

FORTH VALLEY HEALTH BOARD

and

ROBERTSON HEALTH (CLACKMANNANSHIRE) LIMITED

**PROJECT AGREEMENT
for
the development of
new Clackmannanshire community health facilities
and
provision of services**

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FREEDOM OF INFORMATION

Some sections of the Project Agreement have been redacted (removed). The Board's stated policy is to redact as little as possible from the documents, however the Board consider that some of the information contained within the agreements should be withheld. The Board has also taken the requirements of the Freedom of Information (Scotland) Act 2002 into account when considering the redactions.

Obligations within the PA require the establishment of bank accounts. Details of bank account numbers and sort codes are contained within the documentation. These details have been redacted to protect against fraud and misappropriation. The Board consider that is a legitimate exemption from publication under section 33(1)(b) of the Freedom of Information (Scotland) Act 2002 (substantial prejudice to commercial interests). The Board also considers that the public interest in withholding the information is outweighed by the public interest in disclosing the information

The financial model and the results derived there from are contained within the FBC and the PA. The Financial Model was given to the Board and its advisers on the grounds that it remained confidential. Neither the Board nor its advisers have any direct input to the model. All the information in the Model is provided by a third party; the shareholders of Project Co, its contractors and funders. The Model, in its completed state, was provided to the Board and its advisers for review without input to the information in the Model.

After due consideration, and considering the obligations placed on it by the Project Agreement regarding such information, the Board decided to withhold the Financial Model on the grounds of confidentiality. These redactions have been made under section 36(2) of the Freedom of Information (Scotland) Act 2002 - confidentiality.

The Board, recognising the public interest in the Project, have published some key information that is derived from the model, such as the Annual Service Payment (Unitary Payment) and the Net Present Value (NPV). The release of information relating to the Annual Service Payment and project NPV contributes to the effective oversight of expenditure of public funds and helps demonstrate that the public obtain value for money and are disclosed for this reason.

Where redactions have been made to any of the documentation they are footnoted accordingly.

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AGREEMENT

BETWEEN:

- (1) **FORTH VALLEY HEALTH BOARD** whose headquarters are at Carseview House, Castle Business Park, Stirling, FK9 4SW; and
- (2) **ROBERTSON HEALTH (CLACKMANNANSHIRE) LIMITED** (registered under number SC312130) whose registered office is at 10 Perimeter Road, Pinefield Industrial Estate, Elgin, Moray, IV30 6AE ("Project Co").

WHEREAS:

- A. The Board wishes to develop new facilities on the Site, and to consolidate on to the Site services currently provided at other locations, in order to improve the quality and efficiency of the services provided by the Board.
- B. Accordingly, the Board invited tenders from interested persons for the financing, design, and construction of and the provision of certain services in connection with the Clackmannanshire Community Health Services Project (the "Project").
- C. Proposals were submitted on behalf of Project Co in response to the Board's invitation. Following negotiations, it appears to the Board to be expedient for the purpose of, or in connection with, the discharge of its functions to enter into this Agreement, which sets out the terms and conditions upon which Project Co will carry out the Project.
- D. The Project has been approved by the Scottish Executive Health Department Private Finance and Capital Unit on behalf of the Scottish Ministers.
- E. The Agreement is entered into under the Government's Private Finance Initiative (the "PFI").
- F. The Agreement is excluded from the application of Part II of the Housing Grants, Construction and Regeneration Act 1996 by operation of Paragraph 4 of the Construction Contracts (Scotland) Exclusion Order 1998 (SI 1998/686).
- G. The Board is constituted in Scotland under the National Health Service (Constitution of Health Boards) (Scotland) Order 1974 (S.I. 1974/267) as amended by the National Health Service (Constitution of Health Boards) (Scotland) Amendment Order 2003 (S.S.I. 2003/217) pursuant to Section 2 of the National Health Service (Scotland) Act 1978 as amended by Section 28 of the National Health Service and Community Care Act 1990.

NOW IT IS HEREBY AGREED as follows:

PART A: PRELIMINARY

1. INTERPRETATION

This Agreement shall be interpreted according to the provisions of Part 1 of the Schedule (*Definitions and Interpretation*).

2. EXECUTION AND DELIVERY OF DOCUMENTS

2.1 On or prior to execution of this Agreement:

- (a) Project Co shall deliver to the Board the documents referred to in Section 1 of Part 2 of the Schedule (*Completion Documents*) (unless the requirement to deliver any such document is waived by the Board by written notice to Project Co); and
- (b) the Board shall deliver to Project Co the documents referred to in Section 2 of Part 2 of the Schedule (*Completion Documents*) (unless the requirement to deliver any such document is waived by Project Co by written notice to the Board).

3. COMMENCEMENT AND DURATION

- 3.1 This Agreement shall commence on the date of execution of this Agreement and Project Co's right and obligation to carry out the Project Operations shall terminate automatically on the expiry of the Project Term unless and to the extent previously terminated in accordance with the provisions of this Agreement.

4. PROJECT DOCUMENTS

Ancillary Documents

- 4.1 Project Co shall perform its obligations under, and observe all of the provisions of, the Project Documents to which it is a party and shall not:
- (a) terminate or agree to the termination of all or part of any Ancillary Document;
 - (b) make or agree to any material variation of any Ancillary Document;
 - (c) in any material respect depart from its obligations (or waive or allow to lapse any rights it may have in a material respect), or procure that others in any material respect depart from their obligations (or waive or allow to lapse any rights they may have in a material respect), under any Ancillary Document; or
 - (d) enter into (or permit the entry into by any other person of), any agreement replacing all or part of (or otherwise materially and adversely affecting the interpretation of) any Ancillary Document,

unless the proposed course of action (and any relevant documentation) has been submitted to the Board's Representative for review under Part 10 of the Schedule (*Review Procedure*) and there has been no objection in accordance with paragraph 3 of Part 10 of the Schedule (*Review Procedure*) within twenty (20) Business Days of receipt by the Board's Representative of the submission of the proposed course of action (and any relevant documentation), or such shorter period as may be agreed by the parties and, in the circumstances specified in Clause 4.1(a). Project Co has complied with Clause 50 (*Assignment, Sub-contracting and Changes in Control*).

Changes to Funding Agreements and Refinancing

- 4.2 Subject to Clauses 4.3 and 4.4, Project Co shall be free, at any time, to enter into, terminate, amend, waive its rights and generally deal with its Funding Agreements on such terms and conditions as it sees fit provided that (at the time such action is contemplated and effected) the same will not materially and adversely affect the ability of Project Co to perform its obligations under the Project Documents or this Agreement.
- 4.3 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.
- 4.4 Any amendment or variation of any Funding Agreements which constitutes a Refinancing shall be carried out in accordance with the provisions of Part 29 of the Schedule (*Refinancing*).
- 4.5 Without prejudice to Clause 4.2 (*Changes to Funding Agreements and Refinancing*), Project Co shall liaise with the Board in accordance with the Liaison Procedure, and shall use all reasonable endeavours to provide the Board with a copy of the relevant agreement in settled draft form, not less than ten (10) Business Days before it enters into any Funding Agreement (other than the Initial Funding Agreements).

Delivery

- 4.6 Without prejudice to the provisions of this Clause 4, if at any time an amendment is made to any Project Document, or Project Co enters into a new Project Document (or any agreement which affects the interpretation or application of any Project Document), Project Co shall deliver to the Board a conformed copy of each such amendment or agreement within ten (10) Business Days of the date of its execution or creation, certified as a true copy by an officer of Project Co.

5. THE PROJECT OPERATIONS*Scope*

- 5.1 Subject to, and in accordance with, the provisions of this Agreement, Project Co shall have the right and the obligation to perform its duties under this Agreement at its own cost and risk without recourse to the Board except as otherwise expressly provided in this Agreement.

General standards

- 5.2 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 (including without limitation the giving of notices and the obtaining of any such Consents) and so as not to prejudice the renewal of any such Consents;
 - (b) in a manner that is not likely to be injurious to health or to cause damage to property;
 - (c) in a manner consistent with the Quality Plans; and
 - (d) except to the extent expressly stated to the contrary in the Board's Construction Requirements or the Service Level Specifications, in compliance with all applicable NHS Requirements;
 - (e) in a manner consistent with the Board discharging its statutory duties and other functions undertaken by it as the same may be notified to Project Co from time to time;
 - (f) in so far as not in conflict with an express obligation of Project Co under this Agreement, or where in relation to a matter there is no express obligation or standard imposed on Project Co under this Agreement, in accordance with Good Industry Practice.

In the event that any ambiguity, uncertainty, dispute or discrepancy arises in the nature and scope of Project Co's obligations under this Clause 5.2, the provisions of this Clause 5.2 will be given meaning and have effect in descending order of precedence set out in this Clause 5.2.

Board's Undertaking

- 5.3 The Board undertakes to Project Co that it shall:
- (a) subject to the provisions of this Agreement, comply with all Laws, NHS Requirements and Consents applicable to it which relate to the Project Operations;
 - (b) not wilfully impede Project Co in the performance of its obligations under this Agreement (having regard always to the interactive nature of the activities of the Board and of Project Co and to the Board's use of the Facilities to provide the Clinical Services and any other operations or activities carried out by the Board on or at the Site for the purposes contemplated by this Agreement or any other of the Board's statutory functions);

- (c) inform Project Co as soon as reasonably practicable if at any time it becomes unable to meet any of its financial obligations and in such case inform, and keep Project Co informed, of any course of action to remedy the situation recommended or required by the Scottish Executive, the Board or other competent authority;
- (d) to the extent permitted by Law, supply to Project Co within sixty (60) Business Days of their publication, a copy of the Board's Annual Report and Accounts; and
- (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 Site all identified on the Site Plan A, are terminated as required by Law and Good Industry Practice so as to enable ProjectCo to carry out its obligations under this Agreement.
- (f) warrant that the Demolition Contractor has complied with the Demolition Contract other than the Demolition Contract Carve Outs.

provided that, to avoid doubt nothing in this Clause 5.3 shall in any way fetter the discretion of the Board in fulfilling its statutory functions.

Co-operation

- 5.4 Each party agrees to co-operate, at its own expense, with the other party in the fulfilment of the purposes and intent of this Agreement. To avoid doubt, neither party shall be under any obligation to perform any of the other's obligations under this Agreement.
- 5.5 Without prejudice to the generality of Clause 5.4 (*Co-operation*), the parties shall liaise with a view to ensuring that the requirements of Patient Rights and Responsibilities and any other NHS requirement relating to customer service and satisfaction which may from time to time supplement or replace Patient Rights and Responsibilities are met in respect of the operation of the Facilities.

PART B: GENERAL PROVISIONS

6. GENERAL OBLIGATIONS AND RESPONSIBILITIES OF PROJECT CO

Other business

- 6.1 Project Co shall not engage in any business or activity other than the business or activities related to, and conducted for, the purpose of the Project Operations.

Project Co Parties

- 6.2 Subject to the provision of Clause 42.1(g) (*Relief Events*), Project Co shall not be relieved or excused of any responsibility, liability or obligation under this Agreement by the appointment of any Project Co Party. Project Co shall, as between itself and the Board, be responsible for the selection, pricing, performance, acts, defaults, omissions, breaches and negligence of all Project Co Parties. All references in this Agreement to any act, default, omission, breach or negligence of Project Co shall be construed accordingly to include any such act, default, omission, breach or negligence of a Project Co Party.

Safety

- 6.3 Project Co shall throughout the progress of the Works and the conduct of the other Project Operations have full regard for the safety of all persons on the Site (whether lawfully or not) and shall keep the Site, the Works and the Facilities in an orderly state, appropriate in accordance with Good Industry Practice, to avoid danger to such persons. Project Co shall take such measures including fencing of the Site where appropriate as are reasonable in accordance with Good Industry Practice to prevent access onto the Site and/or the Facilities of any persons or creatures not entitled to be there.

7. WARRANTIES

Neither the Board nor Project Co make any representation or warranty of any nature to the other party in connection with this Agreement, except as may be expressly set out in this Agreement.

8. INDEMNITIES AND LIABILITY

Project Co indemnities to Board

- 8.1 Project Co shall indemnify and keep the Board indemnified at all times from and against all Direct Losses sustained by the Board in consequence of:
- (a) any claim for, or in respect of, the death and/or personal injury of any employee of, or person engaged by, Project Co or any Project Co Party notwithstanding any act or omission of the Board or any Board Party;
 - (b) any claim for, or in respect of, the death and/or personal injury of any third party (other than a person referred to in Clause 8.2(a) (*Board Indemnities to Project Co*)) arising out of, or in the course of, the Project Operations, save to the extent caused (or contributed to) by any Unreasonable Act by the Board or any Board Party, 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;
 - (c) any physical loss of or damage to Board Assets 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; and
 - (d) any loss of or damage to property or assets of any third party 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.

Board indemnities to Project Co

- 8.2 The Board shall indemnify and keep Project Co indemnified at all times from and against all Direct Losses sustained by Project Co in consequence of:
- (a) any claim for, or in respect of, the death and/or personal injury of any employee of, or person engaged by, the Board or any Board Party notwithstanding any act or omission of Project Co or any Project Co Party;
 - (b) any claim for, or in respect of, the death and/or personal injury of any third party (other than a person referred to in Clause 8.1(a) (*Project Co Indemnities to Board*)) arising by reason of any act or omission of the Board or any Board Party in the course of the provision of the Clinical Services, any Unreasonable Act by the Board or any Board Party, 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, save to the extent caused (or contributed to) by any act or omission of Project Co or any Project Co Party;
 - (c) any physical damage to any part of the Facilities or any assets or other property of Project Co or any Project Co Party arising by reason of any 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, save to the extent caused (or contributed to) by any act or omission of Project Co or any Project Co Party; and
 - (d) any loss of or damage to property or assets of any third party arising by reason of any 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, save to the extent caused (or contributed to) by any act or omission of Project Co or any Project Co Party.

Provided that in the case of Clause 8.2(c) and (d) there shall be excluded from the indemnity given by the Board any liability for the occurrence of risks against which and to the extent to which Project Co is bound to insure under this Agreement.

Conduct of claims

- 8.3 This Clause shall apply to the conduct, by a party from whom an indemnity is sought under this Agreement, of claims made by a third person against a party having (or claiming to have) the benefit of the indemnity. The party having, or claiming to have, the benefit of the indemnity is referred to as the "Beneficiary" and the party giving the indemnity is referred to as the "Indemnifier". Accordingly:
- (a) if the Beneficiary receives any notice, demand, letter or other document concerning any claim for which it appears that the Beneficiary is, or may become entitled to, indemnification under this Agreement, the Beneficiary shall give notice in writing to the Indemnifier as soon as reasonably practicable and in any event within twenty (20) Business Days of receipt of the same;
 - (b) subject to Clauses 8.3(c), (d) and (e) below, on the giving of a notice by the Beneficiary pursuant to Clause 8.3(a) above, where it appears that the Beneficiary is or may be entitled to indemnification from the Indemnifier in respect of all (but not part only) of the liability arising out of the claim, the Indemnifier shall (subject to providing the Beneficiary with an indemnity to its reasonable satisfaction against all costs and expenses that it may incur by reason of such action) be entitled to dispute the claim in the name of the Beneficiary at the Indemnifier's own expense and take conduct of any defence, dispute, compromise, or appeal of the claim and of any incidental negotiations. The Beneficiary shall give the Indemnifier all reasonable co-operation, access and assistance for the purposes of considering and resisting such claim;

- (c) with respect to any claim conducted by the Indemnifier pursuant to Clause 8.3(b) above:
- (i) the Indemnifier shall keep the Beneficiary fully informed and consult with it about material elements of the conduct of the claim;
 - (ii) the Indemnifier shall not bring the name of the Beneficiary into disrepute; and
 - (iii) the Indemnifier shall not pay or settle such claims without the prior consent of the Beneficiary, such consent not to be unreasonably withheld or delayed;
- (d) the Beneficiary shall be free to pay or settle any claim on such terms as it thinks fit and without prejudice to its rights and remedies under this Agreement if:
- (i) the Indemnifier is not entitled to take conduct of the claim in accordance with Clause 8.3(b) above; or
 - (ii) the Indemnifier fails to notify the Beneficiary of its intention to take conduct of the relevant claim within twenty (20) Business Days of the notice from the Beneficiary under Clause 8.3(a) above or notifies the Beneficiary that it does not intend to take conduct of the claim; or
 - (iii) the Indemnifier fails to comply in any material respect with the provisions of Clause 8.3(c) above;
- (e) the Beneficiary shall be free at any time to give notice to the Indemnifier that it is retaining or taking over (as the case may be) the conduct of any defence, dispute, compromise or appeal of any claim (or of any incidental negotiations) to which Clause 8.3(b) above applies. On receipt of such notice the Indemnifier shall promptly take all steps necessary to transfer the conduct of such claim to the Beneficiary, and shall provide to the Beneficiary all reasonable co-operation, access and assistance for the purposes of considering and resisting such claim. If the Beneficiary gives any notice pursuant to this Clause 8.3(e), then the Indemnifier shall be released from any liability under its indemnity under Clause 8.1 or Clause 8.2 (as the case may be) and, without prejudice to any accrued liabilities, any liability under its indemnity given pursuant to Clause 8.3(b) in respect of such claim;
- (f) if the Indemnifier pays to the Beneficiary an amount in respect of an indemnity and the Beneficiary subsequently recovers (whether by payment, discount, credit, saving, relief or other benefit or otherwise) a sum which is directly referable to the fact, matter, event or circumstances giving rise to the claim under the indemnity, the Beneficiary shall forthwith repay to the Indemnifier whichever is the lesser of:
- (i) an amount equal to the sum recovered (or the value of the saving or benefit obtained) less any out-of-pocket costs and expenses properly incurred by the Beneficiary in recovering the same; and
 - (ii) the amount paid to the Beneficiary by the Indemnifier in respect of the claim under the relevant indemnity,
- provided that there shall be no obligation on the Beneficiary to pursue such recovery and that the Indemnifier is repaid only to the extent that the amount of such recovery aggregated with any sum recovered from the Indemnifier exceeds any loss sustained by the Beneficiary (including for this purpose indirect or consequential losses or claims for loss of profits which are excluded by this Agreement from being recovered from the Indemnifier); and
- (g) any person taking any of the steps contemplated by Clauses 8.3(a) to (e) shall comply with the requirements of any insurer who may have an obligation to provide an indemnity in respect of any liability arising under this Agreement.

Mitigation – indemnity claims

- 8.4 To avoid doubt the provisions of Clause 66 (*Mitigation*) apply to any indemnity given under this Agreement and any such indemnity shall not apply to the extent that such part or parts of Direct Losses could have been reduced or avoided by the Beneficiary complying with the provisions of such Clause.

Taxation

- 8.5 If any payment by one party under an indemnity in this Agreement is subject to income tax or corporation tax (or any tax replacing them) in the hands of the recipient, the recipient may demand in writing to the party making the payment that the payment shall be increased by such amount as would ensure that, after taking into account any such tax payable in respect of such additional amount, the recipient receives and retains a net sum equal to the amount it would have otherwise received had the payment not been subject to such tax. In relation to any such additional amount payable to Project Co, Project Co and the Board shall have the same rights and obligations as would apply to a Relevant Tax Liability under Clause 48.7(c) and Clauses 48.6 to 48.11 (inclusive) shall apply *mutatis mutandis* to the payment of the additional amount. The party making the payment shall pay such additional amount within ten (10) Business Days of receipt of such demand.

Excusing Causes

- 8.6 If an Excusing Cause interferes adversely with, or causes a failure of, the performance of the Project Operations and/or causes the occurrence of a Service Failure and provided that the effect of such Excusing Cause is claimed within ten (10) Business Days of the date on which Project Co became aware (or ought reasonably to have become so aware) of the occurrence of the Excusing Cause, then (subject to Clauses 8.8 (*Insured exposure*) and 8.9 (*Mitigation*)) to the extent such failure or interference or occurrence of a Service Failure arises as a result of such Excusing Cause:

- (a) such failure by Project Co to perform, and any poor performance of, any affected Service shall not constitute a breach of the provisions of this Agreement by Project Co;
- (b) such interference shall be taken account of in measuring the performance of any affected Service in accordance with the Performance Monitoring System, which shall be operated as though the relevant Service had been performed free from such adverse interference; and
- (c) any such Service Failure shall be deemed not to have occurred,

so that Project Co shall be entitled to payment under this Agreement as if there had been no such interference with the Project Operations.

- 8.7 For the purpose of Clause 8.6, an Excusing Cause means:

- (a) any breach of any express provision of this Agreement by the Board or any Board Party (unless, and to the extent, caused or contributed to by Project Co or any Project Co Party);
- (b) any deliberate act or omission of the Board or of any Board Party or any failure by the Board or Board Party (having regard always to the interactive nature of the activities of the Board and of Project Co) to take reasonable steps to carry out its activities in a manner which minimises undue interference with Project Co's performance of the Project Operations, save where (and to the extent):
 - (i) caused or contributed to by Project Co or any Project Co Party;
 - (ii) the Board or Board Party is acting in accordance with a recommendation or instruction of Project Co or any Project Co Party;

- (iii) any such act or omission giving rise to such failure was within the contemplation of the parties or was otherwise provided for in this Agreement;
 - (iv) the consequences of any such deliberate act or omission or other acts or omissions giving rise to such failure would have been prevented by the proper performance of Project Co's obligations under this Agreement.
- (c) the outbreak or the effects of any outbreak of any Medical Contamination unless and to the extent that the effects of such outbreak are caused (or contributed to) by any failure of Project Co or any Project Co Party to comply with procedures (or Board instructions) relating to control of infection or to take all reasonable steps to mitigate the effect of such Medical Contamination;
 - (d) the implementation of any action taken by the Board or any Board Party, or any suspension of Project Co's obligation to deliver any or any part of the Services or the compliance by Project Co with instructions given by the Board, in each case in the circumstances referred to in Clauses 29.7 to 29.9 (inclusive);
 - (e) the carrying out of any Small Works in accordance with the terms of this Agreement during the period of time agreed between the Board and Project Co;
 - (f) the carrying out of planned preventative maintenance in accordance with the Schedule of Programmed Maintenance;
 - (g) the occurrence of a Site Interruption Event; or
 - (h) the occurrence of the circumstances described in Clause 15.3

where in this Clause 8.7 a cause is said to be an Excusing Cause save to the extent that some other cause operates, the relevant financial effects of the said cause shall be apportioned between the Board or Board Party on the one hand, and Project Co on the other, by reference to the respective influence of each cause.

