

NHS Forth Valley Healthcare Strategy - Clackmannanshire Community Health Services Project

Full Business Case Addendum

August 2007
Published Version



Foreword

This document presents an update to the Full Business Case (FBC) for the Clackmannanshire Community Health Services Project in Alloa.

The Full Business Case for the project was approved by the NHS Board on the 30th January 2007 and the Scottish Executive Health Department on the 8th March 2007. This addendum was approved by the Director - General Health and Chief Executive NHS Scotland on 13th November 2007.

1 Full Business Case Update

1.1 Introduction

- 1.1.1 The Board, at a meeting in January 2007, agreed that the project to develop a new Community Hospital and Health Centre on the site of the former Sauchie Hospital in Clackmannanshire could proceed to Financial Close. It was also agreed that the delegated authority to conclude the negotiation with the bidder was £2.222 million.
- 1.1.2 The Scottish Executive Health Department approved the Full Business Case on 8th March 2007.
- 1.1.3 Following these approvals the project entered the final stages of negotiations with the preferred bidder Robertson Healthcare (now Robertson Health (Clackmannanshire) Limited).
- 1.1.4 This addendum details amendments to the Full Business Case reflecting the final agreed position at Financial Close on 10th July 2007.

1.2 Summary

- 1.2.1 The following represents a summary of the affordability and value for money positions:

Table 1: Summary Table

| | At Financial Close | January 2007 NHS Board Mt | Variance |
|--|-----------------------|---------------------------|-----------------------|
| Unitary Payment (NHS Board Delegated Limit £2.222 million) | £2.056 million | £1.999 million | £0.057 million |
| Pass Through Costs | £0.173 million | £0.173 million | - |
| Contingency | - | £0.050 million | |
| Affordability Position | £2.229 million | £2.222 million | £0.007 million |

| | | | |
|--|----|-------|-----------------|
| Interest Rates | ■% | ■% | |
| Interest Rate Buffer | | 0.25% | |
| Net Position | ■% | ■% | 0.34% |
| At an average cost of £1.7k per 0.010% increase in rates | | | +£0.057 million |

Value for Money

| | | | |
|--------------------------|---------------------|-----------------|-----------------------|
| Net Present Value of PPP | £ 46.281million | £45.313 million | +£0.968 million |
| Value for Money | 2.89 ¹ % | 4.82% | - 1.93 ¹ % |

- 1.2.2 The Unitary Payment of £2.056 million was settled within the Board Delegated Limit of £2.222 million. However, the total charge, including pass through costs, at Financial Close of £2.229 million was £0.007 million (£7,000) greater an anticipated by the Full Business Case.

¹ Impacted by the increase in Unitary Payment due to interest rate movement

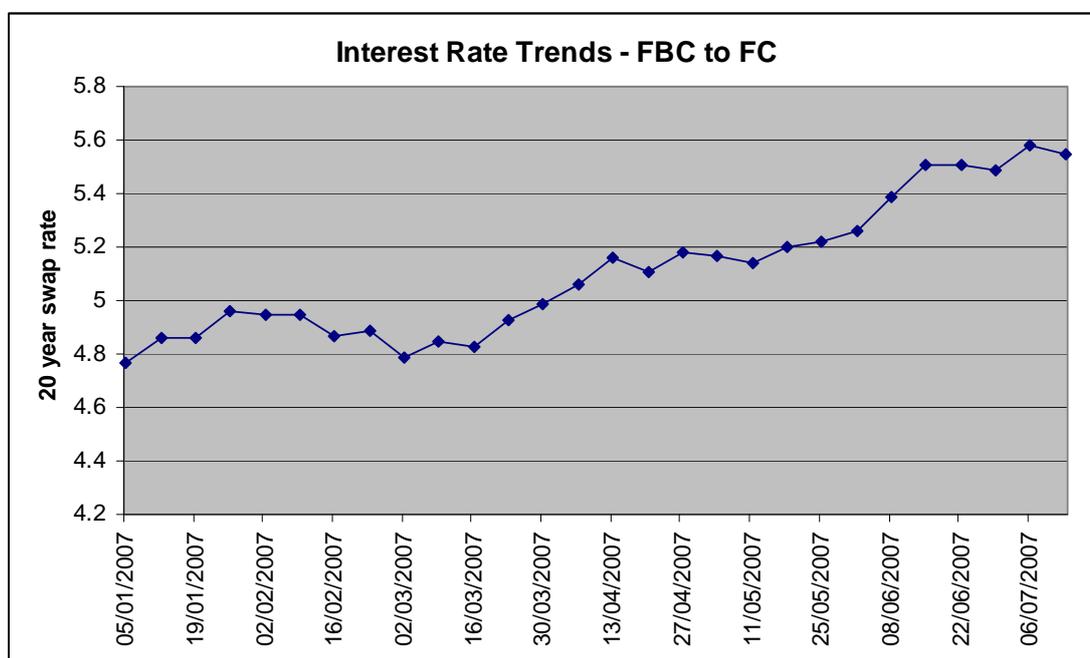
1.2.3 The main reason for the increased Unitary Payment was the continuing upward trend in interest rates, although construction inflation during the period was also higher than anticipated. Interest rates continued to rise beyond the 'buffered' rate assumed at the time of the FBC.

1.2.4 There were no changes to the scope of clinical services, the bidder's costs or service levels which affected the Unitary Charge.

1.3 Interest Rate Movements

1.3.1 The Full Business Case assumed interest rates of █% with a 0.25% buffer giving an effective rate of █%.

1.3.2 Early in April 2007 on the back of announcements regarding the UK economy, interest rates began to firm at a higher level than that assumed for the business case.



1.3.3 The increased interest rates experienced, resulted in an increased Unitary Payment than that assumed at FBC (exclusive of buffer) of £0.100 million. In anticipation of an adverse moving market, provision was made in the FBC (and approved as part of the delegated authority) for an interest rate 'buffer' of 0.25%. This provision helped 'offset' this increase but at the time of Financial Close was insufficient to cover the whole of the increase and an added cost of £0.057 million has resulted.

1.3.4 The table below summarises the position:

Table 2: Interest Rate Movements

| Rates | 'Final Rate' V 'Buffered Rate' | 'Final Rate' V 'Un-buffered Rate' |
|------------------------------------|--------------------------------------|---|
| Interest Rate at Financial Close | ■% ² | ■% |
| Interest Rate in FBC (incl buffer) | ■% | |
| Interest Rate in FBC (excl buffer) | | ■% |
| Increase from FBC | 0.34% | 0.59% |
| At £1.7k per 0.010% | £0.057 million | £0.100 million |

1.4 Contingencies

1.4.1 At the time of the Full Business Case there were a number of areas where further negotiation was required. The Project Team assessed the financial impact of these at £0.050 million and this sum was approved by the Board. All matters were subsequently concluded without the need to incur additional costs and therefore, this sum has also assisted in offsetting the increased Unitary Payment caused by the increases in interest rates, reducing the additional cost to £0.007 million (£7,000).

1.5 Update to Economic Appraisal

1.5.1 Although the Unitary Payment is greater than anticipated by the Full Business Case the project continues to demonstrate Value for Money and PFI as the preferred procurement route.

Table 3: Economic Changes

| Net Present Value | At Financial Close | At FBC |
|-----------------------|--------------------|-----------------|
| NPV (CPAM) | £ 47.658million | £47.607 million |
| NPV (PFI) | £46.281 million | £45.313 million |
| Total Value for Money | £1.376 million | £2.294 million |
| % Value for Money | 2.89% | 4.82% |

1.5.2 The above table demonstrates that the PFI option continues to demonstrate greater value for money than the CPAM option.

²

Note – rate not exactly as per graph as graph represents a “standard” 20-year interest rate swap and actual rate at Financial Close was priced from the debt profile

