deleted. Drafting allows for either termination in the event of the service levels not being met or service credits to be applied as a deduction on any service charges payable.</p>
<p>Clause 7 – Change Control</p>	<p>As described in the drafting notes, this provision deals with changes to the scope or price of the services. Clause 7 provides a mechanism whereby such change requests can be negotiated and implemented if agreed.</p>
<p>Clause 9 – Conduct of Claims</p>	<p>This provision deals with circumstances where a third party makes clear its intention to make a claim against either party which may result in the other party in this agreement being obliged to pay damages under the terms of the agreement.</p>
<p>Clause 10 – Assignments and Successors</p>	<p>Assignment of the benefits and obligations of this agreement is not permitted unless this is a result of an acquisition of either of the contracting parties or as agreed.</p>
<p>Clause 11 - Intellectual Property Rights</p>	<p>Unless agreed otherwise, all intellectual property rights will remain with the Service Provider.</p>
<p>Clause 12 – Confidentiality</p>	<p>This clause stipulates that each party will keep relevant information confidential.</p>
<p>Clause 13 – Force Majeure</p>	<p>This provision deals with circumstances where an “Act of God” outside the control of either party prevents either or both parties from fulfilling their obligations under the terms of this agreement. See drafting note at Clause 13.3 where an appropriate timescale should be inserted to allow the client to terminate the agreement in the event of a force majeure event.</p>

Clause 14 – Service Provider’s Exclusion of Liability	This clause sets out the exclusions on the Service Provider’s liabilities. This includes where the client is in default of any of its payment obligations under the agreement.
Clause 15 – Indemnity, Limitation of Liability and Insurance	These provisions should be reviewed carefully and amended to reflect the commercial agreement between the parties. Note drafting notes in bold italics and square brackets in respect of the limitations on liability and minimum amounts of insurance cover.
Clause 16 – Termination	<p>This clause sets out the circumstances in which this agreement may be terminated.</p> <p>Note that clause 16.1 sets out the levels of non-performance of the Equipment (as a result of the Service Provider not complying with the terms of the O&M Agreement) which are required to trigger a right to terminate.</p> <p>These include insolvency and breach of any material obligation under the agreement. Note that Clause 21 (Dispute Resolution) applies in respect of disputes under the agreement.</p>
Clause 17 – Consequences of Termination – General	This provision sets out the consequences for each party in the event of termination of the agreement.
Clause 18 – Consequences of Termination – Employees	This clause deals with continuing performance of obligations under the agreement prior to termination and also Clause 18.3 deals with treatment of employees upon termination of this agreement in order to ensure compliance with relevant employment legislation.
Clause 21 – Dispute Resolution	Clause 21 deals with the process for resolving disputes between the parties.
Clause 22 – Non Poaching of Staff	This provision restricts the poaching of staff by the Service Provider from the employment of the Client.
Schedule 4	An accurate description of the services to be provided should be included here to the extent there is no manufacturer’s operating manual or any services are additional to those set out in the manual.
Schedule 5 – Implementation Plan	This schedule should be included if there is a need for a long term implementation plan. For instance, if services cannot be delivered in full from day one.