Insured exposure

- 8.8 Without prejudice to Clause 36 (*Insurance*), Project Co shall not be entitled to any payment which would not have been due under this Agreement but for Clause 8.6 (*Excusing Causes*) to the extent that Project Co is or should be able to recover under any policy of insurance required to be maintained by Project Co or any Project Co Party in accordance with this Agreement (whether or not such insurance has in fact been effected or, if effected, has been vitiated as a result of any act or omission of Project Co (or any Project Co Party), including but not limited to non-disclosure or under-insurance) or any other policy of insurance which Project Co has taken out and maintained.

Mitigation of Excusing Cause

- 8.9 Project Co shall take all reasonable steps to mitigate the consequences of an Excusing Cause on Project Co's ability to perform its obligations under this Agreement. To the extent that Project Co does not take such steps, Project Co shall not be entitled to, and shall not receive, the relief specified in Clause 8.6 (*Excusing Causes*).
- 8.10 To avoid doubt, Clause 8.7(b) (*Acts of the Board*) shall not impose a general obligation on the Board to take (or to procure that any Board Party takes) such steps and shall apply (and be construed) solely for the purpose of establishing whether an Excusing Cause has occurred.

9. LIMITS ON LIABILITY

Exclusions

- 9.1 The indemnities under this Agreement shall not apply and (without prejudice to the Board's rights under the Payment Mechanism) there shall be no right to claim damages for breach of this Agreement, in delict or on any other basis whatsoever to the extent that any loss claimed by either party is for loss of profits, loss of use, loss of production, loss of business or loss of business opportunity or is a claim for consequential loss or for indirect loss of any nature ("Indirect Losses") suffered or allegedly suffered by either party. The Board agrees that, notwithstanding the foregoing, any losses of Project Co arising under the Construction Contract and the Service Contracts as originally executed (or as amended in accordance with and subject to Clause 4.1 (*Ancillary Documents*)) which are not Indirect Losses shall not be excluded from such a claim solely by reason of this Clause.
- 9.2 The Board shall not be liable in delict to Project Co or any Project Co Party in respect of any negligent act or omission of the Board or any Board Party relating to or in connection with this Agreement and Project Co shall procure that no Project Co Party shall bring such a claim against the Board. Project Co has accepted this on the basis that it and each Project Co Party will cover the risk of negligent acts or omissions by insurance or in such other manner as it (or they) may think fit.

Sole remedy

- 9.3 Subject to:
- (a) any other express right of the Board pursuant to this Agreement; and
 - (b) the Board's right to claim, on or after termination of this Agreement, the amount of its reasonable costs, losses, damages and expenses suffered or incurred by it as a result of rectifying or mitigating the effects of any breach of this Agreement by Project Co save to the extent that the same has already been recovered by the Board pursuant to this Agreement or has been taken into account to reduce any compensation payable by the Board pursuant to Clause 48 (*Compensation on Termination*),

the sole remedy of the Board in respect of a failure to provide the Services in accordance with this Agreement shall be the operation of the Payment Mechanism.

- 9.4 Nothing in Clause 9.3 shall prevent or restrict the right of the Board to seek interdict or a decree of specific implement or other discretionary remedies of the court.
- 9.5 Notwithstanding any other provision of this Agreement, neither party shall be entitled to recover compensation or make a claim under this Agreement, the Licence, or any other agreement in relation to the Project in respect of any loss that it has incurred (or any failure of the other party) to the extent that it has already been compensated in respect of that loss or failure pursuant to this Agreement, the Licence or otherwise.
- 9.6 Without prejudice to Clause 15 of this Agreement Project Co acknowledges that the Board does not warrant the performance of the Contractor under the Grouting Works Contract.

10. BOARD'S DATA

No liability

- 10.1 The Board shall not be liable to Project Co for and Project Co shall not seek to recover from the Board (or from any Board Party) any damages, losses, costs, liabilities or expenses which may arise (whether in contract, delict or otherwise) from the adoption, use or application of the Disclosed Data by, or on behalf of, Project Co, the Independent Tester or any Project Co Party.

No warranty

- 10.2 The Board gives no warranty or undertaking of whatever nature in respect of the Disclosed Data and, specifically (but without limitation), the Board does not warrant that the Disclosed Data represents all of the information in its possession or power (either during the conduct of the tender process for the Project or at the time of execution of this Agreement) relevant or material to or in connection with the Project or the obligations of Project Co under this Agreement or under any of the Project Documents. Also, the Board shall not be liable to Project Co in respect of any failure to disclose or make available to Project Co (whether before, on or after the execution of this Agreement) any information, documents or data, nor any failure to review or to update the Disclosed Data, nor any failure to inform Project Co (whether before, on or after execution of this Agreement) of any inaccuracy, error, omission, defects or inadequacy in the Disclosed Data.

Project Co investigation

- 10.3 Project Co acknowledges and confirms that:
- (a) it has conducted its own analysis and review of the Disclosed Data and has, before the execution of this Agreement, satisfied itself as to the accuracy, completeness and fitness for purpose of any such Disclosed Data upon which it places reliance; and
 - (b) it shall not be entitled to and shall not (and shall procure that no Project Co Party shall) make any claim against the Board or any Board Party whether in contract, delict or otherwise including, without limitation, any claim in damages, for extensions of time or for additional payments under this Agreement on the grounds:
 - (i) of any misunderstanding or misapprehension in respect of the Disclosed Data; or
 - (ii) that incorrect or insufficient information relating to the Disclosed Data was given to it by any person, whether or not a Board Party,

nor shall Project Co be relieved from any obligation imposed on, or undertaken by it, under this Agreement on any such ground.

11. REPRESENTATIVES*Representatives of the Board*

- 11.1 The Board's Representative shall be Robert Cairney or such other person appointed pursuant to this Clause. The Board's Representative shall exercise the functions and powers of the Board in relation to the Project Operations which are identified in this Agreement as functions or powers to be carried out by the Board's Representative. The Board's Representative shall also exercise such other functions and powers of the Board under this Agreement as may be notified to Project Co from time to time.
- 11.2 The Board's Representative shall be entitled at any time, by notice to Project Co, to authorise any other person to exercise the functions and powers of the Board delegated to him pursuant to this Clause, either generally or specifically. Any act of any such person shall, for the purposes of this Agreement, constitute an act of the Board's Representative and all references to the "Board's Representative" in this Agreement (apart from this Clause) shall be taken as references to such person so far as they concern matters within the scope of such person's authority.
- 11.3 The Board may by notice to Project Co change the Board's Representative. The Board shall (as far as practicable) consult with Project Co prior to the appointment of any replacement for the Board's Representative, taking account of the need for liaison and continuity in respect of the Project. Such change shall have effect on the date specified in the written notice (which date shall, other than in the case of emergency, be such date as

will not cause material inconvenience to Project Co in the execution of its obligations under this Agreement).

- 11.4 During any period when no Board's Representative has been appointed (or when the Board's Representative is unable through illness, incapacity or any other reason whatsoever to carry out or exercise his functions under this Agreement) the Board shall carry out the functions which would otherwise be performed by the Board's Representative.
- 11.5 No act or omission of the Board, the Board's Representative or any officer, employee or other person engaged by the Board shall, except as otherwise expressly provided in this Agreement:
- (a) in any way relieve or absolve Project Co from, modify, or act as a waiver or personal bar of, any liability, responsibility, obligation or duty under this Agreement; or
 - (b) in the absence of an express order or authorisation under Part 22 of the Schedule (*Variation Procedure*), constitute or authorise a Variation.
- 11.6 Except as previously notified in writing before such act by the Board to Project Co, Project Co and Project Co's Representative shall be entitled to treat any act of the Board's Representative which is authorised by this Agreement as being expressly authorised by the Board and Project Co and Project Co's Representative shall not be required to determine whether an express authority has in fact been given.

Representative of Project Co

- 11.7 Project Co's Representative shall be Gary Gallacher or such other person appointed pursuant to this Clause. Project Co's Representative shall have full authority to act on behalf of Project Co for all purposes of this Agreement. Except as previously notified in writing before such act by Project Co to the Board, the Board and the Board's Representative shall be entitled to treat any act of Project Co's Representative in connection with this Agreement as being expressly authorised by Project Co and the Board and the Board's Representative shall not be required to determine whether any express authority has in fact been given.
- 11.8 Project Co may by notice to the Board change Project Co's Representative. Where Project Co wishes to do so it shall by written notice to the Board propose a substitute for approval, taking account of the need for liaison and continuity in respect of the Project. Such appointment shall be subject to the approval of the Board (not to be unreasonably withheld or delayed).
- 11.9 Project Co's key Works personnel are identified in Part 4 of the Schedule (*Key Works Personnel*). Project Co shall, as far as it is within Project Co's control, ensure that such persons retain their involvement in the Works and, in particular, will not, for the duration of the Works require or request any of them to be involved in any other project on behalf of Project Co or any of the Shareholders or its or their Associated Companies if, in the reasonable opinion of the Board, this would adversely affect the Project.

12. LIAISON

Liaison Committee

- 12.1 The Board and Project Co shall establish and maintain throughout the Project Term a joint liaison committee (the "Liaison Committee"), consisting of three (3) representatives of the Board (one of whom shall be appointed Chairman) and three (3) representatives of Project Co which shall have the functions described below.
- 12.2 The functions of the Liaison Committee shall be:
- (a) to provide a means for the joint review of issues relating to all day to day aspects of the performance of this Agreement;

- (b) to provide a forum for joint strategic discussion, considering actual and anticipated changes in the market and business of the Board, and possible variations of this Agreement to reflect those changes or for the more efficient performance of this Agreement; and
 - (c) in certain circumstances, pursuant to Part 26 of the Schedule (*Dispute Resolution Procedure*), to provide a means of resolving disputes or disagreements between the parties amicably.
- 12.3 The role of the Liaison Committee is to make recommendations to the parties, which they may accept or reject at their complete discretion. Neither the Liaison Committee itself, nor its members acting in that capacity, shall have any authority to vary any of the provisions of this Agreement or to make any decision which is binding on the parties (save as expressly provided in Part 26 of the Schedule (*Dispute Resolution Procedure*)). Neither party shall rely on any act or omission of the Liaison Committee, or any member of the Liaison Committee acting in that capacity, so as to give rise to any waiver or personal bar in respect of any right, benefit or obligation of either party.
- 12.4 The parties shall appoint and remove their representatives on the Liaison Committee by written notice delivered to the other at any time. A representative on the Liaison Committee may appoint and remove an alternate (who may be another representative of that party) in the same manner. If a representative is unavailable (and the other party's representatives may rely on the alternate's statement that the representative is unavailable) his alternate shall have the same rights and powers as the representative.

Procedures and practices

- 12.5 Subject to the provisions of this Agreement, the members of the Liaison Committee may adopt such procedures and practices for the conduct of the activities of the Liaison Committee as they consider appropriate from time to time and:
- (a) may invite to any meeting of the Liaison Committee such other persons as its members may agree (in accordance with Clause 12.6); and
 - (b) receive and review a report from any person agreed by its members.
- 12.6 Recommendations and other decisions of the Liaison Committee must have the affirmative vote of all those voting on the matter, which must include not less than one (1) representative of the Board and not less than one (1) representative of Project Co.
- 12.7 Each member of the Liaison Committee shall have one (1) vote. The Chairman shall not have a right to a casting vote.
- 12.8 The Liaison Committee shall meet at least once each quarter (unless otherwise agreed by its members) and from time to time as necessary.
- 12.9 Any member of the Liaison Committee may convene a meeting of the Liaison Committee at any time.
- 12.10 Meetings of the Liaison Committee shall be convened on not less than ten (10) Business Days' notice (identifying the agenda items to be discussed at the meeting) provided that in emergencies a meeting may be called at any time on such notice as may be reasonable in the circumstances.
- 12.11 Where the Liaison Committee decides it is appropriate, meetings may also be held by telephone or another form of telecommunication, by which each participant can hear and speak to all other participants at the same time.
- 12.12 Minutes of all recommendations (including those made by telephone or other form of telecommunication) and meetings of the Liaison Committee shall be kept by Project Co and copies circulated promptly to the parties, normally within five (5) Business Days of the

making of the recommendation or the holding of the meeting. A full set of minutes shall be open to inspection by either party at any time, upon request.

13. DISASTER PLAN

- 13.1 The parties shall comply with the provisions of the Disaster Plan as set out in Part 5 of the Schedule.
- 13.2 The parties shall liaise with each other in accordance with the Liaison Procedure in order periodically to review and update the Disaster Plan.

PART C: LAND ISSUES

14. NATURE OF LAND INTERESTS

Access During Construction

14.1 From the date of issue of the Certificate of Commencement until the Actual Completion Date or (if earlier) the Termination Date, the Board shall procure the grant of a licence from the Scottish Ministers, to Project Co and the Project Co Parties to:

- (a) exercise the Ancillary Rights; and
- (b) enter upon the Site,

in each case solely for the purposes of implementing the Works and carrying out Project Co's Pre-Completion Commissioning.

Access following Construction

14.2 After the occurrence of the Actual Completion Date the Board shall procure the grant of a licence to Project Co and Project Co Parties of the right to enter upon the Site solely for the purposes of:

- (a) the carrying out of Project Operations (other than those Project Operations which Project Co is licensed to carry out pursuant to Clause 14.1); and
- (b) remedying of Defects and the carrying out of Snagging Matters; and
- (c) exercising the Ancillary Rights,

and such rights to terminate on the Expiry Date or (if earlier) the Termination Date.

Extent of Licences

14.3 The rights referred to at Clauses 14.1 and 14.2 shall not operate or be deemed to operate as a lease of the Facilities or the Site or any part of the Facilities or the Site and Project Co shall not have or be entitled to exclusive possession or any estate right title or interest in and to the Site or the Facilities but shall occupy the Site as a licensee only.

14.4 The rights referred to at clauses 14.1 and 14.2 are personal to Project Co and the Project Co Parties and are granted only in so far as such rights are capable of being granted by the Scottish Ministers whether as a result of any restriction in the Title Deeds or otherwise.

14.5 Project Co shall procure that:

- (a) all Project Operations carried out at the Site by or on behalf of Project Co (whether before, during or after the completion of the Works) shall be carried out in a manner which does not breach any provisions of the Title Deed; and
- (b) there shall be no action, or omission to act by ProjectCo or a ProjectCo Party, which shall give rise to a right for any person to obtain title to the Site or any part of it.

14.6 The Board undertakes pursuant to the grant of the Licence in terms of Clauses 14.1 and 14.2 to liaise with and consult the Scottish Ministers as licensor in respect of any matters arising under the said licence and/or relating to exercise of the rights granted to Project Co thereunder and/or in terms of this Agreement.

14.7 For the avoidance of doubt, a breach by the Scottish Ministers or the then heritable proprietors of the Site of its obligations under the Licence shall be deemed to constitute a breach by the Board of this Agreement and in respect of such breach Project Co shall be

entitled to exercise the rights and remedies available to Project Co in respect of a breach of this Agreement by the Board subject to and in accordance with the provisions of this Agreement. Furthermore, the Parties hereby acknowledge that each of Project Co and the Scottish Ministers have waived their respective rights to exercise rights and remedies under the Licence against the other on the basis that the Licence and rights and remedies available to the parties thereunder are to be construed as if the Licence were part of this Agreement.

15. THE SITE

15.1 The condition of the Site shall be the sole responsibility of Project Co. Accordingly (without prejudice to any other obligation of Project Co under this Agreement), Project Co shall be deemed to have:

- (a) carried out a Ground Physical and Geophysical Investigation and to have inspected and examined the Site and its surroundings and (where applicable) any existing structures or works on, over or under the Site;
- (b) satisfied itself as to the nature of the Site Conditions, the ground and the subsoil, the form and nature of the Site, the load bearing and other relevant properties of the Site, the risk of injury or damage to property affecting the Site, the nature of the materials (whether natural or otherwise) to be excavated and the nature of the design, work and materials necessary for the execution of the Works;
- (c) subject to any Site Interruption Event, satisfied itself as to the adequacy of the rights of access to and through the Site and any accommodation it may require for the purposes of fulfilling its obligations under this Agreement (such as additional land or buildings outside the Site);
- (d) satisfied itself as to the possibility of interference by persons of any description whatsoever (other than the Board), with access to or use of, or rights in respect of, the Site, with particular regard to the owners of any land adjacent to the Site, subject to any Site Interruption Event; and
- (e) satisfied itself as to the precautions, times and methods of working necessary to prevent any nuisance or interference, whether public or private, being caused to any third parties.

15.2 To avoid doubt, Project Co accepts full responsibility for all matters referred to in Clause 15.1 and Project Co shall:

- (a) not be entitled to make any claim against the Board of any nature whatsoever save, if applicable, as expressly provided in Clause 41 (*Delay Events*), on any grounds including (without limitation) the fact that incorrect or insufficient information on any matter relating to the Site was given to it by any person, whether or not a Board Party; and
- (b) be responsible for, and hold the Board harmless from, cleaning up 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).

15.3 To the extent that unforeseen ground conditions (and/or Contamination) exist in any part of the Ward 4 Area, Project Co shall not be responsible for them, unless:-

- (i) they were discovered by the Ground Physical and Geophysical Investigation; or
- (ii) they should reasonably have been discoverable if the Ground Physical and Geophysical Investigation had been properly carried out; or

- (iii) 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.

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.

- 15.4 Where pursuant to Clause 15.3 the Board is responsible for any of the matters referred to then the following provisions shall apply:
- (a) where any such matter arises during the Construction Phase it shall be deemed to be a Compensation Event for the purposes of this Agreement and any work which is required or instructed to be done in consequence of it shall be deemed to be a Qualifying Variation;
 - (b) where any such matter arises during the Operational Term it shall, for the avoidance of doubt, be deemed to be an Excusing Cause for the purposes of Clause 8.7;
 - (c) further where any such matter arises during the Operational Term and any work or change to the Services is required or instructed to be done in consequence of it, it shall be deemed to be a Qualifying Variation; and
 - (d) where any such matter is Contamination (whether during the Construction Phase or the Operational Term) the Board shall further hold Project Co harmless from cleaning up and otherwise dealing with the Contamination and shall indemnify Project Co in respect of all Direct Losses incurred by Project Co resulting from such Contamination.

16. CONSENTS AND PLANNING APPROVAL

- 16.1 Project Co shall be responsible for:
- (a) obtaining all Consents which may be required for the performance of the Project Operations; and
 - (b) subject to Clauses 16.2 and 16.3, implementing each Consent within the period of its validity in accordance with its terms
- 16.2 The Board shall be responsible for discharging the following conditions to the Planning Approval:
- (a) condition 1(a), relating to the construction of a roundabout at the junction of Hallpark Road and Fairfield Road;
 - (b) condition 1(b), relating to the construction of a pedestrian crossing;
 - (c) condition 1(c), relating to the provision of lighting along the mixed leisure route (but only to the extent that the mixed leisure route falls outside the boundaries of the Site);
 - (d) condition 2, relating to the provision of a travel plan; and
 - (e) condition 11, relating to the existing lodge house on the Lodge Site for so long as this condition remains in force.
 - (f) condition 1(f), relating to the provision of art. Subject to Project Co providing £7,000 contribution for the provision of art payable within 10 Business Days of the Actual Completion Date.
- 16.3 Subject to Clause 16.4A, Project Co shall maintain the Listed Boundary Walls in the location identified on Site Plan A as part of the Services throughout the Operational Term.

- 16.3A Project Co will be relieved from all obligations pursuant to Clause 16.3 or Section 7.3.6 of Project Co's Proposals in the event that a heritable proprietor of any of the properties adjacent to the Site and located in the areas coloured yellow on the Site Plan A refuses to allow Project Co or any Project Co Party sufficient access to allow Project Co to carry out, in relation to the Operational Term the obligations described in Clause 16.4 and, in relation to the Construction Phase, the obligations described in Section 7.3.6 of Project Co's Proposals, provided that Project Co and any Project Co Party uses all reasonable endeavours to obtain such access.
- 16.4 Project Co shall re-position the Gate Piers and maintain them in the location identified on Site Plan B, as part of the Services throughout the Operational Term.

PART D: DESIGN AND CONSTRUCTION

17. THE DESIGN, CONSTRUCTION AND COMMISSIONING PROCESS

Overall Responsibility

17.1 Project Co shall carry out the Works:

- (a) so as to procure satisfaction of the Board's Construction Requirements;
- (b) in accordance with Project Co's Proposals; and
- (c) in accordance with the terms of this Agreement.

To avoid doubt, the obligations in Clauses 17.1(a), 17.1(b) and 17.1(c) are independent obligations. In particular:

- (i) 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
- (ii) 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.

Design responsibility

17.2 Project Co warrants that it has used, and will continue to use, the degree of skill and care in the design of the Facilities that would reasonably be expected of a competent professional designer experienced in carrying out design activities of a similar nature, scope and complexity to those comprised in the Works.

Thermal and energy efficiency

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, subject to Clause 17.4.1:

- (a) monitoring of actual energy consumption 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 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
- (b) 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 Sections 7 and 10 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(b) is not a requirement of the Completion Criteria.

- 17.4.1 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*).
- 17.4A 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). 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.
- 17.4B 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 17.4A, 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.

NHS Construction Projects – Corporate Identity and Signage

- 17.5 The parties acknowledge that the Board may, from time to time during the Construction Phase, be required to procure the erection of hoarding, site boards, plaques and/or other signage in connection with the Project:
- (a) Where requested by the Board acting reasonably, Project Co shall procure the erection and maintenance of such hoarding, site boards, plaques and/or other signage as the Board may require.
 - (b) The size, design, information disclosed, position and materials used in connection with such hoarding, site boards, plaques or other signage shall be approved by the Board, such approval not to be unreasonably withheld.
 - (c) For the purposes of this Clause 17.5, the Board shall be deemed to be acting reasonably where any proposals made by it and/or any approvals exercised by it conform with any relevant guidance issued to NHS Boards by the Scottish Executive or

NHS Forth Valley in relation to such matters whether by Health Service Circular or otherwise.

- (d) 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.

Board design approval

17.6 The Board confirms that, as at the date of this Agreement, it has reviewed such of Project Co's Proposals as have been initialled by the Board and that, subject to any qualifications and/or comments notified by the Board to Project Co in writing and set out in Section 9 of Part 8 of the Schedule (*Construction Matters*) such proposals satisfy the Board's requirements in respect of Clinical Functionality, so far as can reasonably be determined given the level of detail of Design Data which has been disclosed to the Board.