2 Contract Framework and Payment Mechanism

2.1 Introduction

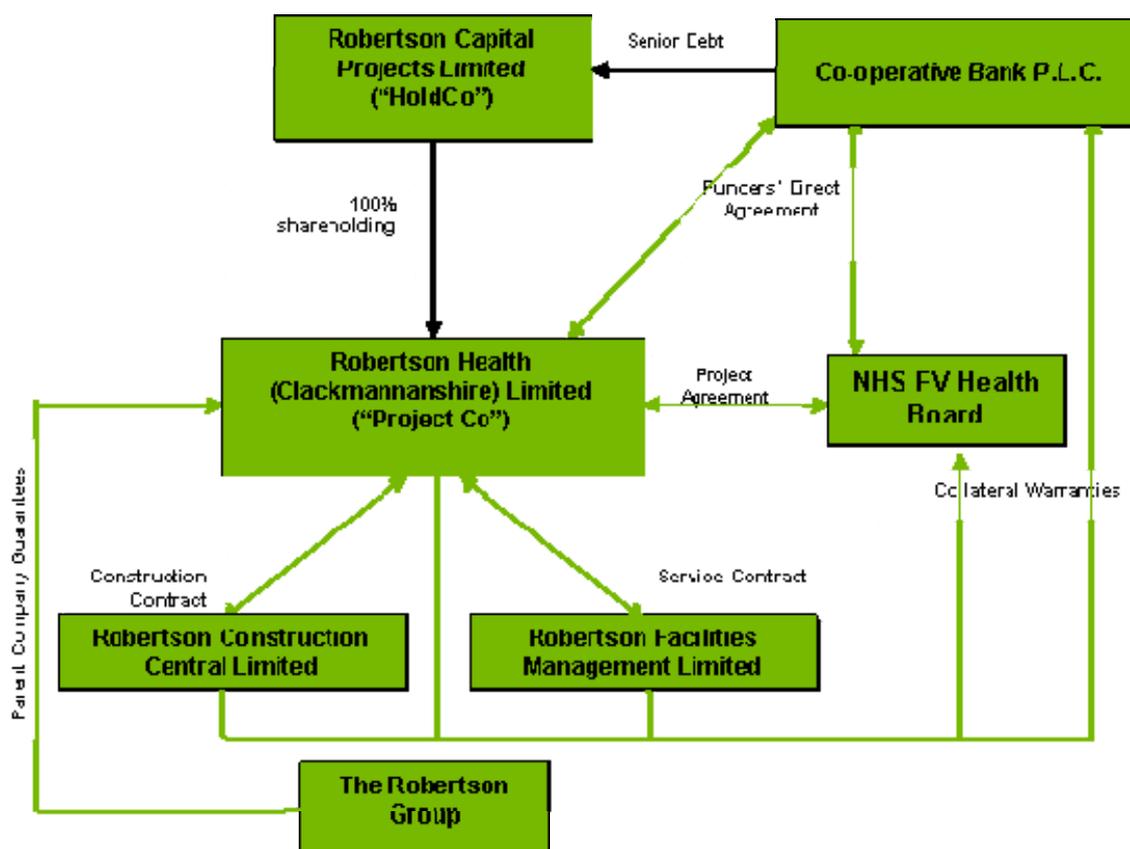
- 2.1.1 The Project Agreement is in the standard form for NHS Project Agreements as issued by the Scottish Executive Health Department. The Board will contract with Robertson Health (Clackmannanshire) Limited for the provision of services (excluding soft facilities management services) related to the new facilities. The Project Agreement will run for a concession period of 30 years including the length of the construction programme.
- 2.1.2 The payment mechanism is structured such that the Board will make a single monthly service payment for all of the Services delivered by Robertson Health (Clackmannanshire) Limited. Underlying the payment mechanism is the philosophy that deductions to the Unitary Payment will be made where Robertson Health (Clackmannanshire) Limited fails to provide the contracted services i.e. no service, no fee.

2.2 Contract structure

As previously said the project is implemented by means of the Standard Form NHS Project Agreements as issued by the Scottish Executive Health Department. This comprises the following key documents:

- 2.2.1 A **Project Agreement** entered into between the Board and Robertson Health (Clackmannanshire) Limited (“Project Co”), a special purpose company established for the project. The standard form Project Agreement has been modified to reflect allowable project-specific matters. A brief summary of the terms of the Project Agreement is set out at Appendix 1.
- 2.2.2 A **Construction Contract** entered into between Project Co and Robertson Construction Central Limited (RCCL), under which RCCL will fulfil Project Co’s obligations under the Project Agreement in relation to the construction works. RCCL’s obligations to Project Co are guaranteed by a Parent Company Guarantee provided by the Robertson Group.
- 2.2.3 A **Service Contract** entered into between Project Co and Robertson Facilities Management Limited (RFM) under which RFM will fulfil the majority of Project Co’s obligations under the Project Agreement in relation to the provision of facilities management and related services. RFM’s obligations to Project Co are guaranteed by a Parent Company Guarantee provided by the Robertson Group.
- 2.2.4 **Senior Funders’ Agreements**, which cover the provision of senior debt funding from the Co-operative Bank P.L.C. to Project Co. These agreements include a Funders’ Direct Agreement (to which the Board is a party), which primarily provides for the senior funders to have step-in rights in circumstances where the Board would otherwise be entitled to terminate the Project Agreement.
- 2.2.5 **Collateral warranties**, giving first the senior funders, and then the Board, step-in rights in circumstances where Project Co would otherwise be entitled to terminate their sub-contracts with RCCL and RFM.
- 2.2.6 An **Independent Tester Contract**, under which an independent tester is appointed to certify completion of the construction works in accordance with pre-agreed criteria.

This contract structure is shown in diagram form below:



3 Derogations from Standard Form Contract

3.1.1 The schedule of derogations is attached at Appendix 2 and is based on the latest version of the standard form Project Agreement made available to NHS Forth Valley (dated 8 August 2006) (the "Standard Form"). This identifies the differences between the Standard Form and the Board's latest draft of the Project Agreement (version PB (3), signed at Financial Close.

This report is divided into five sections as follows:

- Section 1 - Derogations (i.e. items which change the Standard Form for a commercial reason).
- Section 2 - Corrections (i.e. derogations which are typographical or cross referencing corrections, plus changes in terminology to conform the main body of the PA to the payment mechanism being adopted for this project).
- Section 3 - Permitted alternative drafting (i.e. alternatives permitted by standard form by way of square bracketed drafting and/or footnotes).
- Section 4 - Completion of document drafting (i.e. changes to fill in blanks in the Standard Form).
- Section 5 - Project specific changes.

- 3.1.2 The derogations report sets out the final position of the requested derogations, i.e. either approved by the Scottish Executive Health Department (SEHD).

4 Risk

- 4.1.1 The strategy for the management of risk was set out in the FBC and no changes were noted at Financial Close.
- 4.1.2 The Conventional Procurement Assessment Model (CPAM) was reviewed at Financial Close; there were no changes in either the risk allocation or the underlying CPAM costs. The CPAM costs were updated to reflect construction inflation in line with the bid model.
- 4.1.3 The Project Team are developing a risk strategy for the implementation and operational phases of the project. The principles supporting the development of the project risk strategy are to:
- allocate responsibility to a lead person, identified on the risk register, within the Board who is the designated "risk owner"; and
 - ensure that the risk owner identifies and implements the proposed mitigation measures.

5 Accounting Treatment of the PFI Scheme

- 5.1.1 The Board has received an opinion on the accounting treatment of the project from its corporate financial advisers, PwC. The Board's external auditors have reviewed PwC's report and concur with the conclusion that an off balance sheet treatment is appropriate following current guidelines.
- 5.1.2 It is recognised that there may be changes to accounting regulations as a result of the introduction of International Accounting Standards in the public sector in 2008. The implications are being considered nationally.

6 Publication Arrangements

- 6.1.1 In line with SEHD guidance, the approved FBC has already been published excluding any information of a commercial nature. This addendum, similarly redacted, will also be published in line with this guidance including circulation to local councils, main libraries and with the Scottish Parliament.

7 Timetable

7.1.1 The table below summarises the timetable from approval of the FBC to completion of the construction period and the commencement of the operational phase.

Table 4: Project Timetable

| | |
|--|---------------|
| Detailed Planning Consent | December 2006 |
| Approval of Full Business Case (FBC) | January 2007 |
| Scottish Executive Health Department approval of FBC | March 2007 |
| Commencement of Enabling Works | March 2007 |
| Financial Close | July 2007 |
| Practical Completion | November 2008 |
| Service Commencement | December 2008 |

Clackmannanshire Community Health Services Project
Executive Summary of the Project Agreement

Executive Summary of the Project Agreement

1. Introduction

- 1.1 This is an executive summary of the Project Agreement dated 10 July 2007 made between Forth Valley Health Board (“the Board”) and Robertson Health (Clackmannanshire) Limited (“Project Co”). The purpose of this document is to summarise the purpose and key terms of the Project Agreement. This document is not intended to be a fully comprehensive report on all of the terms of the Project Agreement. Review of the precise terms of the Project Agreement should always be undertaken when interpreting the parties’ rights and obligations under it.
- 1.2 The Project Agreement is based on the standard form required to be used by the Scottish Executive Health Department. That standard form has been amended only to the extent required to address project-specific issues, and in consultation with the SEHD.

2. Part A - Preliminary

Part A contains general interpretation clauses (in accordance with Part 1 of the Schedule), the commencement and duration of the Agreement, the parties’ general obligations concerning the Project Documents as well as the parties’ undertakings and obligations in relation to the Project Operations (including a general duty to co-operate).

3. Part B - General Provisions

- 3.1 Clause 6 sets out general obligations of Project Co which are:
- 3.1.1 not to engage in any other business outside of those permitted by the Project Agreement;
 - 3.1.2 to take responsibility for all Project Co Parties; and
 - 3.1.3 ensure compliance with all safety matters throughout the duration of the works and other Project Operations.
- 3.2 Clause 8 contains the indemnities and liabilities between the parties and deals with the management between the parties of any potential third party claims under which an indemnity will be payable from one party to the other. The limits on liability are contained within clause 9.
- 3.3 Project specific provisions were required to deal with the need for grouting works to be carried out to stabilise the site, and therefore the Board entered into a Grouting Works Contract with the Construction Contractor prior to the start of the Project Agreement. This is a separate contract under which the Construction Contractor undertakes the Grouting Works and the Board pays him a fixed fee per tonne of grouting works required. Under the Project Agreement, the Board does not warrant the performance of the Contractor under the Grouting Works Contract to Project Co, so that Project Co takes the risk of the sufficiency of the Grouting Works.

3.4 Limits on the Board's liability regarding Board Data are contained in clause 10, which specifically states that the Board gives no warranty to Project Co in relation to data provided to Project Co during the procurement process.

3.5 The appointment, role and liability of the parties' representatives is contained in this Part as well as the appointment, role and procedures of the Liaison Committee which will be formed of three representatives of the Board and three representatives of Project Co.

4. **Part C - Land Issues**

4.1 In general, this Part deals with the grant of a Licence to and rights of access in favour of Project Co and Project Co Parties throughout the Project Term, the risk allocation as between the parties in relation to the condition of the Site (e.g. ground conditions and contamination), and provisions relating to consents and planning approvals.

4.2 In addition to the normal position, due to the configuration of the site, which is split by a cycle path, Clackmannanshire Council has granted a Licence and Deed of Servitude allowing Project Co to have access over the cycle path intercepting the Site during the Construction and Operational Phase.