17.7 Project Co shall develop and finalise the design and specification of the Works and the Board shall review the Reviewable Design Data in accordance with Part 10 of the Schedule (*Review Procedure*) and the provisions of this Clause:

- (a) Project Co shall submit the Reviewable Design Data and the design of any Variations developed in accordance with the procedure set out in Part 22 of the Schedule (*Variation Procedure*) to the Board's Representative for review under Part 10 of the Schedule (*Review Procedure*). Project Co shall not commence or permit the commencement of construction of the part or parts of the Facilities to which such Reviewable Design Data relates until it has submitted the appropriate Reviewable Design Data and either it is confirmed by the Board's Representative that Project Co is entitled to proceed with construction in accordance with paragraph 4.3 of Part 10 of the Schedule (*Review Procedure*) or Project Co is disputing the status of such Reviewable Design Data pursuant to paragraph 4.3 of Part 10 of the Schedule (*Review Procedure*).
- (b) with effect from the date at which any item of Reviewable Design Data is or becomes an Approved RDD Item in accordance with Part 10 of the Schedule (*Review Procedure*), such Approved RDD Item shall for the purposes of this Agreement be deemed to have satisfied the requirements of the Board in the manner and to the extent set out in Appendix 1, Table A of Part 10 of the Schedule (*Review Procedure*);
- (c) Project Co shall allow the Board's Representative, at any time, a reasonable opportunity to view any items of Design Data, which shall be made available to the Board's Representative as soon as practicable following receipt of any written request from the Board's Representative; and
- (d) Project Co shall procure that the Contractor establishes and maintains a computerised design database which Project Co and the Board's Representative may access remotely by computer to view drawings comprised within the Design Data (including Reviewable Design Data) and electronically store and/or print copies of such Design Data. In the event of the Board's Representative being unable to access such design database, Project Co shall procure that it is made available for inspection by the Board's Representative, or any other person authorised by the Board's Representative.

Rectification of Project Co's Proposals

17.8 Without prejudice to Clause 17.1, if it should be found that Project Co's Proposals do not fulfil the Board's Construction Requirements, Project Co shall at its own expense amend Project Co's Proposals and rectify the Works or any part affected. Such amendment and rectification shall have the effect that:

- (a) Project Co's Proposals shall satisfy the Board's Construction Requirements; and
- (b) following the amendment or rectification, the structural, mechanical and electrical performance of the Facilities will be of an equivalent standard of performance to that

set out in Project Co's Proposals prior to their amendment or rectification (for the purpose of this comparison disregarding the fault which required the amendment or rectification to be made).

18. RIGHT OF ACCESS OF BOARD'S REPRESENTATIVE

Access to Site

18.1 Project Co shall procure that:

- (a) subject to complying with all relevant safety procedures, which shall include any relevant health and safety plans for the construction of the Facilities, the Contractor's Site Rules from time to time and any reasonable directions with regard to site safety that may be issued by or on behalf of the Contractor's Site Manager from time to time, the Board's Representative shall have unrestricted access at all reasonable times during normal working hours to:
 - (i) view the Works at the Site on reasonable prior notice appropriate to the circumstances, provided that the notice procedures in this Clause 18.1(a)(i) shall not apply to the right of access for the Board's Representative and his staff and visitors to the office and other facilities provided at the Site for his use; and
 - (ii) subject to obtaining the consent of the relevant manufacturer or supplier (which Project Co agrees to use all reasonable endeavours to obtain), visit any site or workshop where materials, plant or equipment are being manufactured, prepared or stored for use in the Works for the purposes of general inspection and of attending any test or investigation being carried out in respect of the Works;
- (b) the Board's Representative shall have such rights of access to the Site in an emergency as he (acting reasonably) considers suitable in the circumstances; and
- (c) monthly progress meetings and site meetings are held and that the Board's Representative shall have the right to attend such monthly progress meetings and site meetings and to attend such other meetings as the Board's Representative may reasonably request.

Increased monitoring

18.2 If, following any viewing, visit or inspection made pursuant to Clause 18.1(a) (*Access to Site*), it is discovered that there are defects in the Works or that Project Co has failed to comply with the Board's Construction Requirements or Project Co's Proposals, the Board's Representative may (without prejudice to any other right or remedy available to the Board) by notice to Project Co increase the level of monitoring of Project Co until such time as Project Co shall have demonstrated to the satisfaction of the Board that it is capable of performing and will perform all its obligations to the Board under this Agreement. Project Co shall compensate the Board for any reasonable additional costs incurred as a result of such increased monitoring.

Right to Open Up

- 18.3 Subject to Clause 18.4, the Board's Representative shall have the right at any time prior to the Actual Completion Date to request Project Co to open up and inspect any part or parts of the Works where the Board's Representative reasonably believes that such part or parts of the Works is or are defective and Project Co shall comply with such request.
- 18.4 Prior to exercising his right pursuant to Clause 18.3 above, the Board's Representative shall notify Project Co of his intention to exercise such right, setting out detailed reasons.
- 18.5 If, following the exercise by the Board's Representative of his right pursuant to Clause 18.3, the inspection shows that the relevant part or parts of the Works are not defective any delay

caused to the Works by the exercise of such rights shall, subject to (and in accordance with) the provisions of Clause 41 (*Delay Events*), be treated as a Delay Event.

- 18.6 If, following the exercise by the Board's Representative of his right pursuant to Clause 18.3, the inspection shows that the relevant part or parts of the Works is or are defective, Project Co shall rectify and make good such defect(s) and any consequence of such rectification and/or making good defect(s) shall be carried out by Project Co at no cost to the Board and Project Co shall not be entitled to any extension of time in relation to such rectification and making good of the Works.
- 18.7 If, following the exercise by the Board's Representative of his right pursuant to Clause 18.3, the Board's Representative is of the opinion that the inspection shows that the relevant part or parts of the Works is or are defective and Project Co does not agree with such opinion, the matter shall be determined in accordance with Part 26 of the Schedule (*Dispute Resolution Procedure*).
- 18.8 Without prejudice to the rights of the Board's Representative pursuant to this Clause 18 the parties acknowledge that the exercise of such rights shall not in any way affect the obligations of Project Co under this Agreement save as expressly set out in this Clause 18.

Safety during Construction

- 18.9 The provisions of Section 2 of Part 8 of the Schedule (*Construction Matters*) shall apply to matters of safety.

19. PROGRAMME AND DATES FOR COMPLETION

Dates for Completion

- 19.1 Project Co shall complete the Works by the Completion Date. Without prejudice to Clauses 44 (*Project Co Events of Default*), 46 (*Non-Default Termination*), 47 (*Effect of Termination*) and 48 (*Compensation on Termination*), the Board shall not be entitled to claim liquidated or general damages in respect of any delay which elapses between the Completion Date and the Actual Completion Date.

The Programme

- 19.2 Any Programme submitted in accordance with the provisions set out below shall be prepared in accordance with Good Industry Practice and shall be in sufficient detail so as to enable the Board's Representative to monitor the progress including all commissioning activities and likely future progress of the Works.
- 19.3 The initial Programme is set out at Part 9 of the Schedule (*The Programme*). Any change to the Programme shall only be made in accordance with this Clause and Part 10 of the Schedule (*Review Procedure*). Project Co shall promptly submit to the Board's Representative a copy of any version of the Programme varied in accordance with this Clause and Part 10 of the Schedule (*Review Procedure*).
- 19.4 If it appears to the Board's Representative at any time that the actual progress of the Works has significantly fallen behind the Programme, then the Board's Representative shall be entitled to require Project Co to submit to the Board's Representative a report identifying the reasons for the delay and, unless the event causing the delay is still subsisting and it is not possible to predict with any certainty when the delay might come to an end, require Project Co (at the Board's option):
- (a) to produce and submit to the Board's Representative in accordance with Part 10 of the Schedule (*Review Procedure*) a revised Programme showing the manner and the periods in which the Works will be carried out to ensure completion; and/or

- (b) to produce and submit to the Board's Representative in accordance with Part 10 of the Schedule (*Review Procedure*) a revised Programme showing the steps which are to be taken to eliminate or reduce the delay.

Notification of early completion

19.5 Project Co shall notify the Board's Representative if at any time the actual progress of the Works is significantly ahead of the Programme so that Project Co anticipates that the Actual Completion Date will be earlier than the Completion Date. The Board's Representative shall be entitled to require Project Co to produce and submit to the Board's Representative, in accordance with Part 10 of the Schedule (*Review Procedure*), a revised Programme showing the manner and the periods in which the Works will be carried out and what the revised date for completion would be to enable the parties to consider (at their absolute discretion):

- (a) whether to agree an earlier date for completion; and
- (b) what modifications (if any) will be required to the Agreement in order to accommodate such earlier date for completion.

20. INDEPENDENT TESTER

Appointment

20.1 The parties have prior to the date of this Agreement, in compliance with all Law relating to procurement which is applicable to either party, appointed a suitably qualified and experienced consultant to act as the Independent Tester for the purposes of this Agreement upon the terms of the Independent Tester Contract.

Changes to terms of appointment

20.2 Neither the Board nor Project Co shall without the other's prior written approval (not to be unreasonably withheld or delayed):

- (a) terminate, repudiate or discharge the Independent Tester Contract or treat the same as having been terminated, repudiated or otherwise discharged;
- (b) waive, settle, compromise or otherwise prejudice any rights or claims which the other may from time to time have against the Independent Tester; or
- (c) vary the terms of the Independent Tester Contract or the service performed or to be performed by the Independent Tester.

20.3 The parties shall comply with and fulfil their respective duties and obligations arising under or in connection with the Independent Tester Contract.

Co-Operation

20.4 The parties agree to co-operate with each other generally in relation to all matters within the scope of or in connection with the Independent Tester Contract. All instructions and representations issued or made by either of the parties to the Independent Tester shall be simultaneously copied to the other and both parties shall be entitled to attend all inspections undertaken by or meetings involving the Independent Tester.

Replacement

20.5 In the event of the Independent Tester's appointment being terminated otherwise than for full performance, the parties shall liaise and co-operate with each other in order to appoint, in accordance with this Clause, a replacement consultant to act as the Independent Tester as soon as reasonably practicable. The identity of any such replacement shall be as agreed

by the parties and the terms of his appointment shall, unless otherwise agreed, be as set out in the Independent Tester Contract.

- 20.6 In the event the parties fail to agree the identity and/or terms of a replacement Independent Tester in accordance with Clause 20.5, within ten (10) Business Days of the original Independent Tester's appointment being terminated, then such disagreement shall be referred for resolution in accordance with Part 26 of the Schedule (*Dispute Resolution Procedure*).

21. EQUIPMENT

Project Co and the Board shall procure, supply, install, maintain and renew all Equipment identified as its responsibility in accordance with Part 13 of the Schedule.

22. PRE-COMPLETION COMMISSIONING AND COMPLETION

Final Commissioning Programme

- 22.1 Not less than 6 months before the Completion Date the Board shall provide Project Co with a draft of the Final Commissioning Programme as jointly developed by the Board and Project Co in accordance with the provisions of Clauses 22.2 and 22.3. Project Co shall provide the Board with comments on the draft Final Commissioning Programme submitted to it no later than 5 months before the Completion Date. The parties shall, within 20 Business Days of receipt by the Board of Project Co's comments agree the terms of the Final Commissioning Programme provided that the Board may by prior notice to Project Co change the scope and time of the Board's Commissioning and reimburse Project Co its reasonable costs incurred as a result of such change in scope or time. If the parties are unable to agree the Final Commissioning Programme or the change in scope or time of the Board's Commissioning one month before the Completion Date the matter shall be referred for determination in accordance with Part 26 of the Schedule (*Dispute Resolution Procedure*).
- 22.2 The Final Commissioning Programme shall be in accordance with the Outline Commissioning Programme and shall impose no greater or more onerous obligations on the Board than those set out in the Outline Commissioning Programme (unless otherwise agreed by the Board in its absolute discretion). The Final Commissioning Programme shall then replace the Outline Commissioning Programme.
- 22.3 The Final Commissioning Programme shall describe the steps necessary, the party responsible for taking each of such steps and the timing and sequence of each of such steps to ensure that Project Co's Pre-Completion Commissioning and the Board's Commissioning will not delay the Actual Completion Date from occurring by the Completion Date.
- 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 paragraph 7.1.6 of Project Co's Proposals and Part 12 of the Schedule (Outline Commissioning Programme).
- 22.5 In accordance with the Completion Process Project Co shall notify the Independent Tester and the Board's Representative of the date when Project Co (acting reasonably) considers that the Works will be complete in accordance with Completion Criteria and this Agreement not less than two (2) months prior to such anticipated completion. Such notification shall trigger the activities of the Independent Tester under this Clause.
- 22.6 The parties each undertake to co-operate with the Independent Tester to ensure that the Independent Tester is familiar with all necessary aspects of the Project for the purposes of its role as described in this Clause.

Commissioning prior to Completion Date

- 22.7 Project Co shall:
- (a) undertake Project Co's Pre-Completion Commissioning in accordance with the Final Commissioning Programme; and
 - (b) permit the Board to undertake the Board's Commissioning on such dates as agreed between the Board and Project Co, in accordance with the Final Commissioning Programme.
- 22.8 Project Co shall give written notice to the Independent Tester and the Board of the commencement of Project Co's Pre-Completion Commissioning and shall ensure that the Independent Tester and the Board's Representative are invited to witness all of, and are provided with all information they may reasonably require in relation to, Project Co's Pre-Completion Commissioning and that the Independent Tester is invited to comment on Project Co's Pre-Completion Commissioning.
- 22.9 Project Co shall (or shall procure that the Contractor shall) give the Board access to the Facilities at such times as may be set out in the Final Commissioning Programme to enable the Board to undertake the Board's Commissioning in accordance with the Final Commissioning Programme for the period prior to completion, provided that if the Board causes any damage to the Works in undertaking the Board's Commissioning, the Board shall be responsible for reimbursing Project Co the reasonable costs of making good such damage.

Pre-Completion inspection

- 22.10 Project Co shall give the Independent Tester and the Board's Representative not less than the appropriate notice period as set out in the Completion Process of the date upon which Project Co considers that the Works will be complete and the tests on completion to be performed in accordance with the Final Commissioning Programme will be carried out. Following receipt of the notice specified in this Clause 22.10 the Board's Representative and the Independent Tester shall be entitled to inspect the Works on the date or dates reasonably specified by Project Co in accordance with this Clause 22.10, and to attend any of the tests on completion. Project Co shall, if so requested, accompany the Board's Representative and the Independent Tester on any such inspection.

Pre-Completion matters

- 22.11 The parties shall procure that the Independent Tester, within five (5) Business Days of any inspection made pursuant to Clause 22.10, notifies Project Co and the Board of any outstanding matters (including, without limitation, the repetition of any of the tests on completion which are required to be carried out and passed in accordance with the Final Commissioning Programme) which are required to be attended to before the Works can be considered to be complete in accordance with the Board's Construction Requirements and Project Co's Proposals. Project Co shall attend to such matters and shall, if necessary, give the Independent Tester further notices in accordance with Clause 22.10 (but dealing only with matters raised in the notification under this Clause 22.11) with matters raised in the notification under this Clause 22.11 so that the procedures in Clause 22.10 and this Clause 22.11 are repeated as often as may be necessary to ensure that all outstanding matters in relation to the Works are attended to.

Completion certificate

- 22.12 Pursuant to the terms of the Independent Tester Contract, the parties shall procure that the Independent Tester shall, when he is satisfied that completion has occurred in accordance with this Agreement, issue a Certificate of Practical Completion to that effect stating the date upon which, in his opinion, the Actual Completion Date occurred. Subject to Clause 22.13 (*Snagging*) and 22.16 (*Defects*), the issue of the Certificate of Practical Completion shall, in the absence of manifest error, bad faith or fraud, be conclusive evidence for the purpose only of ascertaining the Payment Commencement Date, that the Actual Completion Date has occurred on the date stated in such certificate.

- 22.13 The Independent Tester shall issue the Certificate of Practical Completion notwithstanding that there are Snagging Matters. Where there are Snagging Matters, the parties shall procure that the Independent Tester shall, within two (2) Business Days of the date of issue of the relevant Certificate of Practical Completion, prepare and issue a Snagging Notice which shall specify the Snagging Matters and an estimate of the cost of rectifying such Snagging Matters.
- 22.14 Following the issue of a Snagging Notice, Project Co shall, in consultation with the Board's Representative and in such manner as to cause as little disruption as reasonably practicable to the Board's commissioning and start up procedures and the Board's use of the Facilities, rectify all Snagging Matters within twenty (20) Business Days of the issue of the Snagging Notice.
- 22.15 If, within twenty (20) Business Days of the issue of the Snagging Notice Project Co has failed to rectify all of those Snagging Matters the Board may be itself (or engage others to) carry out the works necessary to rectify the Snagging Matters, at the risk and cost of Project Co.
- 22.16 The issue of the Certificate of Practical Completion shall in no way affect the obligations of Project Co under this Agreement including in respect of any Defects.

As-built specification

- 22.17 As soon as it is available, after the issue of the Certificate of Practical Completion, Project Co shall provide to the Board a copy of the as-built building specification, together with all drawings relating to the Works and the appropriate section of any health and safety file together with all as-built drawings and maintenance manuals and results of technical commissioning.

23. POST COMPLETION COMMISSIONING

Not used.

Operational Manuals

- 23.1 Within 10 Business Days of the Actual Completion Date and throughout the remainder of the Project Term, Project Co shall at all reasonable times make available on the Site to the Board's Representative all operation and maintenance manuals and each and every health and safety file required under the CDM Regulations in connection with the Project.

24. FOSSILS AND ANTIQUITIES

Property

- 24.1 As between the parties, all fossils, antiquities, and other objects having artistic, historic or monetary value and human remains which may be found on or at the Site are or shall become, upon discovery, the absolute property of the Board.

Discovery

- 24.2 Upon the discovery of any such item during the course of the Works, Project Co shall:
- (a) immediately inform the Board's Representative of such discovery;
 - (b) take all steps not to disturb the object and, if necessary, cease any Works in so far as the carrying out of such Works would endanger the object or prevent or impede its excavation; and
 - (c) take all necessary steps to preserve the object in the same position and condition in which it was found.

Action

- 24.3 The Board shall procure that the Board's Representative promptly, and in any event within ten (10) Business Days, issues an instruction to Project Co specifying what action the Board's Representative requires Project Co to take in relation to such discovery.
- 24.4 Project Co shall promptly and diligently comply with any instruction issued by the Board's Representative referred to in Clause 24.3 above (except and to the extent that such instruction constitutes a Board Works Variation pursuant to Clause 24.6 below in respect of which the provisions of Part 22 of the Schedule (*Variation Procedure*) shall apply), at its own cost.
- 24.5 If directed by the Board's Representative, Project Co shall allow representatives of the Board to enter the Site for the purposes of removal or disposal of such discovery provided that such entry shall be subject to the Board complying with all relevant safety procedures, which shall include any relevant health and safety plans for the construction of the Facilities, the Contractor's Site Rules from time to time and any reasonable directions with regard to site safety that may be issued by or on behalf of the Contractor's Site Manager from time to time.
- 24.6 If any instruction referred to in Clause 24.3 above includes a requirement for Project Co to carry out works (being any work of alteration, addition, demolition or extension or variation in the Facilities) which are not works which would be necessary for the purpose of compliance with Law or any Consents, such works shall be deemed to be a Board Works Variation and the provisions of Part 22 of the Schedule (*Variation Procedure*) shall apply as if such instruction were a Variation Enquiry issued by the Board in accordance with the provisions of Section 1 of Part 22 of the Schedule (*Variation Procedure*).

PART E: QUALITY ASSURANCE

25. QUALITY ASSURANCE

Quality Plans and Systems

- 25.1 Project Co shall procure that all aspects of the Project Operations are the subject of quality management systems in accordance with the provisions of this Clause 25.
- 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).
- 25.3 Without limitation to the generality of Clause 25.2, there shall be:
- (a) a Design Quality Plan;
 - (b) a Construction Quality Plan; and
 - (c) a Services Quality Plan for each Service,
- provided that the Design Quality Plan and the Construction Quality Plan may be incorporated into one document.
- 25.4 Project Co shall procure that the Project Operations are carried out in compliance with the Quality Plans. All Quality Plans shall be submitted to the Board's Representative in accordance with Part 10 of the Schedule (*Review Procedure*) and Project Co shall not be entitled to implement or procure the implementation of any Quality Plan unless Project Co is entitled to proceed with such implementation pursuant to Part 10 of the Schedule (*Review Procedure*).
- 25.5 Project Co shall implement the quality management systems referred to in Clause 25.1 and shall procure that:
- (a) the Contractor implements the Design Quality Plan;
 - (b) the Contractor implements the Construction Quality Plan;
 - (c) each Service Provider implements the relevant Services Quality Plan for each Service being provided by that Service Provider.
- 25.6 Where any aspect of the Project Operations is performed by more than one contractor or subcontractor, then the provisions of this Clause 25 (in so far as relevant or appropriate to the activities to be performed by such contractor or subcontractor) shall apply in respect of each of such contractors or subcontractors, and references in this Clause 25 to the "Contractor" or the "Service Provider" shall be construed accordingly. To avoid doubt, this Clause shall not be construed as requiring subcontractors of the Contractor or the Service Provider to have their own quality plans but only to comply with the Design Quality Plan and the Construction Quality Plan or the relevant aspects of the Services Quality Plan (as the case may be).
- 25.7 Project Co shall from time to time submit to the Board's Representative in accordance with Part 10 of the Schedule (*Review Procedure*) any changes to any of the Quality Plans required for such Quality Plan to continue to comply with the requirements set out in Clause 25.2. The Board's Representative may raise comments on any such proposed change only on the grounds set out in paragraph 3(f) of Part 10 of the Schedule (*Review Procedure*).
- 25.8 In the event that any ambiguity, uncertainty, dispute or discrepancy arises in relation to the nature and scope of Project Co's obligations under this Clause, wherever possible, the provisions of this Clause shall be interpreted and construed in such a manner as to resolve

the apparent ambiguity, uncertainty, dispute or discrepancy so that all the provisions of this Clause may be given meaning and effect but, if such interpretation or construction is not possible, the provisions of this Clause shall be given meaning and effect in the following order of precedence (in descending order):

- (a) the provisions and standards referred to in Clause 25.2;
- (b) the Quality Plans referred to in Clause 25.3;
- (c) Board's Construction Requirements and/or the Service Level Specifications (as the case may be);
- (d) Project Co's Proposals and/or the Method Statements (as the case may be);
- (e) Project Co's and/or the Contractor's and/or any Service Provider's quality manuals and procedures; and
- (f) Good Industry Practice.

25.9 If there is no objection under Part 10 of the Schedule (*Review Procedure*) to a change to any Quality Plan proposed pursuant to Clause 25.7, the Quality Plan shall be amended to incorporate such change.