5. **Part D - Design and Construction**

5.1 **Design Construction and Commissioning Process**

Clause 17 contains Project Co's responsibilities in carrying out the Works as well as its obligations in terms of design, the monitoring and control of thermal and energy efficiency and compliance with the Board's Construction Requirements (i.e. the Board's specification for the construction of the facilities). The procedure for agreeing Reviewable Design Data (but also see Part 10 of the Schedule) and corporate identity and signage is also contained here.

5.2 **Board Representative's Right of Access**

Clause 18 grants the Board's Representative various rights of access to inspect the conduct of the construction works. Should the Board's Representative find any defects following his or her inspection, the Board may increase the level of monitoring until the Board is satisfied that the defects have been remedied.

5.3 **The Programme and Dates For Completion**

Project Co is to complete the Works by the Completion Date. However, the Board will not be entitled to damages for any delay between the contractual date for completion and the actual completion date. Instead, the Board's remedy is that it is not required to make any payment for the facilities until it has been completed.

5.4 **Independent Tester**

An Independent Tester will inspect the works and determine whether or not it has been completed in accordance with the requirements of the Agreement. If the

works has been so completed, the Independent Tester will issue a Completion Certificate, which will trigger payment of the Unitary Charge by the Board.

5.5 **Commissioning and Completion**

The parties are to agree a “Final Commissioning Programme” for the project which will supersede an initial “Outline Commissioning Programme”. This Programme will detail the steps that are necessary by each party to ensure that commissioning to be undertaken by each party does not delay the overall completion of the construction works.

6. **Part E - Quality Assurance**

This Part details all the quality plans and quality assurance procedures that are to be implemented by Project Co.

7. **Part G - Services**

7.1 Project Co is to provide the Services in accordance with the terms of the Project Agreement and the Method Statements it has provided, so as to ensure that the Service Level Specifications are met. Project Co is also required to co-ordinate the delivery of the Services to ensure no interference with the operations of the Board.

7.2 The parties are to agree an annual Schedule of Programmed Maintenance in accordance with the Review Procedure. There is also a process for the parties to discuss proposals to amend that schedule.

7.3 A 5 Year Maintenance Plan relating to the Estates Service and Grounds and Gardens Maintenance Service will be produced by Project Co and the Board will be entitled to inspect the Facilities to ensure Project Co's compliance.

7.4 Project Co's performance of the Services will be monitored and the Board will be entitled to award Service Failure Points in respect of Project Co failures to meet the Service Requirements (Part 14 of the Schedule). The accrual of Service Failure Points may ultimately lead to the Board issuing Warning Notices, increasing its monitoring and/or taking step-in action.

7.5 There are no transferring staff in this project therefore Clause 30 deals with employee issues if they arise.

7.6 This Part also deals with site security and compliance with Board Policies, Project Co's general obligations regarding employee recruitment and training, as well as the use and standards of any materials and equipment on the site.

8. **Part H - Payment and Financial Matters**

8.1 **Payment**

This Part deals with the invoicing and payment of Monthly Service Payments and the required contents of Monthly Service Payment Statements (monthly reports submitted by Project Co to the Board summarising, among other things, Project Co's performance of the Services). The detailed calculations of payments are set out in the Payment Mechanism (Part 18 of the Schedule).

Any disputes are to be resolved within 15 Business Days of the dispute arising, otherwise the matter will be referred to the Dispute Resolution Procedure.

8.2 **Insurance**

Project Co is to ensure all the Insurances are in place in accordance with Part 21 of the Schedule. The insurance provisions also deal with the treatment of insurance proceeds, and the arrangements to apply in the event that any risks cannot be insured against in the insurance market.

8.3 **Audit Access**

Project Co is to fully co-operate in the provision of information to the Board required under an audit carried out by the Auditor General for Scotland.

9. **Part I - Changes in Law and Variations**

9.1 Project Co is to comply with all changes in law. Clause 39 deals with the allocation of risk between the parties of the financial consequences of a change in law.

9.2 The detail of the Variation Procedure is contained in Part 22 of the Schedule.

10. **Part J - Delay Events, Relief Events and Force Majeure**

10.1 This Part allows for Project Co to request an extension of time for completion of its obligations and/or compensation in the event that various "Delay Events" occur (i.e. events that are outside the control of Project Co).

10.2 The parties are protected against termination of the Project Agreement in the event that they are unable to perform their obligations as a result of a "Relief Event" (generally, an event that is outside the control of both parties, e.g. fires, floods etc).

10.3 Should an event of force majeure occur, there are provisions dealing with relief from the parties' obligations under the Agreement, and the possible termination of the Agreement.

11. **Part K - Termination**

This Part deals with those events or triggers that will automatically or at one party's option terminate the Project Agreement. The effects of termination are also dealt with under this Part, in particular the payment of compensation on termination.

12. **Part L - Miscellaneous**

This Part deals with all other matters such as assignation and sub-contracting, rights to intellectual property, confidentiality and freedom of information, addresses for service of notice and corrupt gifts and payments.

13. **Schedule to the Project Agreement**

The following table sets out the various parts of the schedule to the Project Agreement, together with a description as to the function of the Part.

| Part | Title | Description |
|-------------|---------------------------------|---|
| 1 | Definitions | Contains all definitions used in the Project Agreement and its Schedule. |
| 2 | Completion Documents | Lists all documents that each party produced to the other as condition precedents to Financial Close. |
| 3 | Not used | |
| 4 | Key Works Personnel | Contact details for the Key Works Personnel of Project Co. |
| 5 | Disaster Plan | This part details the Disaster Plan |
| 6 | Funders' Direct Agreement | Sets out the Funders' Direct Agreement |
| 7 | Land Matters | This part contains the Licence by the Scottish Ministers granting access to the Site to Project Co. |
| 8 | Construction Matters | Part 8 sets out in detail "Project Co's Proposals" for the construction of the Facilities. This also deals with safety particulars during the construction phase, the list of items that will be subject to ongoing design development (to take place in conjunction with the Board), the procedure for developing/finalising the Room Data Sheets and the thermal and energy efficiency testing procedure. |
| 9 | The Programme | The Programme itself is an Agreed Form document but this Part also contains information relating to dates for completion of the Project. |
| 10 | Review Procedure | Sets out the process by which Project Co will continue to develop the design of the new buildings, in conjunction with the Board. |
| 11 | Collateral Agreements | Contains the Collateral Agreements for the Service Provider and Contractors. |
| 12 | Outline Commissioning Programme | Details in outline how the commissioning of the project will be completed. |

| Part | Title | Description |
|-------------|------------------------------|---|
| 13 | Equipment | Sets out the respective responsibilities of the parties in relation to various matters relating to Equipment, including specification, selection, procurement, installation, and replacement. |
| 14 | Service Level Specifications | Sets out the obligations of Project Co in relation to the provision of facilities management and other services. This specification is underpinned by the payment mechanism. |
| 15 | Independent Tester Contract | Sets out the Independent Tester Contract |
| 16 | Not used | |
| 17 | Not used | |
| 18 | Payment Mechanism | Determines the calculation of the Monthly Service Payment from the Board to Project Co. In particular, this provides for deductions to be made in respect of performance failures or unavailability of parts of the new hospital buildings. |
| 19 | Financial Model | A spreadsheet providing the base calculations of Project Co's costs and returns, and the amount to be paid by the Board by way of an Annual Service Payment. This may be amended during the Project Term as a result of various matters, including variations. |
| 20 | Not used | |
| 21 | Insurance Requirements | Lists the insurances to be implemented by Project Co against the risks specified together with other details including details of insured parties and limits of indemnities. |
| 22 | Variation Procedure | Procedure to be followed should the Board decide to alter its requirements including notices to be served, estimates to be provided by Project Co, and the calculation of additional payments to be made by the Board. This includes variations classed as "Small Works". |
| 23 | Compensation on Termination | Includes the calculations used to determine the amount of compensation payable by the Board as a result of early termination. |
| 24 | Handback Procedure | Contains the procedure to be followed by the parties prior to the expiry of the Project Term to ensure that the Facilities are handed back to the Board in a condition that complies with the Board's specified requirements. |

| Part | Title | Description |
|-------------|--------------------------------------|--|
| 25 | Record Provisions | Sets out the requirements for the retention of all records specified and for the period stated. |
| 26 | Dispute Resolution Procedure | Sets out the procedure by which disputes that the parties are unable to resolve between themselves will be settled. Such procedures include referral to the Liaison Committee, mediation and referral to an adjudicator. |
| 27 | Project Co Information | Contains company information and contact details for Project Co. |
| 28 | Certificates | Set out the form of various certificates to be issued under the Project Agreement. |
| 29 | Refinancing | Procedure for determining the Board's share and receipt of any financial gains resulting from a refinancing of the project. |
| 30 | Not used | |
| 31 | Not used | |
| 32 | Insurance Proceeds Account Agreement | Sets out the Insurance Proceeds Account Agreement. |
| 33 | Commercially Sensitive | Lists that information which Project Co considers to be commercially sensitive. |

Clackmannanshire Community Health Services Project
Schedule of derogations from SEHD standard form Project Agreement

NHS FORTH VALLEY

CLACKMANNANSHIRE COMMUNITY HEALTH SERVICES PROJECT

DEROGATIONS FROM STANDARD FORM PROJECT AGREEMENT

June 2007 – Updated version dated 04.07.07

Introduction

The table below identifies the derogations, from the standard form project agreement (version 2.1), which NHS Forth Valley sought from SEHD.

Structure of table

The table was divided into a number of sections, to assist with the review of the draft contract. The primary aim of this exercise was to ensure that the material changes to the standard form were contained in the first section of the table. The sections are as follows:

Section 1 – Derogations 'proper', i.e. derogations which propose changes to standard text for a commercial or practical reason

Section 2 – Corrections: derogations which are corrections to drafting only

Section 3 – Permitted Alternative Drafting: alternatives permitted by the standard form (e.g. phasing, interim services)

Section 4 – Completion of document, i.e. changes simply to fill in blanks in the standard form

Section 5 – Project specific changes

| No | Reference | Amendment Made |
|--|---|---|
| Section 1 Derogations that change text for a commercial or practical reason | | |
| 1 | Clause 17 (<i>The Design, Construction and Commissioning Process</i>) | Thermal and energy efficiency requirements: Clauses 17.3, 17.4, 17.4A and 17.4B have been amended – please see the Appendix for proposed drafting. In summary: The principal change has been to introduce a two part test. The first test is carried out at practical completion when the independent tester confirms that the facilities have been designed and built to meet a gigajoule energy use target of 42. the second test is that based on actual use of the facility during the first two years, actual energy use has not exceeded 50 gigajoules. |
| 2 | Clause 32 (<i>Site Security and Personnel Issues</i>) | Clause 32.10(b) – convictions and disciplinary action – “only in the case of potential staff who may reasonably be expected in the course of their employment to have access to children or vulnerable adults are required to complete a police check form are subjected to such checks as may be undertaken by Disclosure Scotland in relation to convictions ”. Disclosure Scotland – means the part of the Scottish Criminal Records Office (or any successor organisation) responsible for issuing certificates (Disclosures) under Part V of the Police Act 1997 or a successor to it. |
| 3 | Clause 32 (<i>Site Security and Personnel Issues</i>) | Clause 32.11 – “Project Co shall procure that no person who discloses any Convictions, or who is found to have any Convictions following the completion of a police check such checks as may be undertaken in terms of Clause 32.10(b) , in either case of which Project Co or a Service Provider is aware of ought to be aware is employed or engaged providing any of the Services without the Board’s prior written consent (such consent not to be unreasonably withheld or delayed).” |
| 4 | Clause 36 (<i>Insurance</i>) | Clause 36.6- subrogation and vitiation: “Project Co shall (a) – procure that all policies of insurance...that the insurers have agreed to waive all rights of subrogation against the Board (and all Board Parties excluding the Board’s agents, contractors and sub-contractors of any tier) (b) – where Project Co is obliged to effect insurance under this Clause, not bring any claim or action against the Board (or any Board Party) excluding the Board’s agents, contractors and sub-contractors of any tier in respect of any loss or damage in circumstances where Project Co could recover such loss or damage under such insurance...” |
| 5 | Clause 66A (<i>No Loss</i>) | New Clause – Where the Board would otherwise be expressly liable to make payment by way of a claim to Project Co including amounts which, in turn, comprise amounts payable to any Sub-Contractors payable by Project Co, the Board shall not be entitled to withhold, reduce or avoid any such payment to Project Co in reliance only on the fact that the amount which is due from Project Co to the Sub-Contractor or the entitlement of the Sub-Contractor to payment of such amount as a result of the circumstances giving rise to the Board’s obligation to pay under such claim, is conditional on the entitlement of, or receipt of payment by Project Co from the Board. |
| 6 | Schedule Part 1 (<i>Definitions</i>) | “Contract Month” – amended to deal with the ‘short’ months at the start and end of the Operational Term. |

| No | Reference | Amendment Made |
|----|--|--|
| 7 | Schedule Part 23 (<i>Compensation on Termination</i>) | <p>Section F: <i>Definitions</i></p> <p>“Deemed New Agreement” – means an agreement on the same terms and conditions as this Agreement, as at the Termination Date, but with the following amendments:</p> <p><u>(a)</u> W if this Agreement is terminated prior to the Actual Completion Date, then the {Longstop Date} shall be extended by a period to allow a New Project Co (had one been appointed) to achieve the Actual Completion Date prior to the Longstop Date;</p> <p><u>(b)</u> X any accrued {Performance Service Failure Points} <u>and outstanding Warning Notices</u> shall be cancelled; and</p> <p>(e) the term of such agreement shall be for a period equal to the term from the Termination Date to the Expiry Date.</p> |

| No | Reference | Amendment Made |
|---|---|--|
| Section 2 Corrections to Drafting Only | | |
| 1 | Clause 8 (<i>Indemnities and liability</i>) | Clause 8.7(h) – no longer a separate bullet point; forms part of the main body of Clause 8.7. |
| 2 | Clause 14 (<i>Nature of Land Interest</i>) | Clause 14.2© – exercise <u>exercising</u> the Ancillary Rights, |
| 3 | Clause 17 (<i>design, Construction and Commissioning Process</i>) | Clause 17.1 – <u>(i)</u> (e) the fact that Project Co has complied with Project Co's Proposals shall not be a defence to an allegation that Project Co has not satisfied the Board's Construction Requirements; and <u>(ii)</u> (e) the fact that Project Co has satisfied the Board's Construction Requirements shall not be a defence to an allegation that Project Co has failed to comply with Project Co's Proposals. |
| 4 | Clause 25 (<i>Quality Assurance</i>) | Clause 25.2 – The quality management systems referred to in Clause 25.1 above shall be reflected in appropriate quality plans, the standard of which shall be consistent with BS EN ISO 9001 or any equivalent standard which is generally recognised as having replaced them (or either of them). |
| 5 | Clause 32 (<i>Site Security and Personnel Issues</i>) | Clause 32.18 – Health requirements – “Project Co shall procure that all potential employees or persons who may otherwise perform any of the Services (other than Transferring <u>Employees Staff</u>) undergo...” |
| 6 | Clause 36 (<i>Insurance</i>) | 36.20D – 36.20E – reinstatement plan – references to Reinstatement Plan changed to Original Reinstatement Plan. |
| 7 | Clause 36 (<i>Insurance</i>) | Clause 36.24 – in respect of increases <u>changes</u> in insurance premium sum the provisions of Part [4] of Part 21 of the Schedule shall apply. |
| 8 | Schedule Part 1 (<i>Definitions</i>) | Fire Risk Assessment - <u>means the assessment required under sections 54 and 55 of the Fire (Scotland) Act 2005</u> <u>Fire Safety Legislation - means the Fire (Scotland) Act 2005 and the Fire Safety (Scotland) Regulations 2006 (SSI 2006/456)</u> |
| 9 | Schedule Part 1 (<i>Definitions</i>) | “Permitted Borrowing” - Part (e) – incorporated into body of definition |
| 10 | Schedule Part 1 (<i>Definitions</i>) | “Procurement Legislation” - means the Public Works Contracts (Scotland) Regulations 1991 (SI 1991/2680), the Public Supply Contracts Regulations 1995 (SI 1995/201), the Public Service Contracts Regulations 1993 (SI 1993/3228) <u>Public Contracts (Scotland) Regulations 2006 (SI No. 2006/1)</u> and any other legislation or rules which may from time to time regulate the procurement activities of the Board |
| 11 | Schedule Part 1 (<i>Definitions</i>) | “Transfer Regulations” - means the Transfer of Undertaking (Protection of Employment) Regulations 1984 <u>2006</u> (SI No. 4794 <u>2006/246</u>) |
| 12 | Schedule Part 23 (<i>Compensation on Termination</i>) | Section F: <i>Definitions</i> “Senior Debt Amount” – means the Revised Senior Debt Termination Amount <u>or</u> the Base Senior Debt Termination Amount as relevant |

| No | Reference | Amendment Made |
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| Section 3 Permitted Alternate Drafting | | |
| 1 | Clause 4 (<i>Project Documents</i>) | Clause 4.3 (<i>Changes to Funding Agreements and Refinancing</i>) – “No amendment, waiver or exercise of a right under any Funding Agreement or Ancillary Document shall have the effect of increasing the Board’s liabilities on early termination of this Agreement unless”: (a) Project Co has obtained the prior written consent of the Board to such increased liability for the purposes of this Clause 4.3 ; or (b) it is an Additional Permitted Borrowing |
| 2 | Clause 14 (<i>Nature of Land Interests</i>) | Clause 14.5(b) - Restriction of requirement for Project Co to procure that there shall be no action, or omission to act by Project Co or a Project Co Party which shall give rise to a right for any person to obtain title to the Site or any part of it. |
| 3 | Clause 17 (<i>The Design, Construction and Commissioning Process</i>) | Clause 17.5(d): New sub-clause “ Notwithstanding Clauses 17.5(b) and (c), Project Co shall be responsible for ensuring that all such hoarding, site boards, plaques and/or other signage complies with all relevant guidance issued to NHS Boards by the Scottish Executive, including "Identikit" issued by the Scottish Executive in June 2001. ” |
| 4 | Clause 36 (<i>Insurance</i>) | Clauses 36.12 - uninsurable risks – new clause |
| 5 | Clause 36 (<i>Insurance</i>) | Clauses 36.13 – unavailability of terms – new clause |
| 6 | Clause 44 (<i>Project Co events of default</i>) | Clause 44.1(a)(v) – deleted (insolvency events analogous to events set out in Clauses 44.1(a)(i)-(iv) in other jurisdictions). |
| 7 | Clause 52 (<i>Confidentiality</i>) | Clause 52 replaced. |
| 8 | Clause 52A (<i>Freedom of Information</i>) | New Clause 52A |
| 9 | Schedule Part 1 (<i>Definitions</i>) | “Commercially Sensitive Information” – new definition |
| 10 | Schedule Part 1 (<i>Definitions</i>) | “Confidential Information” – new definition |
| 11 | Schedule Part 1 (<i>Definitions</i>) | “Environmental Information (Scotland) Regulations” - new definition |
| 12 | Schedule Part 1 (<i>Definitions</i>) | “Fees Regulations” - new definition |
| 13 | Schedule Part 1 (<i>Definitions</i>) | “FOISA” - new definition |
| 14 | Schedule Part 1 (<i>Definitions</i>) | “Information” - new definition |