Quality Manuals and Procedures

25.10 If any Quality Plan refers to, relies on or incorporates any quality manual or procedure, then such quality manual or procedure or the relevant parts of it shall be submitted to the Board's Representative at the time that the relevant Quality Plan or part of (or change to) a Quality Plan is submitted in accordance with Part 10 of the Schedule (*Review Procedure*), and the contents of such quality manual or procedure shall be taken into account in the consideration of the relevant Quality Plan or part of (or change to) a Quality Plan in accordance with Part 10 of the Schedule (*Review Procedure*).

Quality Management

25.11 Project Co shall maintain a quality management system which shall:

- (a) ensure the effective operation of the quality systems described in this Clause;
- (b) cause an audit of the quality systems at regular intervals and the findings of such audit will be reported to the Board's Representative;
- (c) require review of all quality systems at intervals agreed with the Board's Representative to ensure their continued suitability and effectiveness;
- (d) require liaison with the Board's Representative on all matters relating to quality management; and
- (e) require production of reports and their delivery to Project Co.

Quality Monitoring

25.12 The Board's Representative may carry out audits of Project Co's quality management system (including all relevant Quality Plans and any quality manuals and procedures) to establish that compliance with Clauses 25.1 and 25.3 is being maintained by Project Co. The Board's Representative may carry out such audits at approximate intervals of three (3) months and may carry out other periodic monitoring, spot checks and auditing of Project Co's quality management systems. Project Co shall procure that the Board's Representative shall have a like right in respect of the Contractor and Service Providers. Project Co shall co-operate and shall procure that any Sub-Contractor co-operates with the

Board's Representative including providing him with all information and documentation which he reasonably requires in connection with his rights under this Clause.

PART F: INFORMATION TECHNOLOGY

26. INFORMATION TECHNOLOGY

26.1 Not used.

PART G: SERVICES

27. THE SERVICES

General obligations

- 27.1 Throughout the Operational Term, Project Co shall provide (or procure the provision by the Service Providers of) the Services:
- (a) in accordance with the terms of this Agreement;
 - (b) in accordance with the Method Statements; and
 - (c) as an obligation independent from, and in addition to, Clause 27.1(b), in such manner as ensures that the Service Level Specifications are met.

Commencement and phase in of Services

- 27.2 Project Co shall provide the Services with effect from the Actual Completion Date.

Project Co Services Changes

- 27.3 Project Co may at any time submit to the Board's Representative in accordance with Part 10 of the Schedule (*Review Procedure*) proposals for amendments to or substitution for the Method Statements or any part of them. If there is no comment on such proposed amendment or substitution (on the grounds set out in paragraph 3(g) of Part 10 of the Schedule (*Review Procedure*)), then the Method Statements as so amended or substituted shall be the Method Statements for the purposes of this Agreement, subject to any further amendment or substitution to which there has been no comment in accordance with Part 10 of the Schedule (*Review Procedure*).
- 27.4 To avoid doubt, an amendment to or substitution for the Method Statements proposed pursuant to Clause 27.3 shall not be a Qualifying Variation entitling Project Co to any payment (or other compensation) or to any relief from the performance of its obligations under this Agreement.

No disruption

- 27.5 Project Co shall perform the Services so as to co-ordinate with the Board's operations on the Site and/or in the Facilities and shall take all reasonable care to ensure that it does not interfere with the operations of the Board or any Board Party.

28. MAINTENANCE

Programmed Maintenance Works

- 28.1 No later than three (3) months prior to the Completion Date Project Co shall submit to the Board's Representative in accordance with Part 10 of the Schedule (*Review Procedure*) a Schedule of Programmed Maintenance for the period from the Completion Date to the expiry of that Contract Year.
- 28.2 Not later than three (3) months prior to the commencement of each subsequent anniversary of the Completion Date Project Co shall submit to the Board's Representative in accordance with Part 10 of the Schedule (*Review Procedure*) a Schedule of Programmed Maintenance for the next succeeding Contract Year.
- 28.3 Each Schedule of Programmed Maintenance shall contain the following information (the "Programmed Maintenance Information"):

- (a) details of the proposed start and end dates for each period of Programmed Maintenance, the works to be carried out and the proposed hours of work; and
 - (b) details of any effect of the Programmed Maintenance on the delivery of any of the Services and/or the activities of the Board.
- 28.4 Not later than twenty (20) Business Days prior to the commencement of any quarter (being a three month period commencing on 1 April, 1 July, 1 October or 1 January), Project Co may submit to the Board's Representative for approval in accordance with paragraph 1.3 of Part 10 of the Schedule (*Review Procedure*) a revision to the Schedule of Programmed Maintenance for the Contract Year in which the relevant quarter falls showing the effect of the proposed changes to the Programmed Maintenance Information. If the Board's Representative does not raise comments on such proposed revision in accordance with Part 10 of the Schedule (*Review Procedure*), the Schedule of Programmed Maintenance as revised shall become the Schedule of Programmed Maintenance in respect of that quarter.
- 28.5 Where the Board's Representative raises comments in respect of any Programmed Maintenance periods and/or hours of work shown in a Schedule of Programmed Maintenance in accordance with paragraph 3(h) of Part 10 of the Schedule (*Review Procedure*), he shall indicate whether, and if so when, the Programmed Maintenance can be re-scheduled and Project Co shall amend the relevant Schedule of Programmed Maintenance accordingly.

Programmed and Unprogrammed Maintenance

- 28.6 Project Co shall not carry out any Programmed Maintenance or Unprogrammed Maintenance Works save:
- (a) in accordance with a Schedule of Programmed Maintenance to which no objection has been made under Part 10 of the Schedule (*Review Procedure*) or, where comment has been raised in respect of the Programmed Maintenance periods and/or time, the Schedule of Programmed Maintenance has been amended pursuant to Clause 28.5;
 - (b) in accordance with the procedures set out in Clause 28.8; or
 - (c) in an emergency, in accordance with Clause 28.9.
- 28.7 Notwithstanding that there has been no objection to a Schedule of Programmed Maintenance, the Board's Representative may, at any time, require Project Co to accelerate or defer any Programmed Maintenance by giving written notice to Project Co, (unless otherwise agreed) not less than twenty (20) Business Days prior to the scheduled date for carrying out such Programmed Maintenance, which notice shall set out the time and/or periods at or during which the Board requires the Programmed Maintenance to be performed. Project Co shall notify the Board of the amount of any additional reasonable costs which it will incur as a direct consequence of such acceleration or deferment (the "Estimated Increased Maintenance Costs") within five (5) Business Days of the receipt of the written notice advising of the requirement for an acceleration or deferment of the Programme Maintenance. The Board shall, within a further period of five (5) Business Days following receipt by the Board of notification of the amount of the Estimated Increased Maintenance Costs, at the Board's option, either confirm or withdraw its request to accelerate or defer the Schedule of Programmed Maintenance. If the Board does not respond within this five (5) Business Day period, the request shall be deemed to have been confirmed. The Board shall reimburse Project Co the direct and reasonable costs actually incurred by Project Co as a consequence of such acceleration or deferment up to, but not exceeding, the amount of the Estimated Increased Maintenance Costs.
- 28.8 If, in circumstances other than an emergency, the need arises for Maintenance Works (excluding any works of a de minimis nature in respect of which the parties have agreed this Clause 28.8 shall not apply and excluding works carried out for the purpose of Rectification, which shall take place in accordance with the provisions of Part 18 of the Schedule), which are not scheduled to be carried out as part of the Programmed Maintenance ("Unprogrammed Maintenance Work"), Project Co shall not carry out any

Unprogrammed Maintenance Work unless and until the Board's Representative has approved the proposed commencement date, the proposed hours of work and estimated duration of the requisite Unprogrammed Maintenance Works in accordance with the provisions of paragraph 3(h) of Part 10 of the Schedule (*Review Procedure*). Nothing in this Clause 28.8 (including any approval of the Board pursuant to Part 10 of the Schedule (*Review Procedure*)) shall prevent the Board from making any deductions from the Service Payments pursuant to the Payment Mechanism.

- 28.9 If, as a result of an emergency, the need arises for Unprogrammed Maintenance Works, Project Co may carry out such Unprogrammed Maintenance Works provided that Project Co shall notify the Board's Representative as soon as possible (and in any event within five (5) Business Days of the occurrence of the emergency) of the extent of the necessary Unprogrammed Maintenance Works and the reasons for them. Project Co shall take all reasonable steps to minimise the duration of such Unprogrammed Maintenance Works. Nothing in this Clause 28.9 shall prevent the Board from making any deductions from the Service Payments pursuant to the Payment Mechanism.
- 28.10 Where Programmed Maintenance scheduled to be carried out in accordance with the Schedule of Programmed Maintenance has been deferred by the Board's Representative under Clause 28.7, Project Co shall not be treated as having failed to perform the Services on account of the condition of the Facilities or any part of them from the time the Programmed Maintenance was scheduled to have been completed until the time the deferred Programmed Maintenance was scheduled to have been completed, but not afterwards, provided always, to avoid doubt, that Project Co shall not be relieved from the consequences of any failure to maintain the Facilities in respect of any period prior to the period for performing the particular work according to the Schedule of Programmed Maintenance.

5 Year Maintenance Plan

- 28.11 Project Co shall deliver to the Board's Representative not less than twenty (20) Business Days prior to the commencement of each Contract Year the latest version of the 5 Year Maintenance Plan for the Estates and Grounds and Gardens Services.
- 28.12 The Board shall have a right to inspect the Facilities and the Maintenance Works to ensure that the Facilities are being maintained in accordance with the Service Level Specifications and that the Facilities comply with the Board's Construction Requirements and Project Co's Proposals throughout the Project Term. The Board may appoint an independent third party for the purposes of carrying out any such inspection and shall make known the findings to Project Co and the Funders. The parties shall then meet to discuss any implications of such findings and any steps that are necessary to remedy any failure to comply with such obligations. Project Co shall (subject to Clause 40 (*Variation Procedure*)) take into account such discussions in the next Schedule of Programmed Maintenance so that any failure to comply with such obligations shall be remedied.

29. MONITORING OF PERFORMANCE

Monitoring

- 29.1 In carrying out the Project Operations, Project Co shall, and shall procure that all Project Co Parties and any other persons for whom it is responsible shall, comply with the provisions of Part 14 of the Schedule (*Service Requirements*).
- 29.2 Project Co shall be responsible for monitoring its performance of this Agreement during the Operational Term, in the manner and at the frequencies set out in Part 14 of the Schedule (*Service Requirements*). Project Co shall provide the Board's Representative with relevant particulars of any aspects of its performance which fail to meet the requirements of this Agreement (unless otherwise notified in writing by the Board). The Board may at all reasonable times observe, inspect and satisfy itself as to the adequacy of the monitoring procedures (including without limitation carrying out sample checks).

Service Failure Points

- 29.3 The Board may, by notice to Project Co, award Service Failure Points in respect of a Service in accordance with Part 14 of the Schedule (*Service Requirements*), depending on the performance of that Service in any month as measured in accordance with Part 14 of the Schedule (*Service Requirements*). Service Failure Points which are agreed, or determined, to have been awarded in circumstances where such award was not justified shall be deemed to have been cancelled.

Warning Notices

- 29.4 Without prejudice to the Board's rights under Clause 44 (*Project Co Events of Default*) and any other express rights under this Agreement, if at any time Project Co has:
- (a) committed any material breach of its obligations under this Agreement; or
 - (b) in relation to any Service, accrued more than the number of Service Failure Points in any one month rolling period listed against that Service set out in the table below:-

Service	SFPs
General	27
Estates	80
Grounds	23
Utilities	24
Helpdesk	36
Pest Control	22

then the Board may give written notice (a "Warning Notice") to Project Co setting out the matter or matters giving rise to such notice and containing a reminder to Project Co of the implications of such notice. Any such notice shall state on its face that it is a "Warning Notice".

- 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 three or more Warning Notices in any rolling three month period in respect of any one 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:
- (a) any such notice to Project Co shall specify in reasonable detail the additional measures to be taken by the Board or by Project Co (as the case may be) in monitoring the performance of Project Co;
 - (b) if Project Co (acting reasonably) objects to any of the specified measures on the grounds that they are excessive it shall notify the Board in writing within two (2) Business Days of the receipt of the notice of the measures objected to (and of any changes necessary in order to prevent prejudice to Project Co's performance of its obligations under this Agreement);

- (c) the measures to be taken by the Board and Project Co (as the case may be) shall be agreed between the parties or, in the absence of agreement within three (3) Business Days of the Board's receipt of Project Co's objection, determined pursuant to Part 26 of the Schedule (*Dispute Resolution Procedure*); and
- (d) Project Co shall bear its own costs and indemnify and keep indemnified the Board at all times from and against all reasonable costs and expenses (if any) incurred by or on behalf of the Board in relation to such increased level of monitoring (including an appropriate sum in respect of general staff costs and overheads).

Board's remedial rights

29.6 The provisions of Clauses 29.7 to 29.12 (inclusive) shall apply if:

- (a) the Board, acting reasonably, considers that a breach by Project Co of any obligation under this Agreement:
 - (i) may create an immediate and serious threat to the health or safety of any user of the Facilities; or
 - (ii) may result in a material interruption in the provision of one or more of the Services; or
 - (iii) is prejudicial to the ability of the Board to provide Clinical Services to a material degree; or
- (b) Project Co has, in relation to any Service, accrued more than the number of Service Failure Points in any one month rolling period (to avoid doubt, comprising the then previous thirty (30) days) listed against that Service set out in the table below.; or

Service	SFPs
General	102
Estates	292
Grounds	83
Utilities	94
Helpdesk	142
Pest Control	71

- (c) Project Co is not in breach of its obligations as described in Clause 29.6(a) and (b), but the Board considers the circumstances constitute an emergency.

29.7 In any of the circumstances set out in Clause 29.6, the Board, acting reasonably, may (without prejudice to its rights under Clause 44 (*Project Co Events of Default*) or any other express rights under this Agreement) either:

- (a) if it considers that there is sufficient time and that it is likely that Project Co will be willing and able to provide assistance, require Project Co by written notice to take such steps as the Board considers necessary or expedient to mitigate or rectify such state of affairs and Project Co shall use its best endeavours to comply with the Board's requirements as soon as reasonably practicable; or

- (b) if it considers there is not sufficient time, or that Project Co is not likely to be willing and able to take the necessary steps, take such steps as it considers to be appropriate (either itself or by engaging others to take any such steps) to ensure performance of the relevant Services to the standards required by this Agreement (or as close as possible to those standards as the circumstances permit and, in any event, in accordance with Good Industry Practice).

29.8 If:

- (a) Project Co does not confirm, within ten (10) Business Days of a notice served pursuant to Clause 29.7(a) (or such shorter period as is appropriate in the case of an emergency), that it is willing to take such steps as are referred to in Clause 29.7(a); or
- (b) Project Co fails to take the steps notified to it by the Board pursuant to Clause 29.7(a) within such time as the Board, acting reasonably, shall think fit,

then (without prejudice to Clause 29.7(b)) the Board, acting reasonably, may itself take or engage others to take such steps as it considers appropriate.

29.9 Where the Board considers it to be necessary or expedient to do so, the steps which the Board may take pursuant to this Clause shall include the partial or total suspension of the right and obligation of Project Co to provide the relevant Services to the Board but only for so long as the circumstances referred to in Clause 29.6 subsist or, in the circumstances set out in Clause 29.6(b), 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 in respect of the relevant Services to the required standard.

29.10 If the Board either takes steps itself or requires Project Co to take steps in accordance with this Clause as a result of the circumstance referred to in Clause 29.6(c):

- (a) the Board shall indemnify and keep indemnified Project Co at all times from and against all additional direct reasonable costs, losses, expenses or damages suffered or incurred in relation to undertaking such steps over and above those that would otherwise have been incurred in the proper performance of Project Co's obligations under this Agreement; and
- (b) any costs incurred by the Board in taking such steps or requiring Project Co to take such steps shall be borne by the Board.

29.11 To the extent that the parties shall agree, or it shall be determined in accordance with Part 26 of the Schedule (*Dispute Resolution Procedure*), that the Board was not reasonable in requiring Project Co to take such steps (or in taking such steps itself) as are referred to in this Clause 29, then the Board shall indemnify and keep indemnified Project Co at all times from and against any costs, losses, expenses or damages (over and above those that would otherwise have been incurred by Project Co in the proper performance of its obligations under this Agreement) that are directly and reasonably incurred by Project Co in complying with those requirements of the Board as are agreed or determined not to be reasonable. To avoid doubt, it is acknowledged that Project Co has no right to require determination before taking any such action that the Board may specify; only subsequently may it refer any dispute for resolution to determine if the Board was reasonable in requiring Project Co to take such steps.

29.12 Subject to Clauses 29.10 and 29.11:

- (a) any costs or expenses incurred by Project Co in taking such steps as are required by the Board pursuant to Clause 29.7(a) shall be borne by Project Co;
- (b) Project Co shall reimburse the Board for all reasonable costs, losses, expenses or damages incurred by it in relation to taking the steps, or engaging others to take the steps, referred to in Clauses 29.7 and 29.8; and

- (c) the Board shall be entitled to deduct any such amount from any amount payable to Project Co under the provisions of this Agreement.

30. TUPE AND EMPLOYMENT MATTERS

No Employee Transfer

- 30.1 The Board and Project Co agree that there are no individuals presently employed by the Board whose contracts of employment will, by virtue of the transfer to Project Co of responsibility for provision of (or procuring the provision by Service Providers of) any of the Services in accordance with this Agreement and in accordance with the Transfer Regulations, have effect after the Actual Completion Date (or at any other time) as if originally made between those persons and the relevant Service Provider.
- 30.2 If it is subsequently agreed or determined that there are persons presently employed by the Board whose contracts of employment do have effect after the Actual Completion Date as if originally made between those persons and the relevant Service Provider ("Transferring Staff") then:
- (a) The Board shall within 30 Business Days of the date on which it was so agreed or determined have the opportunity to offer a position, as an employee of the Board, to some or all of the Transferring Staff;
 - (b) Project Co shall procure that no person to whom the Board has offered a position in accordance with Clause 30.2(a) shall be dismissed by reason of redundancy until the period for acceptance of the Board's offer has expired and the person in question has not accepted the Board's offer which shall not be more than one month;
 - (c) Subject to Clauses 30.2(a) and 30.2(b), Project Co or any Service Provider shall be entitled to dismiss any or all of the Transferring Staff by reason of redundancy provided that Project Co shall use and shall procure that any Service Provider shall carry out in the required manner any obligation to consult with the Transferring Staff or any of them, or their respective representatives, and shall use all reasonable endeavours to mitigate the amount of any costs payable in respect of the Transferring Staff or their dismissal.

The Board shall indemnify Project Co against any costs referred to in Clause 30.2(c) reasonably incurred by Project Co (or by a relevant Service Provider and for which Project Co is responsible).

Compliance with Law and Board Policies

- 30.3 Project Co shall comply and shall procure that each Service Provider and all persons employed or engaged by a Service Provider in connection with the provision of any Service shall comply at all times with the Law on health and safety at work and on anti-discrimination and equal opportunities.
- 30.4 Project Co shall procure that each Service Provider takes all reasonable steps to procure that all persons including any employed or engaged by a Service Provider in connection with the provision of any Service shall, so far as applicable, comply with the Board Policies as regards health and safety at work (including the Board Policy regarding smoking) and with those relating to anti-discrimination and equal opportunities (including those relating to harassment). Project Co also shall take and shall procure that every Service Provider shall take all such steps as the Board may reasonably require, which shall include co-operation with action proposed or taken by the Board, to ensure that the Board complies with its duty under Section 3(1) Health and Safety at Work Act 1974 regarding the conduct of the undertaking of the Board.

Project Co Indemnities

30.5 Project Co shall indemnify and keep indemnified in full the Board and, at the Board's request, each and every service provider who has or shall provide any service equivalent to any of the Services against:-

- (a) claims in respect of all emoluments and all other contractual or statutory payments unpaid by Project Co or a Service Provider to any person entitled to such payments from Project Co or a Service Provider who is or has been employed or engaged by Project Co or any Service Provider in connection with the provision of any of the Services which relate to any period of employment or engagement with Project Co or any Service Provider in connection with the provision of the Services on or after the commencement of such employment or engagement but prior to the date of expiry or termination of this Agreement, and all income tax and pension and national insurance contributions payable thereon; and
- (b) insofar as clause 30.5(a) does not apply, all Direct Losses incurred by the Board as a result of any claim against the Board in respect of any liability to any person who is or has been employed or engaged (whether as a consequence of the Transfer Regulations or of the provisions of this Clause 30) by Project Co or any Service Provider in connection with the provision of any of the Services, where such claim arises as a result of any act or omission of Project Co or the Service Provider occurring after the Actual Completion Date and before the expiry or termination of this Agreement;

BUT the indemnities in Clauses 30.5(a) and (b) shall not apply to the extent that the claim arises from a wrongful act or omission of the Board.

30.6 Clause 8.3 and Clause 8.4 of this Agreement shall apply where any claim is made in respect of the indemnities given by Project Co under Clause 30.5.

Position on expiry or earlier termination of this Agreement

30.7 On the expiry or earlier termination of this Agreement, the Board and Project Co agree that it is their intention that the Transfer Regulations shall apply in respect of the provision thereafter of any service equivalent to a Service but the position shall be determined in accordance with the Law at the date of expiry or termination as the case may be and this Clause is without prejudice to such determination.

30.8 Project Co shall not and shall procure that no Service Provider shall make any material change to the terms and conditions of employment of any person employed in the provision of any Service, transfer any person employed in the provision of any Service to another part of its business or materially increase or decrease the number of such persons:

- (a) within the period of twelve months immediately preceding the expiry of this Agreement, or
- (b) within the period of twelve months before the termination of this Agreement or, if shorter, during the period of notice of termination

without the Board's consent (which shall not be unreasonably withheld), except if such change is required by Law.

30.9 If the Transfer Regulations do not apply on the expiry or earlier termination of this Agreement, the Board shall ensure that each new provider of a service equivalent to a Service on or after the expiry or earlier termination of this Agreement (including the Board) shall offer employment to the persons employed by Project Co or a Service Provider in the provision of the Service immediately before the expiry or earlier termination of this Agreement and shall indemnify Project Co or a Service Provider for Direct Losses any of them may suffer or incur as a result of its failure

to do so, and for any costs, claims or liabilities for redundancy payments (whether statutory or contractual).