| No | Reference | Amendment Made |
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| 15 | Schedule Part 1 (Definitions) | “Permitted Borrowing” – part (d) - interest and, in respect of the initial <u>original Senior</u> Funding Agreements only (<u>as entered into at the date of this Agreement</u> prior to any subsequent amendment), other amounts accrued or payable under the terms of <u>such original</u> Senior Funders Agreements, |
| 16 | Schedule Part 1 (Definitions) | “Requests for Information” - new definition |
| 17 | Schedule Part 1 (Definitions) | “RPI” – amended definition |

| No | Reference | Amendment Made |
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| Section 4 Completion of Drafting | | |
| 1 | Clause 5 (<i>Project Operations</i>) | Name of Board Inserted |
| 2 | Clause 7 (<i>Warranties</i>) | No warranties by either Party save as expressly set out in Agreement. |
| 3 | Clause 10 (<i>Board's Data</i>) | Deletion of references to Clause 7 (<i>Warranties</i>) in Clauses 10.1, 10.2 and 10.3. |
| 4 | Clause 13 (<i>Disaster Plan</i>) | Disaster plan set out in the Part 5 of the Schedule (Disaster Plan) |
| 5 | Clause 15 (<i>The Site</i>) | Clauses 15.2 - Deletion of reference to Clause 7 (<i>Warranties</i>) |
| 6 | Clause 22 (<i>Pre-Completion Commissioning and Completion</i>) | Clause 22.4 – The Parties shall procure that the steps that they are responsible for carrying out and completing pursuant to the Final Commissioning Programme include, in the case of Project Co's activities, the activities described at [] of the Board's Construction Requirements Project Co's Proposals . |
| 7 | Schedule Part 1 (<i>Definitions</i>) | "Construction Phase" means the period of the Project Term during which the Works are being carried out |
| 8 | Schedule Part 1 (<i>Definitions</i>) | "Facilities Manager" – new definition: means Project Co's duty manager who shall be present at the Facilities in accordance with the Service Level Specifications |
| 9 | Schedule Part 1 (<i>Definitions</i>) | "Junior Debt" has the meaning given in Section F of Part 23 of the Schedule (Compensation on Termination) |
| 10 | Schedule Part 1 (<i>Definitions</i>) | "Patient Rights and Responsibilities" - new definition: means [the document entitled "The NHS and You" issued by the Scottish Executive Health Department on [X]] |
| 11 | Schedule Part 23 (<i>Compensation on Termination</i>) | Section F: <i>Definitions</i> "Junior Debt" means all of the debt, as the context requires, to the extent properly incurred by Project Co pursuant to the Subordinated Funding Agreements and which is subordinated to the Base Senior Debt Termination Amount or the Revised Senior Debt Termination Amount as the case may be. |
| 12 | Schedule Part 23 (<i>Compensation on Termination</i>) | Section F: <i>Definitions</i> "Senior Funders Agreements" means one of the Funding Agreements being the agreement so named between Project Co and the Senior Funders for the provision of senior finance to Project Co in the agreed form. |

| No | Reference | Amendment Made |
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| Section 5 Project Specific Changes | | |
| 1 | Clause 5 (<i>Project Operations</i>) | Clause 5.2 (General Standards) "Project Co shall at its own cost be solely responsible for procuring that the Project Operations are at all times performed: (a) in compliance with all law and, subject to Clause 16 (Consents and Planning Approval) , Consents... |
| 2 | Clause 5 (<i>Project Operations</i>) | New clause 5.3(e):- ensure that on or before Financial Close any live services and/or utilities on the Site, other than (i) High Voltage Cables, (ii) Gas Main (iii) Fire Hydrant and (iv) the services associated with the Lodge House all identified on plan [X], are terminated as required by Law and Good Industry Practice so as to enable ProjectCo to carry out its obligations under this Agreement. |
| 3 | Clause 5 (<i>Project Operations</i>) | New clause 5.3(f):- warrant that the Demolition Contractor has complied with the Demolition Contract other than the Demolition Contract Carve Outs. |
| 4 | Clause 8 (<i>Indemnities and Liabilities</i>) | New clause 8.1A:- Project Co shall indemnify and keep the Scottish Ministers indemnified at all times from and against all Direct Losses sustained by the Scottish Ministers in consequence of any physical loss of or damage to the Site arising by reason of any act or omission of Project Co or any Project Co Party, save to the extent that such loss or damage arises out of the breach of any express provision of this Agreement by the Board or any Board Party or any deliberate act or omission of the Board or any Board Party. |
| 5 | Clause 9 (<i>Limits on Liability</i>) | New clause 9.6: " Project Co acknowledges that the Board does not warrant the performance of the Contractor under the Grouting Works Contract. |
| 6 | Clause 15 (<i>The Site</i>) | Clause 15.2(b) - be responsible for, and hold the Board harmless from, cleaning up and/or otherwise dealing with any Contamination at the Site so that it shall at all times comply with its obligations under this Agreement including (without limitation) complying with, at its own cost, any applicable Laws and subject to the terms of Clause 16 any Consents, orders, notices or directions of any regulatory body (whether made against the Board or Project Co). |

| No | Reference | Amendment Made |
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| 7 | Clause 15 (<i>The Site</i>) | <p>Clause 15.3:-</p> <p>To the extent that unforeseen ground conditions (and/or Contamination) exist in any parts of the Site which are under existing buildings as at Financial Close and which it is not practical for Project Co to investigate or survey <u>part of the Ward 4 Area</u>, Project Co shall not be responsible for them, unless they were discovered by the Ground Physical and Geophysical Investigation and accordingly identified in Section 3 of Part 8 of the of Schedule (Construction Matters) or unless they should reasonably have been discoverable if the Ground Physical and Geophysical Investigation had been properly carried out. If Project Co is not responsible for such ground conditions and/or Contamination under this Clause 15.3 then the Board shall be so responsible. The areas to which this Clause 15.3 applies are as follows: [] :-</p> <p><u>(iii) they were discovered by the Ground Physical and Geophysical Investigation; or</u></p> <p><u>(iv) they should reasonably have been discoverable if the Ground Physical and Geophysical Investigation had been properly carried out; or</u></p> <p><u>(v) unforeseen ground conditions or contamination exist as a result of failure by the contractor to carry out its obligations under the Grouting Works Contract in accordance with the Grouting Works Contract.</u></p> <p><u>If Project Co is not responsible for such ground conditions and/or Contamination under this Clause 15.3 then the Board shall be so responsible.</u></p> |
| 8 | Clause 16 (<i>Consents and Planning Approval</i>) | Clauses 16.2 – 16.5 – New provisions relating to maintenance of listed boundary walls and preservation of gate piers |
| 9 | Clause 21 (<i>Equipment</i>) | Insertion of Project Specific wording – <u>Project Co and the Board shall procure, supply, install, maintain and renew all Equipment identified as is responsibility in accordance with Part 13 of the Schedule.</u> |
| 10 | Clause 22 (<i>Pre-Completion Commissioning and Completion</i>) | <p>Clause 22.13 – insertion –</p> <p>The Independent Tester shall issue the Certificate of Practical Completion in relation to a Phase notwithstanding that there are Snagging Matters. Where there are Snagging Matters, the parties shall procure that the Independent Tester shall, within [] <u>two (2)</u> Business Days of the date of issue of the relevant Certificate of Practical Completion, <u>prepare and</u> issue a Snagging Notice which shall specify the Snagging Matters and an estimate of the cost of rectifying such Snagging Matters.</p> |
| 11 | Clause 22 (<i>Pre-Completion Commissioning and Completion</i>) | Clause 22.14 – replacement of “Board’s Post Completion Commissioning” with Board’s <u>commissioning and start up procedures</u> ”. |
| 12 | Clause 22 (<i>Pre-Completion Commissioning and Completion</i>) | Clause 22.17 – additional obligation on Project Co to provide Board with <u>the appropriate section of any health and safety file together with all as-built drawings and maintenance manuals and results of technical commissioning.</u> |
| 13 | Clause 23 (<i>Post-Completion Commissioning</i>) | Deletion of Clauses 23.1 - 23.4 |