- 30.10 If an offer of employment is made in accordance with Clause 30.9 the employment shall be on the same terms and conditions as applied immediately before the expiry or earlier termination of this Agreement including full continuity of employment, except that the Board or other new service provider may at its absolute discretion not offer such terms and conditions if there has been any change to the terms and conditions of the persons concerned in breach of Clause 30.8.

31. NOT USED

Not Used.

32. SITE SECURITY AND PERSONNEL ISSUES

Access

- 32.1 The Board shall have the right to refuse admittance to, or order the removal from, the Facilities of any person employed by (or acting on behalf of) Project Co, any Project Co Party or any sub-contractor whose presence, in the reasonable opinion of the Board, is likely to have a material adverse effect on the performance by the Board of the Clinical Services or who is not a fit and proper person to be in the Facilities.
- 32.2 Action taken under Clause 32.1 shall forthwith be confirmed in writing by the Board to Project Co and, to avoid doubt, shall not relieve Project Co of any of its obligations under this Agreement.
- 32.3 If and when so directed in writing by the Board, Project Co shall within twenty (20) Business Days provide a list of the names and addresses of all persons it expects may require admission in connection with this Agreement, to any premises occupied by the Board, specifying the capacities in which those persons are concerned with this Agreement and giving such other particulars as the Board may reasonably require.
- 32.4 The decision of the Board as to whether any person is to be refused admission shall be final and conclusive.

Board Policies

- 32.5 Project Co shall, and shall procure that all Project Co Parties shall, comply at all times with the Board Policies.
- 32.6 The Board shall notify Project Co of any proposed change to the Board Policies as soon as practicable (and, in any event, prior to such change taking effect) and consult with Project Co. Subject to Clause 32.7, such change shall take effect as a Variation in accordance with Part 22 of the Schedule (*Variation Procedure*).
- 32.7 The Board may, at its sole option, notify Project Co that Project Co shall not be obliged to comply with any change to any Board Policy and that Project Co should continue to comply with the relevant Board Policy prior to any change in which case such change shall not take effect as a Variation in accordance with Part 22 of the Schedule (*Variation Procedure*).

Resources and training

- 32.8 Project Co shall procure that:
- (a) there shall at all times be a sufficient number of staff (including all relevant grades of supervisory staff) engaged in the provision of the Services with the requisite level of skill and experience. To avoid doubt, this obligation shall include ensuring that there are sufficient staff to cover periods of holiday, sickness, other absence, and anticipated and actual peaks in demand for each of the Services; and

- (b) all staff receive such training and supervision as is necessary to ensure the proper performance of this Agreement and compliance with all health and safety rules, procedures and requirements

provided that Project Co shall not be in breach of its obligations under this Clause 32.8 to the extent that such breach is caused or contributed to by the Board failing to comply with its obligations under Clause 32.9.

- 32.9 The Board agrees to permit and arrange for any person who in the event that he or she remains in the employment of the Board as at the Actual Completion Date to receive training and to make familiarisation visits to the Facilities (all as reasonably requested by Project Co and in such manner as to ensure that there is no material adverse effect on the operations of the Board as a result of the same).

Convictions and disciplinary action

- 32.10 Project Co (to the extent permitted by Law) shall procure that all potential staff or persons performing any of the Services (other than Transferring Staff as confirmed by the Board whose duties do not thereafter change so that they may reasonably be expected to have access to children in the course of their employment or engagement) who may reasonably be expected in the course of their employment or engagement to have access to children and/or access to persons receiving Clinical Services:
- (a) are questioned concerning their Convictions; and
- (b) 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 subjected to such checks as may be undertaken by Disclosure Scotland in relation to Convictions.
- 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 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 or 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).
- 32.12 Project Co shall procure that the Board is kept advised at all times of any person employed or engaged by Project Co or any Service Provider in the provision of any of the Services who, subsequent to his/her commencement of such employment or engagement, receives a Conviction of which Project Co or a Service Provider becomes aware or whose previous Convictions become known to Project Co or a Service Provider.
- 32.13 The Board's Representative (acting reasonably) may instruct Project Co to procure that appropriate disciplinary action is taken against any employee of Project Co or any Sub-Contractor (in accordance with the terms and conditions of employment of the employee concerned) who misconducts himself or is incompetent or negligent in his duties. The Board shall co-operate with any such disciplinary proceedings and shall be advised in writing by Project Co of the outcome.
- 32.14 Project Co shall procure that there are set up and maintained, by it and by all Service Providers, personnel policies and procedures covering all relevant matters (including discipline, grievance, equal opportunities and health and safety). Project Co shall procure that the terms and the implementation of such policies and procedures comply with Law and Good Industry Practice and that they are published in written form and that copies of them (and any revisions and amendments to them) are forthwith issued to the Board.

Management

- 32.15 Project Co shall consult with the Board in relation to the selection procedure for Project Co's Hospital Manager and such person shall not be appointed (or replaced) without the prior written consent of the Board (such consent not to be unreasonably withheld or delayed).

- 32.16 Project Co shall provide, and shall procure that all Service Providers provide, to the Board upon request details of their respective management organisations.

Lists and Records

- 32.17 Project Co shall procure that the Board's Representative shall at all reasonable times have access to all material details in respect of all employees of Project Co or any Service Provider engaged in the provision of the Services including numbers and categories of staff employed to perform the Services and including in respect of each such employee:
- (a) details of qualifications; and
 - (b) details of training undertaken by the employee.

Health Requirements

- 32.18 Project Co shall procure that all potential employees or persons who may otherwise perform any of the Services (other than Transferring Staff) undergo pre-employment health screening (including a medical examination if necessary) by a qualified occupational health professional to establish in each case that the relevant person is medically fit for his proposed tasks in the provision of any Service and that he does not pose at that time any danger to the health of other persons (provided that Project Co is not required to procure compliance with an obligation which contravenes the Disability Discrimination Act 1995) and Project Co shall also procure (to the extent permitted by Law) that all persons employed or engaged in the provision of any Service shall undergo such medical screening examination or treatment and provide such information during the currency of this Agreement when reasonably requested to do so by the Board as required to ensure that the Board is able to comply with relevant legal obligations in respect of the health of Board staff, patients or visitors to Board premises.
- 32.19 To the extent permitted by Law records of all screenings, examinations or treatments referred to in this Clause 32 shall be held by Project Co on behalf of and agent for the Board and produced (subject to requirements under the Law) for inspection upon request by the Board's Representative provided that no such inspection shall take place unless each Staff member has given his or her written consent to such inspection.
- 32.20 Project Co shall (to the extent permitted by Law) procure that the Board shall be informed upon reasonable request by the Board of the outcome of each and every medical screening examination or treatment referred to in Clause 32.18 with reference to the purpose of the screening, examination or treatment concerned and shall receive all such other information referred to in Clause 32.18 subject to requirements under the Law.
- 32.21 The Board's Representative may (acting reasonably) refuse admittance to or order the removal from the Board's premises of any person employed or engaged in the provision of any Service whose presence poses or is reasonably believed to pose a risk to the health of Board staff, patients or visitors and such action which shall forthwith be confirmed in writing by the Board shall not relieve Project Co of any of its obligations under this Agreement.

33. STOCKS, CONSUMABLES, MATERIALS AND EQUIPMENT

Standards

- 33.1 All goods, equipment, consumables and materials which are to be used in the provision of the Services shall be of satisfactory quality.
- 33.2 Project Co shall ensure that the goods, equipment, consumables and materials used by it or any Sub-Contractor in connection with the provision of any of the Services (each as a distinct and separate obligation) are:
- (a) maintained in a safe, serviceable and clean condition in accordance with Good Industry Practice;

- (b) of the type specified in the Service Level Specifications and/or the Method Statements (where appropriate); and
- (c) in compliance with any relevant rules, regulations, codes of practice and/or British or European Standards,

and shall, as soon as practicable after receiving a request from the Board's Representative, supply to the Board's Representative evidence to demonstrate its compliance with this Clause 33.2.

- 33.3 Project Co shall procure that sufficient stocks of goods, consumables, equipment and materials are held in order to comply with its obligations under this Agreement.

Hazardous substances and materials

- 33.4 Project Co shall not install, keep or use in or on the Facilities any materials, equipment or apparatus the installation, keeping or use of which is likely to cause (or in fact causes):

- (a) material damage to the Facilities;
- (b) dust, noise or vibration constituting a nuisance to the owners and/or occupiers of any property adjoining or near to the Facilities; or
- (c) the generation, accumulation or migration of any hazardous substance in an unlawful manner whether within or outside the Facilities,

and shall use all reasonable endeavours to ensure (by directions to staff and otherwise) that all materials, equipment or apparatus in or on the Facilities is operated so as to minimise noise and vibration likely to cause annoyance or disturbance and the unlawful generation or migration of any hazardous substance.

- 33.5 Save for articles or things commonly used or generated in hospitals, Project Co shall not bring in or on to (or keep or maintain in or on) the Facilities any hazardous materials or equipment without the prior written consent of the Board and unless Project Co has complied with all relevant Law.

- 33.6 Without prejudice to the generality of its obligations, Project Co shall:

- (a) procure that all hazardous materials and equipment used or stored on the Site shall be kept in accordance with Good Industry Practice, properly and securely labelled and stored, under appropriate supervision and used only by appropriately trained and competent staff; and
- (b) use all practicable and reasonable means to:
 - (i) prevent or counteract the unlawful emission of any hazardous substance to the satisfaction of the Board's Representative;
 - (ii) avoid the unlawful discharge into any conducting media serving the Facilities of any hazardous substance;
 - (iii) prevent the unlawful generation, accumulation or migration of any hazardous substance at or from the Facilities; and
 - (iv) prevent any environmental claims arising or any circumstances arising likely to result in any environmental claims,

in so far as such hazardous substance is, or should be, under the control of Project Co pursuant to this Agreement.

34. NOT USED

PART H: PAYMENT AND FINANCIAL MATTERS

35. PAYMENT

Service Payments

- 35.1 Project Co shall not be entitled to receive any Service Payments until the Payment Commencement Date. Subject to the provisions of this Agreement, the Board shall pay Project Co the Service Payments in respect of each Contract Month following the Payment Commencement Date in accordance with the provisions of Part 18 of the Schedule (*Payment Mechanism*).

Invoicing and payment arrangements

- 35.2 (a) Project Co shall issue a VAT invoice and Service Payment Statement (setting out the amount of the Service Payment payable for that Contract Month, together with details of how it has been confirmed) to the Board's Representative no later than the fifteenth day of the Contract Month. The Service Payment Statement will contain details of deductions incurred in the immediately preceding Contract Month, and will be accompanied by clear working papers setting out the derivation and calculation of all deductions made.
- (b) Where the amount of the Service Payment set out in a VAT invoice submitted in accordance with Clause 35.2(a) (*Invoicing and payment arrangements*) is not disputed by the Board, the Board shall pay Project Co the amount set out in the VAT invoice within the first five (5) Business Days of the beginning of the Contract Month following the issue of the relevant Service Payment Statement.
- 35.2A In respect of the first Contract Month after the Payment Commencement Date, Project Co shall invoice the Board no later than 10 Business Days after the start of the Contract Month in accordance with the provisions of clause 35.2(a)) on the basis that no Deductions will apply to this first Monthly Service Payment.
- 35.2B In respect of the final Contract Month during the Project Term the Board shall be entitled to invoice Project Co for the Deductions in such period on the day which is one month and three days after expiry of the Project Term. Project Co shall pay the amounts included in such invoice on or before the twenty eighth day following receipt by Project Co of the invoice from the Board.

Manner of payment

- 35.3 All payments under this Agreement shall be made in pounds sterling by electronic transfer of funds for value on the day in question to the bank account of the recipient (located in the United Kingdom) specified in the relevant invoice, quoting the invoice number against which payment is made.

Disputes

- 35.4 If either party (acting in good faith) disputes all or any part of the Service Payments calculated in accordance with Clause 35.2 (*Invoicing and payment arrangements*), the undisputed amount of the Service Payment shall be paid by the Board in accordance with Clause 35.2 (*Invoicing and payment arrangements*) and the provisions of this Clause 35.4 shall apply. The parties shall use all reasonable endeavours to resolve the dispute in question within fifteen (15) Business Days of the dispute arising. If they fail so to resolve it, either party may refer the matter to the Dispute Resolution Procedure. Following resolution of the dispute, any amount agreed or determined to have been payable shall be paid

forthwith by the Board to Project Co, together with interest on such amount calculated in accordance with Clause 35.5 (*Late Payments*).

Late Payments

- 35.5 Each party shall be entitled, without prejudice to any other right or remedy, to receive interest on any payment not duly made pursuant to the terms of this Agreement on the due date calculated from day to day at a rate per annum equal to the Default Interest Rate from the day after the date on which payment was due up to and including the date of payment.

Set-Off

- 35.6 Whenever any sum of money shall be agreed, or determined, as due and payable by Project Co to the Board, such sum may at the Board's discretion be deducted from or applied to reduce the amount of any sum then due, or which at any time afterwards may become due, to Project Co from the Board under this Agreement provided that the Board has given Project Co not less than five (5) Business Days' notice of its intention to deduct or apply such sum.
- 35.7 Whenever any sum of money shall be agreed, or determined, as due and payable by the Board to Project Co, such sum may at Project Co's discretion be deducted from or applied to reduce the amount of any sum then due, or which at any time afterwards may become due, from Project Co to the Board under this Agreement provided that Project Co has given the Board not less than five (5) Business Days' notice of its intention to deduct or apply such sum.

VAT

- 35.8 The provisions of Clause 53 (*Taxation*) shall apply.

36. INSURANCE

Project Co Insurances

- 36.1 Project Co shall, at its own cost, procure that the insurances, details of which are set out in Section 1 of Part 21 of the Schedule (*Insurance Requirements*), are taken out prior to the commencement of the Works and are maintained for the periods specified in Section 1 of Part 21 of the Schedule (*Insurance Requirements*).
- 36.2 Project Co shall, at its own cost, procure that the insurances, details of which are set out in Section 2 of Part 21 of the Schedule (*Insurance Requirements*), are taken out prior to the Actual Completion Date and are maintained for the periods specified in Section 2 of Part 21 of the Schedule (*Insurance Requirements*).
- 36.3 Without prejudice to the other provisions of this Clause, Project Co shall, at all relevant times, at its own cost, effect and maintain in full force those insurances which it is required to effect by any applicable Law.
- 36.4 All Insurances shall:
- (a) be maintained in the names of the parties specified in Part 21 of the Schedule (*Insurance Requirements*) and shall be composite policies of insurance (and not joint unless stated otherwise in any case in Part 21 of the Schedule (*Insurance Requirements*));
 - (b) be placed with insurers who are acceptable to the Board (such acceptance not to be unreasonably withheld or delayed);
 - (c) provide that they shall continue in effect and unaltered for the benefit of the insured parties for at least thirty (30) Business Days after written notice by registered mail or

fax of any cancellation, adverse change or lapse by reason of non-payment of premiums or instalment or otherwise has been received by the Board;

- (d) contain a provision that:
 - (i) no claim of any of the insured under the policy shall be defeated, prejudiced or otherwise affected by any act or omission on the part of any other insured and shall insure the interests of each insured regardless of any act or omission on the part of any other insured party; and
 - (ii) each policy of insurance which insures the rights and interests of more than one party operates, save for limits of liability and/or amount, in the same manner as if there were a separate policy with and covering each insured and be without right of contribution from any other insurance which is carried by an insured;
- (e) in so far as they relate to damage to assets (including the Facilities), cover the same for the full reinstatement value; and
- (f) comply with the relevant provisions of Part 21 of the Schedule (*Insurance Requirements*).

36.5 Project Co shall ensure that its brokers give the Board a letter of undertaking in the Agreed Form as set out in Part 21 of the Schedule Appendix 1.

Subrogation and Vitiating

36.6 Project Co shall:

- (a) procure that all policies of insurance to be effected by it pursuant to this Clause shall contain a provision to the effect 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); and
- (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 (whether or not such insurance has in fact been effected or, if effected, has been vitiating as a result of any act or omission of Project Co (or any Project Co Party), including but not limited to non-disclosure or under-insurance),

provided that, to avoid doubt, this Clause 36.6 shall not by itself prevent Project Co from claiming against the Board (or any Board Party) for any loss or damage not covered because of the level of deductibles under such insurance permitted by this Agreement or to the extent such loss or damage exceeds the maximum of such insurance required by this Agreement.

36.7 Neither party shall take any action or fail to take any reasonable action or (in so far as it is reasonably within its power) permit or allow others to take or fail to take any action (including failure to disclose any fact) as a result of which any of the Insurances maintained pursuant to this Clause 36 may be rendered void, voidable, unenforceable or suspended or impaired in whole or in part or which may otherwise render any sum paid out under any relevant policy repayable in whole or in part.

Evidence of Project Co Insurance

36.8 Not less than ten (10) Business Days prior to the expiry or amendment of any relevant insurance policy, Project Co shall submit to the Board a request for approval from the Board of the insurer and the principal terms and conditions of such insurance policy (and any revision to such terms and conditions or change in identity of such insurer), such approval not to be unreasonably withheld or delayed.

- 36.9 Project Co shall supply the Board with copies of every policy of Insurance (or such other evidence of insurances as may be reasonably required) as soon as it is available, together with evidence of payment of the premiums. If Project Co defaults in insuring or continuing to maintain the Insurances, the Board may insure against any risk in respect of which such default has occurred and recover any premiums from Project Co as a debt.

Acceptance and compliance

- 36.10 The supply to the Board of any draft insurance policy or certificate of insurance or other evidence of compliance with this Clause shall not imply acceptance by the Board (or the Board's Representative) that:
- (a) the extent of insurance cover is sufficient and its terms are satisfactory; or
 - (b) in respect of any risks not insured against, that the same were Uninsurable.
- 36.11 Neither failure to comply nor full compliance with the insurance provisions of this Agreement shall relieve Project Co of its liabilities and obligations under this Agreement.

Uninsurable Risks

36.12

- (a) If a risk usually covered by contractors' 'all risks' insurance, property damage insurance, third party liability insurance, delay in start up and business interruption insurance (but not loss of profits) or statutory insurances in each case required under this Agreement becomes Uninsurable then:
 - (i) Project Co shall notify the Board of any such risk becoming Uninsurable within 5 Business Days of becoming aware of the same and in any event at least 5 Business Days before expiry or cancellation of any existing insurance in respect of that risk; and
 - (ii) if both parties agree, or it is determined in accordance with the Dispute Resolution Procedure that the risk is Uninsurable and that:
 - a. the risk being Uninsurable is not caused by the actions of Project Co or any sub-contractor of Project Co (of any tier); and
 - b. Project Co has demonstrated to the Board that Project Co and a prudent board of directors of a company operating the same or substantially similar PFI businesses in the United Kingdom to that operated by Project Co would in similar circumstances (in the absence of the type of relief envisaged by this clause) be acting reasonably and in the best interests of the company if they resolved to cease to operate such businesses as a result of that risk becoming Uninsurable, taking into account inter alia (and without limitation) the likelihood of the Uninsurable risk occurring (if it has not already occurred), the financial consequences for such company if such Uninsurable risk did occur (or has occurred) and other mitigants against such consequences which may be available to such company

the parties shall meet to discuss the means by which the risk should be managed or shared (including considering the issue of self-insurance by either party).
- (b) If the requirements of paragraph (a) are satisfied, but the parties cannot agree as to how to manage or share the risk, then:
 - (i) in respect of such third party liability insurance only the Board shall (at the Board's option) either pay to Project Co an amount equal to the amount calculated in accordance with Section C of Part 23 of the Schedule

(*Consequences of Termination for Force Majeure*) and this Agreement will terminate, or elect to allow this Agreement to continue and paragraph (ii) below shall thereafter apply in respect of such risk; and

- (ii) in respect of such contractors' 'all risks' insurance, property damage insurance, third party liability insurance (if the Board elects to allow the Agreement to continue in accordance with Clause 36.12 (b)(i)), delay in start up and business interruption insurance (but not loss of profits) or statutory insurances this Agreement shall continue and on the occurrence of the risk (but only for as long as such risk remains Uninsurable) the Board shall (at the Board's option) either pay to Project Co an amount equal to insurance proceeds that would have been payable had the relevant insurance continued to be available and this Agreement will continue, or an amount equal to the amount calculated in accordance with Section C of Part 23 of the Schedule (*Consequences of Termination for Force Majeure*) plus (in relation to third party liability insurance only) the amount of insurance proceeds that would have been payable whereupon this Agreement will terminate; and
 - (iii) where pursuant to paragraphs (b)(i) and/or (ii) this Agreement continues then the Service Payment shall be reduced in each year for which the relevant insurance is not maintained by an amount equal to the premium paid (or which would have been paid) by Project Co in respect of the relevant risk in the year prior to it becoming Uninsurable (index linked from the date that the risk becomes Uninsurable). Where the risk is Uninsurable for part of a year only the reduction in the Service Payment shall be pro rated to the number of months for which the risk is Uninsurable; and
 - (iv) where pursuant to paragraphs (b)(i) and/or (ii) this Agreement continues Project Co shall approach the insurance market at least every four months to establish whether the risk remains Uninsurable. As soon as Project Co is aware that the risk is no longer Uninsurable, Project Co shall take out and maintain or procure the taking out and maintenance of insurance (to be incepted as soon as is reasonably practicable) for such risk in accordance with this Agreement.
- (c) If, pursuant to Clause 36.12(b)(ii), the Board elects to make payment to Project Co (such that this Agreement will terminate)(the "Relevant Payment"), Project Co shall have the option (exercisable in writing within (20) Business Days of the date of such election by the Board (the "Option Period")) to pay to the Board on or before the end of the Option Period, an amount equal to the insurance proceeds that would have been payable had the relevant risk not become Uninsurable, in which case the Agreement will continue (and the Relevant Payment will not be made by the Board), and Project Co's payment shall be applied for the same purpose and in the same manner as insurance proceeds would have been applied had the relevant risk not become Uninsurable.

36.13 Unavailability of Terms

- (a) If, upon the renewal of any of the Insurances:
 - (i) any Insurance Term is not available to Project Co in the worldwide insurance market with reputable insurers of good standing; and/or
 - (ii) the insurance premium payable for Insurance incorporating such Insurance Term is such that the Insurance Term is not generally being incorporated in insurance procured in the worldwide insurance market with reputable insurers of good standing by contractors in the United Kingdom,

(other than, in each case, by reason of one or more actions of Project Co and/or any sub-contractor of Project Co (of any tier)) then paragraph (b) shall apply.
- (b) If it is agreed or determined that paragraph (a) applies then the Board shall waive Project Co's obligations in Clauses 36.1 to 36.3 and/or Schedule Part 21 (*Insurance*

Requirements) in respect of that particular Insurance Term and Project Co shall not be considered in breach of its obligations regarding the maintenance of insurance pursuant to this Agreement as a result of the failure to maintain insurance incorporating such Insurance Term for so long as the relevant circumstances described in paragraph (a) continue to apply to such Insurance Term.