| No | Reference | Amendment Made |
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| 14 | Clause 25 (<i>Quality Assurance</i>) | Clause 25.8(c):- Board's Construction Requirements and/or Board's the Service Requirements <u>Level Specifications</u> (as the case may be); |
| 15 | Clause 29 (<i>Monitoring of Performance</i>) | Clause 29.5:- Without prejudice to the Board's rights under Clause 44 (Project Co Events of Default) and to any other express rights under this Agreement, if Project Co receives { <u>three</u> or more Warning Notices in any { <u>rolling three month</u> period in respect of any <u>one</u> Service, the Board may by notice to Project Co increase the level of its monitoring of Project Co, or (at the Board's option) of Project Co's monitoring of its own performance of its obligations under this Agreement, in respect of the relevant Service, in which case, the following provisions shall apply until such time as Project Co shall have demonstrated to the reasonable satisfaction of the Board that it will perform (and is capable of performing) its obligations under this Agreement: |
| 16 | Clause 30 (<i>TUPE and Employment Matters</i>) | Standard form v2.1 "no TUPE" wording, subject to deletion of Clause 30.11, which relates to Market Testing, and substitution of Relevant Service Transfer by Actual Completion Date. |
| 17 | Clause 31 (<i>Pension Matters</i>) | Deleted |
| 18 | Clause 34 (<i>Value or Market Testing</i>) | Deleted |
| 19 | Clause 35 (<i>Payments</i>) | Clause 35.2 – Provisions setting out invoicing and payments arrangements have been inserted. |
| 20 | Clause 36 (Insurance) | Clause 36.18 – All insurance proceeds received by Project Co under the insurances referred to in { of Part 1 and { <u>paragraph 1 of Section 1 and paragraph 1 of Section 2</u> of Part 2 ⁴⁴² and of Part 21 of the Schedule (<i>Insurance Requirements</i>) shall be paid into the Insurance Proceeds Account and shall be applied in accordance with this Agreement and in accordance with the Insurance Proceeds Accounts Agreement. |
| 21 | Clause 37 (<i>Custody of financial model</i>) | Clause 37.1 – Changed from obligation on Project Co to deliver 2 copies of Financial Model to Custodian, to requirement for Board to have custody of the Financial Model: "Immediately after execution of this Agreement, Project Co shall deliver two (2) copies of the Financial Model to the Custodian (both on disc and in hard copy) to be held in custody in accordance with the provisions of the Custody Agreement <u>Board</u> . Clauses 37.4, 37.5 – consequential changes in light of arrangements set out in Clause 37.1. |
| 22 | Clause 44 (<i>Project Co events of default</i>) | Clause 44.3 (c) – in the case of any Project Co Event of Default referred to in Clause 44.1(i) (Service Failure Points), if Project Co is awarded { <u>1,710</u> or more further (Service Failure Points) (Warning Notices) in the following { <u>six</u> month period, terminate this Agreement in its entirety by notice in writing having immediate effect. |

| No | Reference | Amendment Made |
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| 23 | Clause 44 (<i>Project Co events of default</i>) | Clause 44.6 - The Board may, in its discretion, require Project Co by written notice to terminate any <u>the provision of any Service pursuant to any relevant</u> Service Contract or procure the termination of any Sub- <u>the provision of any Service pursuant to any relevant Sub-</u> Contract (as the case may be) in respect of any relevant Market Tested Service and appoint a replacement Service Provider or procure the appointment of that a replacement Sub-Contractor <u>is appointed</u> in accordance with Clause 50 (Assignment, sub-contracting <u>Sub-Contracting</u> and Change in Control) to provide all those parts of the Services which were performed pursuant to the previous Service Contract or Sub-Contract: (a) Sub-Contract within sixty (60) Business Days; as an alternative to termination of this Agreement <u>or part thereof</u> pursuant to the provisions of Clause 44.5 in any circumstance <u>circumstances</u> in which the Board could exercise such power; or |
| 24 | Clause 50 (<i>Assignment, sub-contracting and changes in control</i>) | Clause 50.9 – deleted |
| 25 | Clause 52 (<i>Confidentiality</i>) | Clause 52.2(g)(ii) (per Standard Form Version 3) deleted; (and para (i) incorporated into body of sub-clause 52.2(g)). |
| 26 | Schedule Part 1 (<i>Definitions</i>) | “Additional Permitted Borrowing” - means on any date, the amount equal to any amount of principal outstanding under the Senior Funders <u>ing</u> Agreements <u>(as the same may from time to time be amended, whether or not with the approval of the Board)</u> in excess of the amount of principal scheduled under the Senior Funders <u>ing</u> Agreements at Financial Close to be outstanding at that date, but only to the extent that: (i) (i) <u>(i)</u> this amount is less than or equal to the Additional Permitted Borrowings Limit; and (ii) (ii) <u>(ii)</u> in respect of any Additional Permitted Borrowing the Agent <u>(as defined in the Funders' Direct Agreement)</u> is not in material breach of its obligations under Clause 10.4.3 of the Funders' Direct Agreement as it applies to such Additional Permitted Borrowing, and provided further that any such excess amount of principal which is <u>(1) invested as part of any Qualifying Variation; or (2) outstanding from time to time as a result of any drawing under the Senior Funding Agreements as entered into at the date of this Agreement, disregarding any subsequent amendment; or (3) outstanding from time to time as a result of any amendment to the Senior Funding Agreements in respect of which the Board has agreed that its liabilities on a termination may be increased pursuant to Clause 4.3 (a), shall not be counted as an</u> Additional Permitted Borrowing |
| 27 | Schedule Part 1 (<i>Definitions</i>) | “Ancillary Rights” has the meaning given in Section 2 of Part 7 of the Schedule (Land Matters) |

| No | Reference | Amendment Made |
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| 28 | Schedule Part 1 (Definitions) | "Board Party" – means any of the Board's agents, contractors and sub-contractors of any tier, lessees or licensees and its or their directors, officers and employees and/or other healthcare providers at the Facilities with the authority of the Board but excluding Project Co, any Project Co Party and statutory undertakers and utilities and "Board Parties" shall be construed accordingly |
| 29 | Schedule Part 1 (Definitions) | <p>Clinical Functionality - means</p> <p>(c) the following matters as shown on the [1:500 scale development control plan]:</p> <p>(i) the points of access to and within the [development site]Site and to the [buildings]Facilities;</p> <p>(ii) the relationship between one or more [the buildings] that comprise the [development]Facilities; and</p> <p>(iii) the adjacencies between the different Hospital departments [referenced to a functional areas within the Facilities as set out in L(06)001 included in Section 4 of Schedule Part 8 and as referenced in Section 9 of Schedule Part 8;</p> <p>(d) the following matters as shown on the [1:200/4:100 scale plans]—(referenced to a list of [scale L(05) series plans included in Section 4 of Schedule Part 8 and as referenced in Section 9 of Schedule Part 8 in Project Co's Proposals for example];</p> <p>1 the points of access to and within the [development site]Site and to the [buildings]Facilities;</p> <p>2 the relationship between one or more [the buildings];² that comprise the Facilities; and</p> <p>(i) (iii)- the adjacencies between different Hospital departmentsthe different functional areas within the Facilities as set out in the above drawings; and</p> <p>(ii) (iv)- the adjacencies between rooms within the Hospital departmentsfunctional areas;</p> <p>(e) the quantity, description and areas (in square metres) of those rooms and spaces shown on the [Schedules]Schedule of Accommodation};</p> <p>(f) the location and relationship of equipment, furniture, fittings and user terminals as shown on the [1:50 loaded room C(RL) series drawings and L(7-) series and as referenced in Section 9 of the Schedule Part 8 all in respect of:</p> <p>1. all bed and trolley positions; and</p> <p>2. internal room elevations; ;</p> <p>(iii) — actual ceiling layouts; and</p> <p>(iv) — [other project specific requirements might need to be considered, for example with regard to theatres and imaging departments]; and</p> <p>(e) — The location of and the inter-relationships between rooms within a department as shown on [—] scale drawings,</p> <p>but only insofar as each of the matters listed in (a) to (d) above relate to or affect Clinical Use</p> |
| 30 | Schedule Part 1 (Definitions) | Commissioning End Date – deleted. |

| No | Reference | Amendment Made |
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| 31 | Schedule Part 1 (Definitions) | “Consents” - means all permissions, consents, approvals, certificates, permits, licences, statutory agreements and authorisations required by Law, and all necessary consents and agreements from any third parties (including, without limitation, any Planning Permission or Diversion Order), needed to carry out the Project Operations in accordance with this Agreement |
| 32 | Schedule Part 1 (Definitions) | Contract Year – means means the period of twelve (12) calendar months commencing on and including 1 April and each subsequent period of twelve (12) calendar months commencing on 1 April, provided that:- (a) the first Contract Year shall be such period as commences on and includes the date of this Agreement and each subsequent period of twelve (12) calendar months commencing on each anniversary of the date of this Agreement, provided that and ends on the immediately following 31 March; and (b) the final Contract Year shall be such period as commences on and includes the anniversary of the date of this Agreement 1 April that falls in the year in which this Agreement expires or is terminated (for whatever reason) and ends on and includes the date of expiry or earlier termination of this Agreement (as the case may be) |
| 33 | Schedule Part 1 (Definitions) | “Demolition Contract” - means the demolition contract between the Board and David Morton (Larbert) Ltd dated around 8 February 2005 “Demolition Contract Carve Outs” - means:- (a) failure to remove some demolition materials; (b) failure to demolish and remove all roads on the Site and all ductwork under those roads; (c) failure to demolish and remove any part of the secondary retaining wall on the Site; and (d) failure to demolish and remove the fire hydrant on the Site. “Demolition Contractor” - means David Morton (Larbert) Ltd (registered under number SCO59245) |
| 34 | Schedule Part 1 (Definitions) | “Disclosed Data” - means any Design Data and any other written information, data (including to avoid doubt the excel spreadsheet provided for the purpose of modelling the impact of the provisions of Schedule 18) and documents (including, to avoid doubt, data and documents concerning the Title Deeds and any rights of any person in respect of the Site but excluding information contained in the First Employee List or any subsequently updated version of that list) made available or issued to Project Co or any Project Co Party in connection with the Project by or on behalf of the Board (or any Board Party) whether before or after the execution of this Agreement |
| 35 | Schedule Part 1 (Definitions) | “Disclosure Scotland” - means the part of the Scottish Criminal Records Office (or any successor organisation) responsible for issuing certificates (Disclosures) under Part V of the Police Act 1997 or any successor to it. |
| 36 | Schedule Part 1 (Definitions) | “Diversion Order” - new definition: means “The Clackmannanshire Council (Various Footways and Footpaths, Sauchie) (Temporary Redetermination of Means of Exercise of Public Right of Passage) Order 2007 |
| 37 | Schedule Part 1 (Definitions) | Equipment - means the equipment identified in Part 13 of the Schedule (Equipment) |
| 38 | Schedule Part 1 (Definitions) | Gate Piers, Listed Boundary Walls and Lodge Site. |

| No | Reference | Amendment Made |
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| 39 | Schedule Part 1 (Definitions) | “Hospital” and “Hospital Manager” deleted |
| 40 | Schedule Part 1 (Definitions) | “Hospital Facilities” - has the meaning given in Part 18 of the Schedule (Payment Mechanism) |
| 41 | Schedule Part 1 (Definitions) | All definitions relating to Market Testing deleted |
| 42 | Schedule Part 1 (Definitions) | “Permitted Borrowing” - Deletion of Part (c) of the definition. |
| 43 | Schedule Part 1 (Definitions) | “Project Co Equipment” - means the Equipment, to the extent that Project Co is responsible for maintaining and/or replacing such Equipment pursuant to the Equipment Responsibilities Matrix |
| 44 | Schedule Part 1 (Definitions) | “Project Co Post Completion Commissioning” deleted |
| 45 | Schedule Part 1 (Definitions) | “Security Trustee” means - means The Co-operative Bank plc or such other party as may be appointed to perform the role of security trustee pursuant to the Senior Funding Agreements from time to time |
| 46 | Schedule Part 1 (Definitions) | “Service Failure” - has the meaning given in paragraph [] of means a Performance Failure and/or an Unavailability Event, as each item is defined in Part 18 of the Schedule (Payment Mechanism) |
| 47 | Schedule Part 1 (Definitions) | “Service Failure Points” - Means the points awarded in accordance with the provisions has the meaning given in Part 18 of the Performance Monitoring System Schedule (Payment Mechanism) |
| 48 | Schedule Part 1 (Definitions) | “Service Payments” - has means Annual Service Payment or Monthly Service Payment (each having the meaning given in Part 18 of the Schedule (Payment Mechanism)), as the context requires |
| 49 | Schedule Part 1 (Definitions) | “Service Payment Statement” - New definition: means the service payment statement to be submitted by Project Co in accordance with the requirements of the Performance Monitoring System |
| 50 | Schedule Part 1 (Definitions) | “Service Statements” - deleted |

| No | Reference | Amendment Made |
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| 51 | Schedule Part 1 (Definitions) | <p>“Site Interruption Event” – means</p> <p>A. any action, or damage caused, by the utility provider in exercising its rights on or after the Commencement Date relative to the following:-</p> <p>(1) Servitude by Glen Alva Limited in favour of Scottish Power plc dated 26 February and recorded GRS (Clackmannan) 13 March both 1992 referred to in paragraph 10.1.5 of Part 4 of the Schedule to the Certificate of Title;</p> <p>(2) Servitude by Glen Alva Limited in favour of British Gas Corporation dated 2 July and recorded GRS (Clackmannan) 1 August 1980 referred to at paragraph 10.1.6 of Part 4 of the Schedule to the Certificate of Title;</p> <p>(3) Servitude by Clackmannan District Council in favour of Scottish Power plc dated 29 July and recorded GRS (Clackmannan) 5 August both months in 1992 referred to in paragraph 10.1.4 of the Schedule to the Certificate of Title; and</p> <p>(4) Servitude by Clackmannanshire Council in favour of Scottish Power plc dated 13 June 1998 and recorded GRS (Clackmannan) 17 March 1999 referred to in paragraph 10.1.14(c) of Part 4 of the Schedule to the Certificate of Title</p> <p>B. the exercise by any third party on or after the Commencement Date of any right of access to the Lodge Site and other associated rights being the Reservations as defined in the Licence;</p> <p>C. the exercise of any rights to work the coal and other minerals by any third party at the Site on or after the Commencement Date;</p> <p>D. the exercise or enforcement by any third party of the rights contained in the following between the Commencement Date and the Completion Date:-</p> <p>(1) Disposition by British Railways Board to Glen Alva Limited recorded GRS (Clackmannan) 7 March 1979 referred to at paragraph 10.1.11(a) of Part 4 of the Schedule to the Certificate of Title;</p> <p>(2) Disposition by British Railways Board in favour of Clackmannan District Council dated 29 March and recorded GRS (Clackmannan) 20 April both 1982 referred to at paragraph 10.1.11(b)(i) as far as it refers to paragraph 10.1.10(a) of Part 4 of the Schedule to the Certificate of Title;</p> <p>(3) Disposition by Marshall Construction Limited to Beatsons Building Supplies Limited recorded GRS (Clackmannan) 11 May 1992 referred to at paragraph 10.1.12(d)(ii) of Part 4 of the Schedule to the Certificate of Title;</p> <p>(4) Disposition by British Coal Corporation in favour of Clackmannan District Council recorded GRS (Clackmannan) 25 April 1991 referred to at paragraph 10.1.13(b)(iii) of Part 4 of the Schedule to the Certificate of Title; and</p> <p>Agreement, or obtaining access to the Site in accordance with the terms of this Agreement and the Licence</p> |

| No | Reference | Amendment Made |
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| 51 | Cont'd | <p>(5) Disposition by British Railways Board in favour of Clackmannanshire District Council recorded GRS (Clackmannan) 26 August 1985 referred to at paragraph 10.1.14(a) in so far as it refers to paragraph 10.1.9(a) of Part 4 of the Schedule to the Certificate of Title;</p> <p>E. the exercise or enforcement by any third party of the rights contained in the following on or after the Commencement Date: -</p> <p>(1) Disposition by British Railways Board to Glen Alva Limited recorded GRS (Clackmannan) 7 March 1979 in relation to all servitudes and rights of wayleave referred to at paragraph 10.1.9(a) of Part 4 of the Schedule to the Certificate of Title;</p> <p>(2) Disposition by British Railways Board in favour of Clackmannan District Council dated 29 March and recorded GRS (Clackmannan) 20 April both 1982 referred to at paragraph 10.1.10(a) of Part 4 of the Schedule to the Certificate of Title;</p> <p>(3) Disposition by Glen Alva Limited in favour of Clackmannan District Council recorded GRS (Clackmannan) 15 May 1992 referred to at paragraph 10.1.11(c)(ii) of Part 4 of the Schedule to the Certificate of Title;</p> <p>(4) Disposition by British Railways Board to National Coal Board recorded GRS (Clackmannan) 19 March 1981 referred to at paragraph 10.1.12(b)(i) of Part 4 of the Schedule to the Certificate of Title; and</p> <p>(5) Disposition by British Coal to Glen Alva Limited recorded GRS (Clackmannan) 16 October 1989 referred to at paragraph 10.1.12(c)(ii) of Part 4 of the Schedule to the Certificate of Title.</p> <p>any of which prevents, hinders or delays Project Co or any Project Co Party from complying with its obligations under this</p> |
| 52 | Schedule Part 1 (Definitions) | <p>“Site Plan A” means – means the plan entitled [“Site Plan A”] in the agreed form as in attachment D of this Agreement</p> <p>“Site Plan B” means – means the plan entitled [“Site Plan B”] in the agreed form as in attachment D of this Agreement</p> |
| 53 | Schedule Part 1 (Definitions) | “Tenderers” - deleted |
| 54 | Schedule Part 1 (Definitions) | “Tender Requirements” - deleted |
| 55 | Schedule Part 1 (Definitions) | “Tender Validity Period” - deleted |
| 56 | Schedule Part 1 (Definitions) | “Third Party Shareholder” - deleted |
| 57 | Schedule Part 1 (Definitions) | “Ward 4 Area” - means the area outlined [] on Site Plan A |

| No | Reference | Amendment Made |
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| 58 | Schedule Part 23 (<i>Compensation on Termination</i>) | <p>Section F Definitions</p> <p>“Base Senior Debt Termination Amount” means –</p> <p><u>(a) all amounts outstanding at the Termination Date, including interest and Default Interest accrued as at that date, from Project Co to the Senior Funders under the Senior Funding Agreements and in respect of Permitted Borrowings; and</u></p> <p><u>(b) all amounts including costs of early termination of interest rate hedging arrangements and other breakage costs, payable by Project Co to the Senior Funders as a result of a prepayment under the Senior Funding Agreements and in respect of Permitted Borrowings, subject to Project Co and the Senior Funders mitigating all such costs to the extent reasonably possible,</u></p> <p><u>less, to the extent it is a positive amount, the aggregate of (without double counting in relation to the calculation of the Base Senior Debt Termination Amount or the amounts below):</u></p> <p><u>(i) any amounts claimable on or after the Termination Date in respect of Contingent Funding Liabilities;</u></p> <p><u>(ii) all amounts, including costs of early termination of interest rate hedging arrangements and other breakage costs, payable by the Senior Funders to Project Co as a result of prepayment of amounts outstanding under the Senior Funding Agreements and in respect of Permitted Borrowings;</u></p> <p><u>(iii) any Additional Permitted Borrowings and any interest and Default Interest on such Additional Permitted Borrowings;</u></p> <p><u>(iv) all other amounts received by the Senior Funders on or after the Termination Date and before the date on which any compensation is payable by the Board to Project Co as a result of enforcing any other rights they may have; and</u></p> <p><u>(v) all credit balances on any bank accounts (but excluding the Insurance Proceeds Account) held by or on behalf of Project Co on the Termination Date.</u></p> |
| 59 | Schedule Part 23 (<i>Compensation on Termination</i>) | <p>Section F Definitions –</p> <p>Contingent Funding Liabilities - <u>means any contingent liabilities of the Shareholders in respect of financial obligations owed to the Contractor Project Co and/or Senior Funders under the Funding Agreements in relation to the Project which are triggered as a result of or in relation to the termination of the Agreement, e.g. including guarantees or letters of credit or support in respect of deferred equity, Junior Debt or obligations to fund reserve accounts but excluding any guarantees or letters of credit or support issued in support of the sub-contractor’s obligations under the relevant sub-contract</u></p> |

| No | Reference | Amendment Made |
|----|--|--|
| 60 | Schedule Part 23 (<i>Compensation on Termination</i>) | Section F Definitions – Longstop Date - means the date falling twelve (12) months after the Completion Date |