- (c) To the extent that the parties agree (acting reasonably), or it is determined pursuant to the Dispute Resolution Procedure, that an alternative or replacement term and /or condition of insurance is available to Project Co in the worldwide insurance market with reputable insurers of good standing which if included in the relevant insurance policy would fully or partially address Project Co's inability to maintain or procure the maintenance of insurance with the relevant Insurance Term, at a cost which contractors in the UK are (at such time) generally prepared to pay, Project Co shall maintain or procure the maintenance of insurance including such alternative or replacement term and/or condition. Notwithstanding any other provision of this Agreement, the costs of such insurance shall be subject to the premium costs sharing mechanism set out at Section 3 of Schedule Part 21 (*Insurance Cost Sharing Schedule*).
- (d) Where the Board has exercised the waiver pursuant to paragraph (b), it shall be entitled to deduct from the annual Service Payment the "Adjusted Amount", such amount being an amount equal to the amount paid for the particular Insurance Term in the preceding year (using a reasonable estimate of such amount where a precise figure is not available) less any annual amount paid or payable by Project Co to maintain and/or procure the maintenance of any (whether full or partial) alternative or replacement insurance in respect of such Insurance Term pursuant to paragraph (c).
- (e) While paragraph (a) applies, the annual Service Payment shall be reduced each Contract Year by the Adjusted Amount, index linked from the date that the particular Insurance Term is no longer available.
- (f) Project Co shall notify the Board as soon as reasonably practicable and in any event within five days of becoming aware that paragraph (a)(i) and/or paragraph (a)(ii) are likely to apply or (on expiry of the relevant insurance then in place) do apply in respect of an Insurance Term (irrespective of the reason for the same). Project Co shall provide the Board with such information as the Board reasonably requests regarding the unavailability of the Insurance Term and the parties shall meet to discuss the means by which such unavailability should be managed as soon as is reasonably practicable.
- (g) In the event that paragraph (a)(i) and/or paragraph (a)(ii) apply in respect of an Insurance Term, (irrespective of the reasons for the same) Project Co shall approach the insurance market at least every four months to establish whether paragraph (a)(i) and/or paragraph (a)(ii) remain applicable to the Insurance Term. As soon as Project Co is aware that paragraph (a)(i) and/or paragraph (a)(ii) has ceased to apply to the Insurance Term, Project Co shall take out and maintain or procure the taking out and maintenance of insurance (to be incepted as soon as is reasonably practicable) incorporating such Insurance Term in accordance with this Agreement.

36.14 Not used

36.15 Not used

Risk Management

36.16 With effect from the date of this Agreement, the Board and Project Co shall each designate or appoint an insurance and risk manager and notify details of the same to the other parties. Such person shall:

- (a) be responsible for dealing with all risk management matters on behalf of its appointing or designating party including (without limitation) ensuring compliance by that party with this Clause;

- (b) advise and report to that party on such matters; and
- (c) ensure that any report or survey conducted by any insurer of any relevant procedures in relation to the Project is disclosed to the parties.

36.17 Without prejudice to the provisions of Clause 36.16, the parties shall notify one another, and in Project Co's case the relevant insurer, of any circumstances which may give rise to a claim of a value equal to or in excess of one hundred thousand pounds (£100,000) (index-linked) under the Insurances within five (5) Business Days of becoming aware of the same (or earlier, if so requested by the terms of the relevant insurance policy). If any insurer disputes any such claim, Project Co shall provide the Board with full details of any disputed claim and the parties shall liaise with one another to ensure that the relevant claim is preserved or pursued.

Application of Proceeds

36.18 All insurance proceeds received by Project Co under the insurances referred to in paragraph 1 of Section 1 and paragraph 1 of Section 2 of Part 2 and of Part 21 of the Schedule (*Insurance Requirements*) 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.

36.19 Subject to the provisions of the Funders' Direct Agreement and Clauses 36.18, 36.20G (*Reinstatement Plan*), and 36.20H Project Co shall apply any proceeds of any policies of Insurance:

- (a) in the case of third party legal liability or employers' liability insurance, in satisfaction of the claim, demand, proceeding or liability in respect of which such proceeds are payable; and
- (b) in the case of any other insurance, so as to ensure the performance by Project Co of its obligations under this Agreement, including where necessary the reinstatement, restoration or replacement of the facilities, assets, materials or goods affected by the event giving rise to the insurance claim and consequent payment of proceeds.

36.19A Where reinstatement monies are required to be released from the Insurance Proceeds Account Project Co shall obtain the Board's consent in accordance with the Insurance Proceeds Account Agreement. The Board shall give its consent to the release of monies from the Insurance Proceeds Account within one (1) Business Day of a request from Project Co (such consent not to be unreasonably withheld).

36.19B If the proceeds of any insurance claim are insufficient to cover the settlement of such claims, Project Co will make good any deficiency forthwith.

36.20 *Reinstatement Plan*

36.20A For the purposes of this Clause 36.20 Material Damage of the Facilities shall mean damage to the Facilities which would give rise to repair and/or reinstatement costs equal to 50% of the Capital Cost of the Facilities or above (index linked) (the "Relevant Incident").

36.20B In the event of damage to, or destruction of, any part of the Facilities which is or is likely to be Material Damage there shall be a meeting between the parties within three (3) Business Days of such damage to make a preliminary assessment of the nature and extent of the damage and in approximate terms the likely reinstatement cost and length of time required to reinstate.

36.20C In the event of Material Damage to the Facilities, Project Co shall deliver (as soon as reasonably practicable and in any event within one (1) month) to:

- (a) the Board; and
- (b) the Scottish Executive Health Department (or its replacement from time to time)

a plan prepared by Project Co (the "Original Reinstatement Plan") for the carrying out of the works necessary (the "Reinstatement Works") to reinstate or replace the damaged or destroyed facilities or assets. Following receipt of the Reinstatement Plan, the Board may also, if it has decided that the relevant Facilities are not required to be reinstated in the same form as prior to the damage or destruction, issue a Variation Enquiry. The provisions of Part 22 of the Schedule (*Variation Procedure*) shall apply to such Variation Enquiry with such amendments as Project Co and the Board may agree to take account of the procedures set out in this Clause 36.20C.

36.20D Any Original Reinstatement Plan shall set out in as much detail as is reasonable in the circumstances:

- (a) the identity of the person, or (if Project Co is seeking competitive tenders) persons intended, to effect the Reinstatement Works;
- (b) the terms and timetable or (if not then established) the reasonably anticipated terms and timetable upon which the Reinstatement Works are to be effected (including the date upon which the Site is reasonably expected to become fully operational again);
- (c) the impact that implementation of the Original Reinstatement Plan will have on the revenues of Project Co under this Agreement and on payment obligations of Project Co under the other Project Documents;
- (d) the total cost or (if not then established) the reasonably anticipated total cost of the Reinstatement Works; and
- (e) the impact of any Variation requested by the Board as part of the reinstatement in accordance with Clause 36.20C.

36.20E The Board shall provide Project Co with any comments it may have on any Original Reinstatement Plan and any Variation Enquiry issued under Clause 36.20C as soon as reasonably practicable and in any event not less than seven (7) days prior to the required date for delivery of the Final Reinstatement Plan.

36.20F As soon as reasonably practicable and in any event within one (1) month of delivery of the Original Reinstatement Plan, Project Co will deliver to the Board and the Scottish Executive Health Department (or its replacement from time to time) a further reinstatement plan setting out the information required in Clause 36.20D (the "Final Reinstatement Plan") amending the Original Reinstatement Plan to incorporate the comments received from the Board in respect of the Original Reinstatement Plan, including (if relevant) any necessary changes to any person(s) and/or the terms and timetable proposed by Project Co to effect the Reinstatement Works in the Original Reinstatement Plan which were not approved by the Board (provided that if there is any conflict between the comments received, such parties shall use reasonable endeavours to remove such conflict(s) and if they are unable to do so the dispute will be resolved in accordance with Clause 56 (*Dispute Resolution Procedure*)) and those changes to the Original Reinstatement Plan necessary to reflect the contractual terms agreed (as negotiated and finalised) with the person effecting the Reinstatement Works.

36.20G Upon receipt of a Final Reinstatement Plan (complying with the requirements of and approved by the Board as contemplated in Clause 36.20F), Project Co shall amend the Financial Model. For the purposes of such amendment to the Financial Model the following assumptions shall be used:

- 36.20G (a) that the Final Reinstatement Plan shall be effected in accordance with its terms;
- 36.20G (b) that those moneys standing to the credit of the Maintenance Reserve Account (as defined in the Funding Agreements) which the Senior Funders confirm are no longer needed to meet the maintenance requirements of assets which are to be replaced as part of the Reinstatement Works can be transferred out of the Maintenance Reserve Account
- 36.20G(c) that the payments under the Senior Funding Agreements to be paid during the period of the Reinstatement Plan shall be met in accordance with the

Funding Agreements on the basis of no rescheduling of any payments under the Senior Funding Agreements;

- 36.20G (d) that payments in respect of any Variation comprised in the Reinstatement Plan will be determined in accordance with Part 22 of the Schedule (*Variation Procedure*).

Board election not to reinstate

- 36.21 In the event that the Facilities are destroyed or substantially destroyed, the Board may, at its option, serve a Viability Statement on Project Co within ten (10) Business Days of:
- (a) completion of the Economic Reinstatement Test; or
 - (b) if the Funders' Direct Agreement has ceased to apply, agreement or determination of the extent of the damage; or
 - (c) receipt by the Board of the Original Reinstatement Plan.

If the Board exercises this right, this Agreement shall automatically terminate and the Board shall pay compensation to Project Co in accordance with Clause 48.3 (*Compensation on Termination*). Any relevant insurance proceeds shall first be applied towards such compensation payment and any balance shall be paid to the Board.

- 36.22 Project Co shall take all reasonable steps to mitigate the effects of any risks or claims covered by this Clause 36 (including without limitation minimising the amount of any costs and expenses which might result).

- 36.23 Nothing in this Agreement shall oblige Project Co to take out and/or maintain insurance in respect of a risk which is not an Uninsurable risk but for which after the date of this Agreement:
- (a) insurance is not available within the worldwide insurance market with reputable insurers of good standing in respect of that risk; or
 - (b) the terms and/or conditions offered in respect of that risk are such that the risk is not generally being insured against in the worldwide insurance market with reputable insurers of good standing;

provided that nothing in this Clause 36.23 will relieve Project Co of any of its other obligations in respect of such risk in this Agreement. For the avoidance of doubt, Project Co shall not be entitled to any payment or indemnity from the Board on the occurrence of such a risk.

Insurance Premium Increase Risk Sharing Mechanism

- 36.24 In respect of changes in insurance premia the provisions of Part 4 of Part 21 of the Schedule shall apply.

37. CUSTODY OF FINANCIAL MODEL

- 37.1 Immediately after execution of this Agreement, Project Co shall deliver the Financial Model to the Board.
- 37.2 Either party shall have the right to inspect and audit the Financial Model at all reasonable times.
- 37.3 Unless otherwise agreed between the parties, any amendments to the Financial Model shall reflect, be consistent with and be made only in accordance with the provisions of this Agreement, and shall in all cases be subject to the prior written approval of the Board (such approval not to be unreasonably withheld or delayed). In the event that the parties fail to

agree any proposed amendments to the Financial Model, the matter shall be referred for resolution in accordance with Part 26 of the Schedule (Dispute Resolution Procedure).

- 37.4 Following the approval of any amendment of the Financial Model by the Board, Project Co shall promptly deliver a copy of the revised Financial Model to the Board, in the same form as the original form (or such other form as may be agreed by the parties from time to time).

38. INFORMATION AND AUDIT ACCESS

- 38.1 Project Co shall provide to the Board's Representative all information, documents, records and the like in the possession of, or available to, Project Co (and to this end Project Co shall use all reasonable endeavours to procure that all such items in the possession of the Contractor or any Service Providers shall be available to it and Project Co has included, or shall include, relevant terms in all contracts with the Contractor or any Service Providers to this effect) as may be reasonably requested by the Board's Representative for any purpose in connection with this Agreement.

- 38.2 For the purpose of:

- (a) the examination and certification of the Board's accounts; or
- (b) any examination pursuant to Section 6(1) of the National Audit Act 1983 of the economy, efficiency and effectiveness with which the Board has used its resources,

the Auditor General for Scotland may examine such documents as he may reasonably require which are owned, held or otherwise within the control of Project Co (and Project Co shall procure that any person acting on its behalf who has such documents and/or other information shall also provide access) and may require Project Co to produce such oral or written explanations as he considers necessary. To avoid doubt, it is hereby declared that the carrying out of an examination under Section 6(3) (d) of the National Audit Act 1983 in relation to Project Co is not a function exercisable under this Clause 38.2.

- 38.3 Project Co shall provide and shall procure that its Sub-Contractors shall provide such information as the Board may reasonably require from time to time to enable it to meet its obligations to provide reports and returns pursuant to regulations, directions or guidance applicable to the NHS or as required by external agencies including, without limitation, reports and returns regarding the physical condition of buildings occupied by the Board, health and safety, under the firecode and relating to environmental health.

PART I: CHANGES IN LAW AND VARIATIONS

39. CHANGES IN LAW

General

- 39.1 Project Co shall take all steps necessary to ensure that the Project Operations are performed in accordance with the terms of this Agreement (including, without limitation, Clause 5.2(a) (Compliance with applicable law)) following any Change in Law.

Relevant Changes in Law

- 39.2 Subject to Clause 39.4(c)(v) and 39.4(c)(vi) (Mitigation) and, on the occurrence of any Relevant Change in Law, the parties shall be entitled to seek adjustments to the Service Payments to compensate for any increase or decrease (as the case may be) in the net cost to Project Co of performing the Project Operations. Such adjustments (if any) will be calculated in accordance with (and subject to) Clauses 39.4 to 39.7 (inclusive).

- 39.3 Relevant Change in Law means any of the following:

- (a) the occurrence of any Discriminatory Change in Law having an impact on the cost of performance of the Project Operations;
- (b) the occurrence of any NHS Specific Change in Law having an impact on the cost of performance of the Project Operations; or
- (c) the occurrence, after the relevant date, of any Change in Law which requires Project Co to carry out works affecting the Facilities (being any work of alteration, addition, demolition or extension or variation in the quality or function of the Facilities) which are not Maintenance Works or work which Project Co would otherwise be required to undertake to comply with its obligations under this Agreement. For the purposes of this Clause 39.3(c), the relevant date shall be the later to occur of the Completion Date and the Actual Completion Date the, save where the Actual Completion Date is delayed by a Compensation Event, a Delay Event referred to in Clause 41.3(a) (*Works Change*) or by a Delay Event referred to in Clause 41.3(g) (*Discriminatory and NHS Specific Changes in Law*), in which case the relevant date shall be the later to occur of the Completion Date and the date on which the Works would have been completed in accordance with this Agreement had the relevant Delay Event not occurred,

provided that:

- (i) in the case of a Change in Law referred to in Clauses (a) and (b) above, the impact of such Relevant Change in Law (either singly or in aggregate with any other such Relevant Change in Law in any Contract Year) on the cost of performance of the Project Operations exceeds one thousand two hundred pounds (£1,200) (index linked) per annum. To avoid doubt, any such amount of one thousand two hundred pounds (£1,200) (index linked) shall always be borne by Project Co;
- (ii) such Change in Law was not reasonably foreseeable at the date of this Agreement by an experienced contractor performing operations similar to the relevant Project Operations, on the basis of draft bills published in Government green or white papers or other Government departmental consultation papers, bills, draft statutory instruments or draft instruments or proposals published in the Official Journal of the European Union, in each case published:
 - (aa) prior to the date of this Agreement; and
 - (bb) in substantially the same form or having substantially the same effect as the Relevant Change in Law; and

- (iii) a Change in Law relating to the application for, coming into effect, terms, implementation, repeal, revocation or otherwise of any Planning Permission shall not constitute a Relevant Change in Law.

39.4 On the occurrence of a Relevant Change in Law:

- (a) either party may give notice to the other of the occurrence of the Relevant Change in Law;
- (b) the parties shall meet within fifteen (15) Business Days of the notice referred to in Clause (a) to consult and seek to agree the effect of the Relevant Change in Law. If the parties, within ten (10) Business Days of this meeting, have not agreed the occurrence or the effect of the Relevant Change in Law, either party may refer the question of whether a Relevant Change in Law has occurred or the effect of any Relevant Change in Law for resolution in accordance with Part 26 of the Schedule (*Dispute Resolution Procedure*); and
- (c) within fifteen (15) Business Days of the agreement or determination referred to in Clause (b) above, the Board's Representative shall issue a Variation Enquiry and the relevant provisions of Part 22 of the Schedule (*Variation Procedure*) shall apply except that:
 - (i) Project Co may give notice to the Board's Representative that it objects to such a Variation Enquiry only on the grounds that the implementation of the Variation would not give effect to or comply with the Relevant Change in Law;
 - (ii) the Board shall issue a Variation Confirmation in respect of the Variation in accordance with the relevant provisions of Part 22 of the Schedule (*Variation Procedure*);
 - (iii) the provisions of Clause 16 (Consents and Planning Approval) shall apply and, to avoid doubt, the provisions of paragraph 5 of Section 1 of Part 22 of the Schedule (*Variation Procedure*) shall not apply;
 - (iv) the Board shall not be entitled to withdraw any Variation Enquiry or Variation Confirmation issued in accordance with this Clause 39.4;
 - (v) Project Co shall, without prejudice to its general obligation to comply with the terms of this Agreement:
 - (aa) use all reasonable endeavours to mitigate the adverse effects of any Relevant Change in Law and take all reasonable steps to minimise any increase in costs arising from such Relevant Change in Law; and
 - (bb) use all reasonable endeavours to take advantage of any positive or beneficial effects of any Relevant Change in Law and take all reasonable steps to maximise any reduction in costs arising from such Relevant Change in Law; and
 - (vi) any compensation payable, or reduction to the Service Payments, shall be calculated in accordance with Clause 39.5 or Clause 39.6 (as appropriate) provided that:
 - (aa) the amount of any compensation payable; or
 - (bb) the amount by which the Services Payment is to be reduced,
 shall not take into account any amounts incurred or to be incurred as a result of Project Co's failure to comply with Clause 39.4(c)(v) above.

Discriminatory and NHS Specific

- 39.5 In relation to a Relevant Change in Law referred to in Clauses 39.3(a) (*Discriminatory*) or 39.3(b) (*NHS Specific*), any compensation payable, or reduction to the Service Payments, pursuant to this Clause shall be calculated on the basis that Project Co shall be placed in no better or worse position than it would have been in had the Relevant Change in Law not occurred, and any assessment of whether Project Co is in a better or worse position shall take account (inter alia) of the provisions of Clauses 39.4(c)(v) and 39.4(c)(vi) (*Failure to mitigate*) and:
- (a) the extent to which Project Co has been (or will be) compensated as a result of any indexation of the Service Payments under this Agreement;
 - (b) any decrease in its costs resulting from any Relevant Change in Law; and
 - (c) any amount which Project Co will recover under any insurance policy (or would have recovered if it had complied with the requirements of this Agreement or of any policy of insurance required under this Agreement) which amount, to avoid doubt, shall not include the amount of any excess or deductibles or any amount above the maximum insured amount applicable to such insurance policy.

Project Co shall not be entitled to any other payment or compensation or, save as expressly provided otherwise in this Agreement, relief in respect of such Relevant Change in Law or associated Variation (or the consequences of either) and the provisions of Clause 41.10 (*Delay Events – Compensation*) shall be construed accordingly.

Works after Actual Completion Date

- 39.6 In relation to a Relevant Change in Law referred to in Clause 39.3(c) (*Works after Actual Completion Date*) (a "Relevant Works Change in Law"):
- (a) for which the Allowable Expenses amounts to less than 0.05% of the Capital Cost of the Facilities (a "De Minimis Amount"), Project Co shall not be entitled to receive any payment, compensation or, save as expressly provided otherwise in this Agreement, any other relief in respect of such Relevant Works Change in Law, save where in any one Contract Year there shall occur more than two (2) Relevant Works Change in Law which each give rise to a De Minimis Amount, in which case the third and each subsequent such De Minimis Amount resulting from a Relevant Works Change in Law in that Contract Year (each an "Additional De Minimis Amount") shall be taken into account for the purposes of:
 - (i) calculating the Cumulative Allowable Expenses; and
 - (ii) calculating the Board's Cost Share of such Additional De Minimis Amounts; and
 - (b) subject to Clause 39.6(a), Project Co shall be entitled to receive compensation from the Board of an amount equal to the Board's Cost Share in respect of such Relevant Works Change in Law. Project Co shall not be entitled to receive any other payment, compensation or (save as expressly provided otherwise in this Agreement) any other relief in respect of any such Relevant Works Change in Law or associated Variations (or the consequences of either) and the provisions of Clause 41.10 (*Delay Events – Compensation*) shall be construed accordingly. Project Co has accepted the risk of bearing the financial consequences which are not covered by (or exceed) the Board's Cost Share and has had the opportunity of assessing the risk when bidding and agreeing the Service Payments.