Appendix

~~17.3~~ ~~[For the purposes of this Clause 17.3, an "average year figure" means an "example weather year" ("EWY") as defined by the Chartered Institution of Building Services Engineers and including data for the [] area.] During the period of [the latest 20 year annual average Heating Degree Day (as defined in Part 18 of the Schedule) figure available at the date which is two (2) years following the Actual Completion Date, calculated to a base of 18.5 degrees Celsius, as published by DH Estates and Facilities for the West Scotland (Area 13). During the period of two (2) years]~~ following the Actual Completion Date, the parties shall monitor the actual energy consumption at the Facilities in accordance with the procedure set out in ~~Section~~Part 7 of Part 8 of the Schedule 8 (Construction Matters), ~~with a view to ascertaining whether and to what extent the thermal and energy efficiency of the Facilities meets the requirements of the Board's Construction Requirements and Project Co's Proposals. [If either of the two (2) years]. If the average Heating Degree Day figure for the two (2) year period referred to above are not~~is either greater than 103% or less than 97% of the average years/year figure, then such monitoring shall continue until the earlier of:

~~(a) there being [two (2)] complete average years; and~~

~~(a) such time as there has been a period of twenty-four (24) consecutive calendar months the Heating Degree Day figure for such period, when averaged, is neither greater than 103% nor less than 97% of the average year figure; and~~

~~(b) [the date five (5) years from] after the Actual Completion Date.]~~

17.4 If:

~~(b) If as a result of the monitoring of actual energy consumption over the periods described above there is any indication that in accordance with Clause 17.3 indicates that in any average year the thermal and energy efficiency of the Hospital Facilities fails to meet the Board's Construction Requirements and/or Project Co's Proposals, the parties shall jointly investigate the matter to determine the cause of such failure either in the manner agreed between them or in such manner as may be determined in accordance with Part 26 of the Schedule (Dispute Resolution Procedure), requirement that actual monitored energy consumption is equal to or less than 50 Giga Joules per 100m³ of heated volume; or~~

~~17.4 If following any investigation pursuant to Clause 17.3, it is agreed between the parties or determined in accordance with Part 26 of the Schedule (Dispute Resolution Procedure) that such failure arises as a consequence of the design and construction of the Facilities by Project Co not complying with the applicable provisions of the Board's Construction Requirements and/or Project Co's Proposals,~~

~~(c) the Independent Tester determines (in accordance with the Independent Tester Contract) that the Facilities have not been designed and built so as to achieve a theoretical energy consumption of 42 Giga Joules per 100m³ of heated volume on the basis of (i) the assumptions arrived at in accordance with Section 7 of Part 8 of the Schedule (Thermal and Energy Efficiency Testing Procedure) and (ii) an average year (as defined in Clause 17.3).~~

~~then Project Co shall compensate the Board for any costs, losses or expenses incurred by the Board as a result of such failure in accordance with Clauses 17.4A and 17.4B. For the avoidance of doubt the test carried out pursuant to Clause 17.4(a) is not a requirement of the Completion Criteria.~~

~~17.4A If Project Co fails to meet the requirement specified in Clause 17.4(b), the Board, acting reasonably, shall require that Project Co shall at its own expense procure that such additional work or other remedial work is carried out to remedy the relevant defect, or otherwise compensate the Board in a manner approved by the Board (such approval not to be unreasonably withheld or delayed) but where, Where the solution adopted selected by the Board is compensation, (a) the Board should not as a consequence face incur any additional liability upon early termination of this Agreement and the provisions of Part 23 of the Schedule shall be amended as necessary to achieve this, and (b) such compensation shall be sum as is equal to the cost to the Board of procuring the excess energy predicted to be consumed by it as a result of the relevant defect until the end of the Project Term, taking into consideration the likely future cost of energy sources, as agreed or determined in accordance with the Dispute Resolution Procedure. The lump sum compensation payment shall be calculated at a discount rate of 3.5% real.~~

17.4B If Project Co fails to meet the requirement specified in Clause 17.4(a), to the extent that the Board incurs costs, losses or expenses which have not been compensated as a result of the application of Clause 17A.4, the Board, acting reasonably, shall require that Project Co shall at its own expense procure that such additional work or other remedial work is carried out to remedy the relevant defect, or otherwise compensate the Board in a manner approved by the Board (such approval not to be unreasonably withheld or delayed). Where the solution selected by the Board is compensation (a) the Board should not as a consequence incur any additional liability upon early termination of this Agreement and the provisions of Part 23 of the Schedule shall be amended as necessary to achieve this, and (b) such compensation shall be sum as is equal to the cost to the Board of procuring the excess energy predicted to be consumed by it as a result of the relevant defect until the end of the Project Term, taking into consideration the likely future cost of energy sources, as agreed or determined in accordance with the Dispute Resolution Procedure. The lump sum compensation payment shall be calculated at a discount rate of 3.5% real.

New Drafting as of 04.07.07

17.3 For the purposes of this Clause 17.3, an "average year figure" means the latest 20 year annual average Degree Day (as defined in Part 18 of the Schedule) figure available at the date which is two (2) years following the Actual Completion Date, calculated to a base of 18.5 degrees Celsius, as published by CIBSE Guide J for East Scotland. During the period of two (2) years following the Actual Completion Date, the parties shall monitor the actual energy consumption at the Facilities in accordance with the procedure set out in Section 7 of Part 8 of the Schedule (*Construction Matters*). If the average Heating Degree Day figure for the two (2) year period referred to above is either greater than 103% or less than 97% of the average year figure, then such monitoring shall continue until the earlier of:

- (a) such time as there has been a period of twenty-four (24) consecutive calendar months the Heating Degree Day figure for such period, when averaged, is neither greater than 103% nor less than 97% of the average year figure; and
- (b) the date five (5) years after the Actual Completion Date.

17.4 If:

monitoring of actual energy consumption in accordance with Clause 17.3 indicates that in any average year the thermal and energy efficiency of the ³Hospital Facilities fails to meet the requirement that actual monitored energy consumption is equal to or less than 50 Giga Joules per 100m³ of heated volume (after adjusting the actual energy consumption in accordance with Section 7 of Part 8 of the Schedule (*Thermal and Energy Efficiency Testing Procedure*); or

- (d) the Independent Tester determines (in accordance with the Independent Tester Contract) that the Hospital Facilities have not been designed and built so as to achieve a theoretical energy consumption of 42 Giga Joules per 100m³ of heated volume on the basis of (i) the assumptions arrived at in accordance with Section 7 of Part 8 of the Schedule (*Thermal and Energy Efficiency Testing Procedure*) and (ii) an average year (as defined in Clause 17.3),

then Project Co shall compensate the Board for any costs, losses or expenses incurred by the Board as a result of such failure in accordance with Clause 17.4B or 17.4C. For the avoidance of doubt the test carried out pursuant to Clause 17.4(b) is not a requirement of the Completion Criteria.

- (ii) 17.4A If as a result of the monitoring of actual energy consumption over the periods described in Clause 17.3(a) above there is any indication that the thermal and energy efficiency of the Hospital Facilities fails to meet the requirement outlined in Clause 17.3(a), the parties shall jointly investigate the matter to determine the cause of such failure either in the manner agreed between them or in such manner as may be determined in accordance with Schedule 26 (*Dispute Resolution Procedure*).

- 17.4B If Project Co fails to meet the requirement specified in Clause 17.4(b), the Board, acting reasonably, shall require that Project Co shall at its own expense procure that such additional work or other remedial work is carried out to remedy the relevant defect, or otherwise compensate the Board in a manner approved by the Board (such approval not to be unreasonably withheld or delayed). Where the solution selected by the Board is compensation (a) the Board should not as a consequence incur any additional liability upon early termination of this Agreement and the provisions of Part 23 of the Schedule shall be amended as necessary to achieve this, and (b) such compensation shall be sum as is equal to the cost to the Board of procuring the excess energy predicted to be consumed by it as a result of the relevant defect until the end of the Project Term, taking into consideration the likely future cost of energy sources, as agreed or determined in accordance with the Dispute Resolution Procedure. The lump sum compensation payment shall be calculated at a discount rate of 3.5% real.
- 17.4C If Project Co fails to meet the requirement specified in Clause 17.4(a), to the extent that the Board incurs costs, losses or expenses which have not been compensated as a result of the application of Clause 17.4B, the Board, acting reasonably, shall require that Project Co shall at its own expense procure that such additional work or other remedial work is carried out to remedy the relevant defect, or otherwise compensate the Board in a manner approved by the Board (such approval not to be unreasonably withheld or delayed). Where the solution selected by the Board is compensation (a) the Board should not as a consequence incur any additional liability upon early termination of this Agreement and the provisions of Part 23 of the Schedule shall be amended as necessary to achieve this, and (b) such compensation shall be sum as is equal to the cost to the Board of procuring the excess energy predicted to be consumed by it as a result of the relevant defect until the end of the Project Term, taking into consideration the likely future cost of energy sources, as agreed or determined in accordance with the Dispute Resolution Procedure. The lump sum compensation payment shall be calculated at a discount rate of 3.5% real.

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