39.7 For the purposes of Clause 39.6:

- (a) "Capital Cost of the Facilities" means £18,275,990;

- (b) "Allowable Expenses" means the costs and expenses to be incurred by Project Co as a direct consequence of the Relevant Works Change in Law, which shall be calculated on the basis that Project Co shall be placed in no better or worse position than it would have been in had the Relevant Works Change in Law not occurred, taking into account (inter alia) the provisions of Clauses 39.4(c)(v) and 39.4(c)(vi) (*Failure to mitigate*) and:
- (i) the extent to which Project Co has been (or will be) compensated as a result of any indexation of the Service Payments under this Agreement;
 - (ii) any decrease in its costs resulting from such Relevant Works Change in Law;
 - (iii) any amount which Project Co will recover under any insurance policy (or would have recovered if it had complied with the requirements of this Agreement or of any policy of insurance under this Agreement) which amount, to avoid doubt, shall not include the amount of any excess or deductibles or any amount above the maximum insured amount applicable to any such insurance policy.
- (c) For the purpose of calculating Allowable Expenses in Clause 39.6:
- (i) there shall be taken into account in addition to Capital Expenditure all the costs and expenses to be incurred by Project Co in performing Project Operations as a consequence of the Relevant Works Change in Law including the additional future capital expenditure, maintenance and lifecycle costs;
 - (ii) in taking these costs into account they shall be expressed in nominal terms; and
 - (iii) all future costs and expenses shall be discounted at the relevant cash balance deposit rates prevailing at the time Project Co makes its application for payment in relation to the Relevant Works Change in Law having regard to the expenditure profile of such costs and expenses.
- (d) "Cumulative Allowable Expenses" means the cumulative amount of the Allowable Expenses from time to time (excluding any De Minimis Amount but including any Additional De Minimis Amount); and
- (e) "Board's Cost Share" means an amount equal to the percentage share of the relevant Allowable Expenses that are to be borne by the Board as indicated in Column 3 in the Table below and which is calculated by reference to the ratio that the Cumulative Allowable Expenses at that time bears to the Capital Cost of the Facilities:

Table B

Column 1	Column 2	Column 3	Column 4
Cumulative Allowable Expenses (as a % of the Capital Cost of the Facilities)	Project Co share of Allowable Expenses (as a % of the Allowable Expenses)	Board's Cost Share (as a % of the Allowable Expenses)	Cumulative Project Co share of Allowable Expenses (as a % of the Capital Cost of the Facilities)
<0.05%	100%	0%	0.05%
0.05%	75%	25%	0.38%
>0.5% - 1%	50%	50%	0.63%
>1% - 5%	25%	75%	1.63%
>5% - 20%	10%	90%	3.13%
>20%	0%	100%	3.13%

General Change in Law

- 39.8 Either party may give notice to the other of the need for a Variation which is necessary in order to enable Project Co to comply with any Change in Law which is not a Relevant Change in Law, in which event:
- (a) the parties shall meet within fifteen (15) Business Days to consult in respect of the effect of the Change in Law and any Variation required as a consequence; and
 - (b) within fifteen (15) Business Days of the meeting referred to in Clause (a) above the Board's Representative shall, if a Variation is required in order to comply with the Change in Law, issue a Variation Enquiry and the relevant provisions of Part 22 of the Schedule (*Variation Procedure*) shall apply except that:
 - (i) Project Co may give notice to the Board's Representative that it objects to such a Variation Enquiry only on the grounds that the implementation of the Variation would not implement the Change in Law;
 - (ii) the Board shall issue a Variation Confirmation in respect of the Variation in accordance with the relevant provisions of Part 22 of the Schedule (*Variation Procedure*);
 - (iii) the provisions of Clause 16 (Consents and Planning Approval) shall apply and, to avoid doubt, the provisions of paragraph 5 of Section 1 of Part 22 of the Schedule (*Variation Procedure*) shall not apply;
 - (iv) the Board shall not be entitled to withdraw any Variation Enquiry or Variation Confirmation issued in accordance with this Clause 39.8; and
 - (v) Project Co shall not be entitled to any payment or other compensation or relief from any performance of its obligations under this Agreement in respect of such Change in Law or associated Variation (or the consequences of either).

40. **VARIATION PROCEDURE**

The provisions of Part 22 of the Schedule (*Variation Procedure*) shall have effect in respect of Variations except as otherwise expressly provided in this Agreement.

PART J: DELAY EVENTS, RELIEF EVENTS AND FORCE MAJEURE

41. DELAY EVENTS

- 41.1 If, at any time, Project Co becomes aware that there will be (or is likely to be) a delay in completion of the Works, Project Co shall forthwith give notice to the Board's Representative to that effect specifying the relevant delay or impediment. In relation to any such delay or impediment:
- (a) if the Board's Representative is satisfied, or it is determined in accordance with Part 26 of the Schedule (*Dispute Resolution Procedure*), that such delay or impediment has arisen as a result of the occurrence of a Delay Event, then, subject to Clause 41.2 (*Mitigation*) the Board's Representative shall allow Project Co an extension of time equal to the delay or impediment caused by such Delay Event (taking into account reasonably foreseeable consequences of the Delay Event) and shall fix a new Completion Date which shall replace the existing Completion Date; but
 - (b) to avoid doubt, there shall be no extension to the Project Term as a result of any such delay or impediment.
- 41.2 If Project Co is (or claims to be) affected by a Delay Event:
- (a) it shall (and shall procure that the Project Co Parties shall) take and continue to take all reasonable steps to eliminate or mitigate the consequences of such an event upon the performance of its obligations under this Agreement and, where relevant, resume performance of its obligations affected by the Delay Event as soon as practicable; and
 - (b) it shall neither be relieved from liability under this Agreement nor entitled to any extension of time for the purpose of Clause 41.1(a) (*Delay Event*) to the extent that it is delayed or impeded due to its failure (if any) to comply with its obligations under Clause 41.2(a) above.
- 41.3 For the purposes of this Agreement, Delay Events means any of the following to the extent in each case that there will be (or is likely to be) a delay in completion of the Facilities:
- (a) a Board's Works Variation initiated by a Board's Works Variation Enquiry in accordance with paragraph 2 of Section 1 of Part 22 of the Schedule (*Variation Procedure*) in relation to which Project Co has issued a response pursuant to paragraph 3.2(b) of Section 1 of Part 22 of the Schedule (*Variation Procedure*) specifying and providing evidence that implementation of the Board's Works Variation would delay the completion of the Facilities if this has been agreed between the parties or determined to be the case in accordance with Part 26 of the Schedule (*Dispute Resolution Procedure*);
 - (b) any breach by the Board and/or any Board Party of any of the Board's express obligations under this Agreement (including any delay in the Board giving access to the Site pursuant to Clause 14 (*Nature of Land Interests*)), or any obstruction of the Ancillary Rights afforded to Project Co pursuant to Clause 14 (*Nature of Land Interests*) by the Board or any Board Party) or pursuant to the Licence by the Scottish Ministers or the then heritable proprietors of the Site to the extent in each case that any such breach is not caused, or contributed to, by Project Co or any Project Co Party;
 - (c) the execution of works on the Site not forming part of this Agreement by the Board or any contractors employed by the Board;
 - (d) opening up of the Works pursuant to Clauses 18.3 to 18.7 (inclusive) (*Right to open up*) where such Works are not subsequently found to be defective (unless it is agreed or determined in accordance with Part 26 of the Schedule (*Dispute Resolution Procedure*) that the opening up of the Works was reasonable in the light of other defects previously discovered by the Board);
 - (e) Force Majeure;

- (f) a Relief Event;
 - (g) a Relevant Change in Law referred to in Clause 39.3(a) (*Discriminatory*) or 39.3(b) (*NHS Specific*); or
 - (h) the occurrence of a Site Interruption Event.
- 41.4 Without prejudice to the generality of Clause 41.1, Project Co shall give notice in writing to the Board's Representative as soon as it (or the Contractor) can reasonably foresee a Delay Event occurring or, if the same is not reasonably foreseeable, as soon as it (or the Contractor) shall become aware of a Delay Event. Project Co shall within ten (10) Business Days after such notification, give further written details to the Board's Representative which shall include:
- (a) a statement of which Delay Event the claim is based upon;
 - (b) details of the circumstances from which the Delay Event arises;
 - (c) details of the contemporary records which Project Co will maintain to substantiate its claim for extra time;
 - (d) details of the consequences (whether direct or indirect, financial or non-financial) which such Delay Event may have upon completion of the Facilities; and
 - (e) details of any measures which Project Co proposes to adopt to mitigate the consequences of such Delay Event.
- 41.5 As soon as possible but in any event within five (5) Business Days of Project Co (or the Contractor) receiving, or becoming aware of, any supplemental information which may further substantiate or support Project Co's claim then Project Co shall submit further particulars based on such information to the Board's Representative.
- 41.6 The Board's Representative shall, after receipt of written details under Clause 41.4, or of further particulars under Clause 41.5, be entitled by notice in writing to require Project Co to provide such further supporting particulars as he may reasonably consider necessary. Project Co shall afford the Board's Representative reasonable facilities for investigating the validity of Project Co's claim including, without limitation, on-site inspection.
- 41.7 Subject to the provisions of this Clause, the Board's Representative shall fix a revised Completion Date in accordance with Clause 41.1(a) (*New Completion Date*) as soon as reasonably practicable and in any event within five (5) Business Days of the later of:
- (a) the date of receipt by the Board's Representative of Project Co's notice given in accordance with Clause 41.4 and the date of receipt of any further particulars (if such are required under Clause 41.6), whichever is the later; and
 - (b) the date of receipt by the Board's Representative of any supplemental information supplied by Project Co in accordance with Clause 41.5 and the date of receipt of any further particulars (if such are required under Clause 41.6), whichever is the later.
- 41.8 If Project Co has failed to comply with the requirements as to the giving of notice under Clause 41.4, or has failed to maintain records or afford facilities for inspection to the Board's Representative, then the following provisions shall apply:
- (a) the Board's Representative may require Project Co to submit details of the reasons for such failure. If the Board's Representative has not stated that he is satisfied with the reasons given within five (5) Business Days of their receipt, Project Co may refer the matter for resolution in accordance with Part 26 of the Schedule (*Dispute Resolution Procedure*);

- (b) if either the Board's Representative is satisfied with the reasons given or the decision of the Dispute Resolution Procedure is that the failure is excusable, then the Board's Representative shall proceed to the evaluation of the request for an extension of time in accordance with Clause 41.7; or
- (c) if the decision of the Board's Representative (or in the event that the decision is disputed, if the determination in accordance with Part 26 of the Schedule (*Dispute Resolution Procedure*)) is that the failure is not excusable, then Project Co shall not be entitled to a revised Completion Date in respect of the relevant Delay Event to the extent that the Board's Representative has, as a result of such failures, been prevented from assessing the consequences of the Delay Event.

41.9 If:

- (a) the Board's Representative declines to fix a revised Completion Date; or
- (b) Project Co considers that a different Completion Date should be fixed; or
- (c) there is a disagreement as to whether a Delay Event has occurred,

then Project Co shall be entitled to refer the matter for determination in accordance with Part 26 of the Schedule (*Dispute Resolution Procedure*).

Compensation

41.10 If either the Delay Event is a Delay Event referred to in Clause 41.11(a) or there is an event referred to in Clause 41.11(b) (each a "Compensation Event"), Project Co's sole right to compensation shall be as provided for in this Clause. To avoid doubt, no other Delay Event (or event referred to in Clause 41.3 pursuant to which Project Co incurs a loss or expense) shall entitle Project Co to receive any compensation save as otherwise expressly provided in:

- (a) Part 22 of the Schedule (*Variation Procedure*) in the case of a Delay Event referred to in Clause 41.3(a) (*Works Change*) (subject always to the provisions of Clause 39 (*Changes in Law*)); or
- (b) Clause 39 (*Changes in Law*) in the case of a Delay Event referred to in Clause 41.3(g) (*Discriminatory and NHS Specific Changes in Law*).

41.11 For the purposes of Clause 41.10, a Compensation Event means either:

- (a) any Delay Event referred to in Clause 41.3(b) (*Breach*), 41.3(c) (*Execution of non-project related works*), 41.3(d) (*Opening up of Works*) or 41.3(h) (*Site Interruption Events*) for which, in each case, it has been agreed or determined pursuant to this Clause that Project Co is entitled to an extension of time; or
- (b) in the period prior to the Actual Completion Date, in circumstances where there is no delay in completion of the Facilities, any breach by the Board and/or any Board Party of any of the Board's express obligations under this Agreement (including any delay in the Board giving access to the Site pursuant to Clause 14 (*Nature of Land Interests*) or any obstruction of the Ancillary Rights afforded to Project Co pursuant to Clause 14 (*Nature of Land Interests*) by the Board or any Board Party) to the extent in each case that any such breach is not caused, or contributed to, by Project Co or any Project Co Party.

41.12 Subject to Clause 41.13, if it is agreed, or determined, that there has been a Compensation Event, and Project Co has incurred loss and/or expense as a direct result of such Compensation Event, Project Co shall be entitled to such compensation as would place Project Co in no better or no worse position than it would have been in had the relevant Compensation Event not occurred. Project Co shall promptly provide the Board's

Representative with any additional information he may require in order to determine the amount of such compensation.

41.13 Project Co shall take all reasonable steps so as to minimise the amount of compensation due in accordance with this Clause in relation to any Compensation Event and any compensation payable shall:

- (a) exclude any amounts incurred or to be incurred as a result of any failure of Project Co (or any Project Co Party) to comply with this Clause; and
- (b) be reduced by any amount which Project Co will recover under any insurance policy (or would have recovered if it had complied with the requirements of this Agreement or of any policy of insurance required under this Agreement) which amount, to avoid doubt, shall not include any excess or deductibles or any amount over the maximum amount insured applicable to any such insurance policy.

41.14 The amount of any compensation due to Project Co under this Clause shall be agreed between the parties or, failing agreement, determined pursuant to Part 26 of the Schedule (*Dispute Resolution Procedure*).

42. RELIEF EVENTS

42.1 For the purposes of this Agreement, subject to Clause 42.4 (*Mitigation*), Relief Events mean any of the following events:

- (a) fire, explosion, lightning, storm, tempest, flood, bursting or overflowing of water tanks, apparatus or pipes, ionising radiation (to the extent it does not constitute Force Majeure), earthquake, riot or civil commotion;
- (b) failure by any statutory undertaker, utility company, local authority or other like body to carry out works or provide services;
- (c) accidental loss or damage to the Works and/or Facilities or any roads servicing the same;
- (d) without prejudice to any obligation of Project Co to provide stand-by power facilities in accordance with the Board's Construction Requirements, the Service Level Specifications, failure or shortage of power, fuel or transport;
- (e) blockade or embargo falling short of Force Majeure;
- (f) the discovery of fossils, antiquities and human remains requiring action in accordance with Clause 24 (*Fossils and Antiquities*); or
- (g) official or unofficial strike, lockout, go slow or other dispute in each case generally affecting the construction, building maintenance or facilities management industry (or a significant sector of that industry),

provided in each case that such event does not arise (directly or indirectly) as a result of any wilful act or default of the party claiming relief and/or (i) in the case of Project Co claiming relief, any Project Co Party and (ii) in the case of the Board claiming relief, any Board Party.

42.2 Subject to Clauses 42.3 and 42.4, no right of termination shall arise under this Agreement by reason of any failure by a party to perform any of its obligations under this Agreement to the extent that such failure to perform occurs because of the occurrence of a Relief Event (and, to avoid doubt, and without prejudice to Clause 42.9 (*No Compensation*), unless expressly stated to the contrary in this Agreement, it is acknowledged that all other rights and obligations of the parties under this Agreement remain unaffected by the occurrence of a Relief Event).

- 42.3 Without prejudice to Project Co's rights under Clause 41 (*Delay Events*), Project Co shall only be relieved of its obligations under Clauses 17 (*The Design, Construction and Commissioning Process*), 18 (*Right of Access of Board's Representative*), 19 (*Programme and Dates for Completion*), 22 (*Pre-Completion Commissioning and Completion*) and 41 (*Delay Events*) by Delay Events in accordance with Clause 41 (*Delay Events*).

Mitigation

- 42.4 Where a party is (or claims to be) affected by a Relief Event:
- (a) it shall take all reasonable steps to mitigate the consequences of such an event upon the performance of its obligations under this Agreement, resume performance of its obligations affected by the Relief Event as soon as practicable and use all reasonable endeavours to remedy its failure to perform; and
 - (b) it shall not be entitled to rely upon the relief afforded to it pursuant to Clause 42.2 of this Agreement to the extent that it is not able to perform, or has not in fact performed, its obligations under this Agreement due to its failure (if any) to comply with its obligations under Clause 42.4(a) above.
- 42.5 The party claiming relief shall serve written notice on the other party within five (5) Business Days of it becoming aware of the relevant Relief Event. Such initial notice shall give sufficient details to identify the particular event claimed to be a Relief Event.
- 42.6 A subsequent written notice shall be served by the party claiming relief on the other party within a further five (5) Business Days of the notice referred to in Clause 42.5 (*Mitigation*) which shall contain such relevant information relating to the failure to perform (or delay in performing) as is available, including (without limitation) the effect of the Relief Event on the ability of the party to perform, the action being taken in accordance with Clause 42.4 (*Mitigation*), the date of the occurrence of the Relief Event and an estimate of the period of time required to overcome it (and/or its effects).
- 42.7 The party claiming relief shall notify the other as soon as the consequences of the Relief Event have ceased and of when performance of its affected obligations can be resumed.
- 42.8 If, following the issue of any notice referred to in Clause 42.6, the party claiming relief receives or becomes aware of any further information relating to the Relief Event (and/or any failure to perform), it shall submit such further information to the other party as soon as reasonably possible.
- 42.9 To avoid doubt, the occurrence of a Relief Event shall not entitle Project Co to any compensation.

43. FORCE MAJEURE

- 43.1 For the purposes of this Agreement, Force Majeure means any of the following events or circumstances:
- (a) war, civil war, armed conflict or terrorism; or
 - (b) nuclear contamination unless in any case Project Co and/or any Project Co Party is the source or cause of the contamination; or
 - (c) chemical or biological contamination of the Works and/or the Facilities and/or the Site from any of the events referred to in Clause (a) above; or
 - (d) pressure waves caused by devices travelling at supersonic speeds,

which directly causes either party to be unable to comply with all or a material part of its obligations under this Agreement.

- 43.2 Subject to Clauses 43.3 and 43.4 the party claiming relief shall be relieved from liability under this Agreement to the extent that by reason of the Force Majeure it is not able to perform its obligations under this Agreement.
- 43.3 Where a party is (or claims to be) affected by an event of Force Majeure:
- (a) it shall take all reasonable steps to mitigate the consequences of such an event upon the performance of its obligations under this Agreement, resume performance of its obligations affected by the event of Force Majeure as soon as practicable and use all reasonable endeavours to remedy its failure to perform; and
 - (b) it shall not be relieved from liability under this Agreement to the extent that it is not able to perform, or has not in fact performed, its obligations under this Agreement due to its failure (if any) to comply with its obligations under Clause 43.3(a).
- 43.4 Without prejudice to Project Co's rights under Clause 41 (*Delay Events*), Project Co shall only be relieved from its obligations under Clauses 17 (*The Design, Construction and Commissioning Process*), 18 (*Right of Access of Board's Representative*), 19 (*Programme and Dates for Completion*) and 41 (*Delay Events*) by Delay Events in accordance with Clause 41 (*Delay Events*).
- 43.5 The party claiming relief shall serve written notice on the other party within five (5) Business Days of it becoming aware of the relevant event of Force Majeure. Such initial notice shall give sufficient details to identify the particular event claimed to be an event of Force Majeure.
- 43.6 A subsequent written notice shall be served by the party claiming relief on the other party within a further five (5) Business Days which shall contain such relevant information relating to the failure to perform (or delay in performing) as is available, including (without limitation) the effect of the event of Force Majeure on the ability of the party to perform, the action being taken in accordance with Clause 43.3 (*Mitigation*), the date of the occurrence of the event of Force Majeure and an estimate of the period of time required to overcome it (and/or its effects).
- 43.7 The party claiming relief shall notify the other as soon as the consequences of the event of Force Majeure have ceased and of when performance of its affected obligations can be resumed.
- 43.8 If, following the issue of any notice referred to in Clause 43.6, the party claiming relief receives or becomes aware of any further information relating to the event of Force Majeure (and/or any failure to perform), it shall submit such further information to the other party as soon as reasonably possible.

Compensation

- 43.9 If the event of Force Majeure occurs on or after the Actual Completion Date, the provisions of Part 18 of the Schedule (*Payment Mechanism*) shall apply to determine the payments to be made to Project Co during the existence of any event of Force Majeure.
- 43.10 If an event of Force Majeure occurs prior to the Actual Completion Date, Project Co shall not be entitled to receive any compensation other than as expressly provided in Clause 48.1 (Compensation on Termination).
- 43.11 Subject to Clause 48.1 (Compensation on Termination), Project Co's sole right to payment or otherwise in relation to the occurrence of an event of Force Majeure shall be as provided in this Clause.

Modifications

- 43.12 The parties shall endeavour to agree any modifications to the Agreement which may be equitable having regard to the nature of an event or events of Force Majeure. Part 26 of

the Schedule (*Dispute Resolution Procedure*) shall not apply to a failure of the Board and Project Co to reach agreement pursuant to this Clause 43.12.

PART K: TERMINATION**44. PROJECT CO EVENTS OF DEFAULT***Project Co Events of Default*

44.1 For the purposes of this Agreement, Project Co Events of Default means any of the following events or circumstances:

Insolvency

- (a) the occurrence of any of the following events in respect of Project Co, namely:
 - (i) any arrangement or composition with or for the benefit of creditors (including any voluntary arrangement as defined in the Insolvency Act 1986) being entered into by or in relation to Project Co;
 - (ii) a receiver, administrator, administrative receiver or other encumbrancer taking possession of or being appointed over, or any distress, execution or other process being levied or enforced (and not being discharged within ten (10) Business Days) upon, the whole or any material part of the assets of Project Co;
 - (iii) Project Co ceasing to carry on business; or
 - (iv) a petition being presented (and not being discharged within twenty (20) Business Days), or a resolution being passed or an order being made for the administration or the winding-up, bankruptcy or dissolution of Project Co;

Long stop

- (b) Project Co failing to achieve the Actual Completion Date within a period of twelve (12) months after the Completion Date;

Default

- (c)
 - (i) Project Co committing a material breach of its obligations under this Agreement which has a material and adverse effect on the delivery of Clinical Services or any other services at the Facilities for which Project Co is not responsible (other than as a consequence of a breach by the Board of its obligations under this Agreement);
 - (ii) Project Co wilfully breaches Part 29 of the Schedule (*Refinancing*);
- (d) Project Co abandoning the Works (other than as a consequence of a breach by the Board of its obligations under this Agreement);
- (e) Project Co ceasing to provide all or a substantial part of the Services to the Board in accordance with this Agreement (other than as a consequence of a breach by the Board of its obligations under this Agreement);

Health and safety

- (f) At any time after the Actual Completion Date Project Co committing a material breach of its obligations under this Agreement (other than as a consequence of a breach by the Board of its obligations under this Agreement) which results in the criminal investigation, prosecution and conviction of Project Co or any Project Co Party or the Board under the Health and Safety Regime (an "H&S Conviction") provided that an H&S Conviction of a Project Co Party or the Board shall not constitute a Project Co Event of Default if, within ninety (90) Business Days from the date of the H&S

Conviction (whether or not the H&S Conviction is subject to an appeal or any further judicial process), the involvement in the Project Operations of each relevant Project Co Party (which in the case of an individual director, officer or employee shall be deemed to include the Project Co Party of which that person is a director, officer or employee) is terminated and a replacement is appointed by Project Co in accordance with Clause 50.5 (*Sub-contractors*);

In determining whether to exercise any right of termination or right to require the termination of the engagement of a Project Co Party pursuant to this Clause 44.1(f), the Board shall:

- (i) act in a reasonable and proportionate manner having regard to such matters as the gravity of any offence and the identity of the person committing it; and
- (ii) give all due consideration, where appropriate, to action other than termination of this Agreement;

Change in Control

- (g) the occurrence of any Change in Control which is prohibited by Clause 50 (*Assignment, Sub-contracting and Changes in Control*);

Assignment

- (h) Project Co failing to comply with the provisions of Clauses 50.2 or 50.5 (*Assignment, Sub-contracting and Changes in Control*);

Service Failure Points

- (i) Project Co being awarded a total of 3,421 or more Service Failure Points in any nine month rolling period; or

Payment

- (j) Project Co failing to pay any sum or sums due to the Board under this Agreement (which sums are not in dispute) which, either singly or in aggregate, exceed(s) fifty thousand (£50,000) pounds (index linked) and such failure continues for sixty (60) Business Days from receipt by Project Co of a notice of non payment from the Board.

Notification

- 44.2 Project Co shall notify the Board of the occurrence, and details, of any Project Co Event of Default and of any event or circumstance which is likely, with the passage of time or otherwise, to constitute or give rise to a Project Co Event of Default, in either case promptly on Project Co becoming aware of its occurrence.

Board's options

- 44.3 On the occurrence of a Project Co Event of Default, or within a reasonable time after the Board becomes aware of the same, and while the same is subsisting, the Board may:
- (a) in the case of the Project Co Events of Default referred to in Clauses 44.1(a), 44.1(b), 44.1(c)(ii), 44.1(f), 44.1(g), 44.1(h) or 44.1(j), terminate this Agreement in its entirety by notice in writing having immediate effect;
 - (b) in the case of any Project Co Event of Default referred to in Clause 44.1(c)(i), 44.1(d) and 44.1(e), serve notice of default on Project Co requiring Project Co at Project Co's option either:

- (i) to remedy the Project Co Event of Default referred to in such notice of default (if the same is continuing) within twenty (20) Business Days of such notice of default; or
 - (ii) to put forward within twenty (20) Business Days of such notice of default a reasonable programme (set out, if appropriate, in stages) for remedying the Project Co Event of Default. The programme shall specify in reasonable detail the manner in, and the latest date by, which such Project Co Event of Default is proposed to be remedied (Project Co shall only have the option of putting forward a programme in accordance with this Clause 44.3(b)(ii) if it first notifies the Board within ten (10) Business Days of such notice of default that it proposes to do so); and
- (c) in the case of any Project Co Event of Default referred to in Clause 44.1(i)/(c)(Service Failure Points), if Project Co is awarded 1,710 or more further Service Failure Points in the following six month period, terminate this Agreement in its entirety by notice in writing having immediate effect.

Remedy provisions

44.4 Where Project Co puts forward a programme in accordance with Clause 44.3(b)(ii), the Board shall have twenty (20) Business Days from receipt of the same within which to notify Project Co (acting reasonably) that it does not accept the programme, failing which the Board shall be deemed to have accepted the programme. Where the Board notifies Project Co that it does not accept the programme as being reasonable, the parties shall endeavour within the following five (5) Business Days to agree any necessary amendments to the programme put forward. In the absence of agreement within five (5) Business Days, the question of whether the programme (as the same may have been amended by agreement) will remedy the Project Co Event of Default in a reasonable manner and within a reasonable time period (and, if not, what would be a reasonable programme) may be referred by either party for resolution in accordance with Part 26 of the Schedule (*Dispute Resolution Procedure*).

44.5 If:

- (a) the Project Co Event of Default notified in a notice of default served under Clause 44.3(b) is not remedied before the expiry of the period referred to in Clause 44.3(b)(i); or
- (b) where Project Co puts forward a programme pursuant to Clause 44.3(b)(ii) which has been accepted by the Board or has been determined to be reasonable and Project Co fails to achieve any element of the programme or the end date for the programme (as the case may be); or
- (c) any programme put forward by Project Co pursuant to Clause 44.3(b)(ii) is rejected by the Board as not being reasonable, and the Dispute Resolution Procedure does not find against that rejection,

then the Board may terminate this Agreement in its entirety by written notice to Project Co with immediate effect. Provided that for the purposes of Clause 44.5(b) if Project Co's performance of the programme is adversely affected by the occurrence of Force Majeure, a Relief Event or an Excusing Cause then, subject to Project Co complying with the mitigation and other requirements in this Agreement concerning Force Majeure, a Relief Event or an Excusing Cause (as the case may be), the time for performance of the programme or any relevant element of it shall be deemed to be extended by a period equal to the delay caused by Force Majeure, the Relief Event or the Excusing Cause (as the case may be) which is agreed by the parties or determined in accordance with Part 26 of the Schedule (*Dispute Resolution Procedure*).

Replacement of a non-performing Sub-Contractor

44.6 The Board may, in its discretion, require Project Co by written notice to terminate the provision of any Service pursuant to any relevant Service Contract or procure the

termination of the provision of any Service pursuant to any relevant Sub-Contract (as the case may be) in respect of any relevant Service and procure that a replacement Sub-Contractor is appointed in accordance with Clause 50 (Assignment, Sub-Contracting and Change in Control) to provide all those parts of the Services which were performed pursuant to the previous Sub-Contract within sixty (60) Business Days as an alternative to termination of this Agreement or part thereof pursuant to the provisions of Clause 44.5 in any circumstances in which the Board could exercise such power.

- 44.7 If the Board exercises its rights under Clause 44.6, Project Co shall forthwith put forward proposals for the interim management or provision of the Services performed pursuant to the previous Service Contract or Sub-Contract to the Board until such time as an alternative Service Provider or Sub-Contractor can be engaged by Project Co. If Project Co fails to do so (or its proposals if implemented are not reasonably likely to give adequate provision of the relevant Services) then without prejudice to the other rights of the Board in this Clause, the Board may perform, or procure a third party to perform, such Services itself and the provisions of Clauses 29.6 to 29.12 (inclusive) (*Monitoring of Performance*) shall apply, changed according to context, to such Services in those circumstances.
- 44.8 If Project Co fails to terminate the relevant Service Contract (or procure the termination of the relevant Sub-Contract) and to appoint a replacement Service Provider or procure the appointment of a replacement Sub-Contractor in accordance with the provisions of Clause 44.6 the Board shall be entitled at its option to exercise its rights in accordance with the provisions of Clause 44.5.

Board's costs

- 44.9 Project Co shall reimburse the Board for all reasonable costs incurred by the Board in exercising any of its rights (including, without limitation, any relevant increased administrative expenses). The Board shall take reasonable steps to mitigate such costs.
- 44.10 The Board shall not exercise, or purport to exercise, any right to terminate this Agreement except as expressly set out in this Agreement. The rights of the Board (to terminate or otherwise) under this Clause are in addition (and without prejudice) to any other right which the Board may have to claim the amount of loss or damage suffered by the Board on account of the acts or omissions of Project Co (or to take any action other than termination of this Agreement).

45. BOARD EVENTS OF DEFAULT

- 45.1 For the purposes of this Agreement, Board Events of Default means any of the following events or circumstances:
- (a) the Board committing a material breach of its obligations under Clause 14 (*Nature of Land Interests*) or the Scottish Ministers or the then heritable proprietor of the Site committing a material breach of its obligations under the Licence (in both cases other than as a consequence of a breach by Project Co of its obligations under this Agreement) and such breach shall materially adversely affect the ability of Project Co to perform its material obligations under this Agreement for a continuous period of not less than thirty (30) Business Days;
 - (b) the failure of the Board to pay any sum or sums due to Project Co under this Agreement (which sums are not in dispute) which, either singly or in aggregate, exceed(s) the amount of the Board's Monthly Service Payment from time to time and such failure continues for thirty (30) Business Days from receipt by the Board and to the Director of Performance Management and Finance, Scottish Executive Health Department (or such other party as may be notified in advance in writing by the Board to Project Co in substitution for such regional office) of a notice of non-payment from Project Co; or
 - (c) an Adverse Law or a Proposal for an Adverse Law being made.

Project Co's options

- 45.2 On the occurrence of a Board Event of Default, or within a reasonable time after Project Co becomes aware of the same, and while the same is still subsisting, Project Co may, at its option:
- (a) in respect of execution of the Works prior to the Actual Completion Date, suspend performance by it of its obligations under this Agreement until such time as the Board shall have demonstrated to the reasonable satisfaction of Project Co that it will perform and is capable of performing its obligations under this Agreement; or
 - (b) serve notice on the Board and to the Director of Performance Management and Finance, Scottish Executive Health Department (or such other party as may be notified in advance in writing by the Board to Project Co) of the occurrence (and specifying details) of such Board Event of Default. If the relevant matter or circumstance has not been rectified or remedied by the Board (or otherwise) in respect of Clauses 45.1(a) or 45.1(c) within sixty (60) Business Days of such notice, and in respect of Clause 45.1(b) within thirty (30) Business Days of such notice, Project Co may serve a further notice on the Board and to the Director of Performance Management and Finance, Scottish Executive Health Department (or its substitute notified in accordance with this Clause 45.2(b)) terminating this Agreement with immediate effect.
- 45.3 Project Co shall not exercise or purport to exercise any right to terminate this Agreement (or accept any repudiation of this Agreement) except as expressly set out in this Agreement.

46. NON-DEFAULT TERMINATION*Force Majeure*

- 46.1 If, in the circumstances referred to in Clause 43 (*Force Majeure*), the parties have failed to reach agreement on any modification to this Agreement pursuant to Clause 43 (*Force Majeure*) within six (6) calendar months of the date on which the party affected serves notice on the other party in accordance with Clause 43 (*Force Majeure*) either party may at any time afterwards terminate this Agreement by written notice to the other party having immediate effect provided always that the effects of the relevant event of Force Majeure continues to prevent either party from performing any material obligation under this Agreement.

Voluntary termination

- 46.2 The Board shall be entitled to terminate this Agreement at any time on six (6) months' written notice to Project Co. In the event of notice being given by the Board in accordance with this Clause, the Board shall, at any time before the expiration of such notice, be entitled to direct Project Co, where the Works (or any part or parts of the Works) or any Service (or any elements of any Service) have not been commenced, to refrain from commencing any such Works or Services (or to procure the same).

Expiry

- 46.3 This Agreement shall terminate automatically on the expiry of the Project Term unless it shall have been terminated earlier in accordance with the provisions of this Agreement. To avoid doubt, Project Co shall not be entitled to any compensation for termination of this Agreement on expiry of the Project Term.

47. EFFECT OF TERMINATION*Termination*

- 47.1 Notwithstanding any provision of this Agreement, on service of a notice of termination, this Agreement shall only terminate in accordance with the provisions of this Clause.

Continued effect - no waiver

- 47.2 Notwithstanding any breach of this Agreement by either party, and without prejudice to any other rights which the other party may have in relation to it, the other party may elect to continue to treat this Agreement as being in full force and effect and to enforce its rights under this Agreement. The failure of either party to exercise any right under this Agreement, including any right to terminate this Agreement and any right to claim damages, shall not be deemed a waiver of such right for any continuing or subsequent breach.

Continued performance

- 47.3 Subject to any exercise by the Board of its rights to perform, or to procure a third party to perform, the obligations of Project Co, the parties shall continue to perform their obligations under this Agreement, notwithstanding the giving of any notice of default or notice of termination, until the termination of the Agreement becomes effective in accordance with the provisions of this Clause.

Transfer to Board of Assets, Contracts etc.

- 47.4 On the service of a notice of termination in accordance with this Agreement for any reason:
- (a) if prior to the Actual Completion Date, in so far as any transfer shall be necessary fully and effectively to transfer property to the Board, Project Co shall transfer to, and there shall vest in, the Board, such part of the Works and/or the Facilities as shall have been constructed and such items of the Plant and Equipment as shall have been procured by Project Co if the Board so elects:
 - (b) all goods and all materials on or near to the Site not yet incorporated in the Works shall remain available to the Board for the purposes of completing the Works and if the cost of such goods and materials has not been reflected in the payment of any compensation pursuant to Part 23 of the Schedule (*Compensation on Termination*), subject to the payment by the Board (determined as between a willing vendor and willing purchaser with any disputes determined pursuant to Clause 56 (*Dispute Resolution Procedure*));
 - (c) the construction plant shall remain available to the Board for the purposes of completing the Works, subject to payment of the Contractor's reasonable charges;
 - (d) Project Co shall hand over to, and there shall vest in, the Board, free from any Encumbrances, the Facilities, Plant and Equipment (which in the case of the termination of this Agreement in accordance with Clause 46.3 (*Non-Default Termination - Expiry*) shall be in the state required in accordance with Part 24 of the Schedule (*Handback Procedure*));
 - (e) if the Board so elects, Project Co shall procure that any of the Construction Contract, the Service Contracts and/or the Independent Tester Contract shall be novated or assigned to the Board, provided that where termination occurs under Clause 45 (*Board Events of Default*) the consent of the Contractor, the Service Provider or the Independent Tester (as the case may be) shall be required;
 - (f) Project Co shall, or shall procure that any Contracting Associate shall (as the case may be), offer to sell to the Board at a fair value (determined as between a willing vendor and willing purchaser, with any disputes as to such fair value being determined pursuant to Part 26 of the Schedule (*Dispute Resolution Procedure*)), free from any Encumbrance all or any part of the stocks of material and other assets, road vehicles, spare parts and other moveable property owned by Project Co or any of its Contracting Associates and reasonably required by the Board in connection with the operation of the Facilities or the provision of the Services;
 - (g) Project Co shall deliver to the Board (as far as not already delivered to the Board) one complete set of:

- (i) "as built drawings" showing all alterations made to the Facilities since the commencement of operation of the Facilities; and
 - (ii) maintenance, operation and training manuals for the Facilities;
- (h) Project Co shall use all reasonable endeavours to procure that the benefit of all manufacturer's warranties in respect of mechanical and electrical plant and equipment used or made available by Project Co under this Agreement and included in the Facilities are assigned, or otherwise transferred, to the Board with full title guarantee; and
- (i) Project Co shall deliver to the Board information equivalent to the information it is required to provide in accordance with Clause 30 (*TUPE and Employment Matters*) in relation to the employees employed by Project Co and/or Service Providers and the records referred to in Clause 55 (*Records and Reports*) except where such documents are required by Law to be retained by Project Co or its Contracting Associates (in which case complete copies shall be delivered to the Board).
- 47.5 Project Co shall ensure that provision is made in all contracts of any description whatsoever to ensure that the Board will be in a position to exercise its rights, and Project Co will be in a position to comply with its obligations, under Clause 47.4.

Termination

- 47.6 On completion of the transfer required by Clause 47.4 (except in so far as any of the requirements of that Clause may be waived by the Board), this Agreement shall terminate and, save as provided in Clause 47.9 (*Continuing obligations*), all rights and obligations of the Board and Project Co under this Agreement shall cease and be of no further force and effect.

Transitional arrangements

- 47.7 On the termination of this Agreement for any reason, for a reasonable period both before and after any such termination, Project Co shall have the following duties:
- (a) Project Co shall co-operate fully with the Board and any successor providing to the Board services in the nature of any of the Services or any part of the Services in order to achieve a smooth transfer of the manner in which the Board obtains services in the nature of the Services and to avoid or mitigate in so far as reasonably practicable any inconvenience or any risk to the health and safety of the employees of the Board and members of the public;
 - (b) Project Co shall as soon as practicable remove from the Site all property not acquired by the Board pursuant to Clause 47.4 (or not belonging to the Board or any Board Party) and if it has not done so within forty (40) Business Days after any notice from the Board requiring it to do so the Board may (without being responsible for any loss, damage, costs or expenses) remove and sell any such property and shall hold any proceeds less all costs incurred to the credit of Project Co;
 - (c) Project Co shall forthwith deliver to the Board's Representative:
 - (i) any keys to the Facilities; and
 - (ii) without prejudice to Clause 51 (*Intellectual Property*), any copyright licences for any computer programmes (or licences to use the same) necessary for the operation of the Facilities (but excluding computer programmes, which have been developed or acquired by a Service Provider for its own use and not solely for the purposes of provision of any of the Services at the Facilities or the assignation or transfer of which is otherwise restricted); and

- (d) Project Co shall as soon as practicable vacate the Site and (without prejudice to Part 24 of the Schedule (*Handback Procedure*)) shall leave the Site and the Facilities in a safe, clean and orderly condition.

47.8 If the Board wishes to conduct a competition prior to the Expiry Date with a view to entering into an agreement for the provision of services (which may or may not be the same as, or similar to, the Services or any of them) following the expiry of this Agreement, Project Co shall co-operate with the Board fully in such competition process including (without limitation) by:

- (a) providing any information which the Board may reasonably require to conduct such competition but, to avoid doubt, information which is commercially sensitive to Project Co shall not be provided (and, for the purpose of this Clause 47.8(a) commercially sensitive shall mean information which would if disclosed to a competitor of Project Co give that competitor a competitive advantage over Project Co and thereby prejudice the business of Project Co but shall, to avoid doubt, exclude any information to be disclosed in terms of Clause 30 (*TUPE and Employment Matters*)); and
- (b) assisting the Board by providing all (or any) participants in such competition process with access to the Site and the Facilities.

Continuing Obligations

47.9 Save as otherwise expressly provided in this Agreement:

- (a) termination of this Agreement shall be without prejudice to any accrued rights and obligations under this Agreement as at the date of termination; and
- (b) termination of this Agreement shall not affect the continuing rights and obligations of Project Co and the Board under Clauses 8 (*Indemnities and Liability*), 9 (*Limits on Liability*), 14 (*Nature of Land Interests*), 30 (*TUPE and Employment Matters*), 35 (*Payment*), 36 (*Insurance*), 43 (*Force Majeure*), 46 (*Non-Default Termination*), 47.7 and 47.8 (*Transitional Arrangements*) 48 (*Compensation on Termination*), 51 (*Intellectual Property*), 52 (*Confidentiality*), 53 (*Taxation*), 54 (*Corrupt Gifts and Payments*), 55 (*Records and Reports*), 56 (*Dispute Resolution Procedure*), 57 (*Notices*), 66 (*Mitigation*) and Clause 67 (*Governing Law and Jurisdiction*) or under any other provision of this Agreement which is expressed to survive termination or which is required to give effect to such termination or the consequences of such termination.

48. COMPENSATION ON TERMINATION

48.1 If this Agreement is terminated pursuant to Clause 46.1 (*Force Majeure*), then the Board shall pay compensation to Project Co in accordance with Section C of Part 23 of the Schedule (*Compensation on Termination*).

48.2 If this Agreement is terminated pursuant to Clause 44 (*Project Co Events of Default*) other than pursuant to Clause 44.1(c)(ii), then the Board shall pay compensation to Project Co in accordance with Section B of Part 23 of the Schedule (*Compensation on Termination*).

48.3 If this Agreement is terminated pursuant to Clause 45 (*Board Events of Default*), then the Board shall pay compensation to Project Co in accordance with Section A of Part 23 of the Schedule (*Compensation on Termination*).

48.4 If this Agreement is terminated pursuant to Clause 46.2 (*Voluntary Termination*), then the Board shall pay compensation to Project Co in accordance with Section A of Part 23 of the Schedule (*Compensation on Termination*).

48.5 If this Agreement is terminated pursuant to Clause 54.3 (*Corrupt Gifts and Payments*) or Clause 44.1(c)(ii), then the Board shall pay compensation to Project Co in accordance with Section D of Part 23 of the Schedule (*Compensation on Termination*).

Tax equalisation

- 48.6 Where a payment is to be made to Project Co pursuant to Clauses 48.1 (*Force Majeure*), 48.3 (*Board Events of Default*), 48.4 (*Voluntary Termination*) or 48.5 (*Corrupt Gifts*) (a "Compensation Payment") and Project Co has a Relevant Tax Liability in respect of such payment, then the amount of the Compensation Payment to be made by the Board to Project Co shall be increased so as to ensure that Project Co is in the same position (after account is taken of the Relevant Tax Liability) as it would have been in had it not been for such Relevant Tax Liability.
- 48.7 For the purposes of this Clause 48:
- (a) "Relief" shall mean any relief, allowance or deduction in computing profits or tax or a credit against, or right to repayment of, tax granted by or pursuant to any legislation for tax purposes;
 - (b) a "Relief derived from the Project" is a Relief which arises in connection with the Project and includes any Relief arising as a consequence of the distribution of any amount obtained in respect of the Project (other than a Compensation Payment) by Project Co (whether by way of interest, dividend or other distribution, repayment, reduction or redemption of capital or indebtedness or return of assets or otherwise); and
 - (c) Project Co shall be regarded as having a "Relevant Tax Liability" in respect of a Compensation Payment to the extent that:
 - (i) it has a liability for tax in consequence of or in respect of a Compensation Payment ("Actual Liability"); or
 - (ii) it would have had a liability for tax within paragraph (i) above but for the utilisation of a Relief other than a Relief derived from the Project ("Deemed Liability").
- 48.8 In determining whether Project Co has a Relevant Tax Liability by reason of a Compensation Payment, it should be assumed that any Reliefs derived from the Project which are available to Project Co (or would have been so available but for a surrender by Project Co of such Reliefs by way of group or consortium relief) for offset against the Compensation Payment, or against tax in relation to the same, have been so offset to the maximum extent possible.
- 48.9 Project Co shall keep the Board fully informed of all negotiations with the HM Revenue and Customs in relation to any Relevant Tax Liability in respect of a Compensation Payment. Project Co shall not agree, accept or compromise any claim, issue or dispute relating to such Relevant Tax Liability without the prior written consent of the Board, which shall not be unreasonably withheld or delayed. The Board may, if it considers in good faith that such action is justified having regard to the likely costs and benefits, direct Project Co to resist, appeal, defend or otherwise dispute the Relevant Tax Liability in respect of the Compensation Payment, provided that the cost of any such dispute (including any interest or penalties incurred) shall be at the Board's expense. However, if Project Co obtains professional advice from an independent person with relevant expertise that any resistance, appeal, defence or other mode of dispute is not likely to result in any more beneficial position in relation to the Relevant Tax Liability, Project Co shall be entitled not to continue with such resistance, appeal, defence or other mode of dispute. Where any resistance, appeal, defence or other mode of dispute results in a more beneficial position in relation to the Relevant Tax Liability, an adjustment will be made to the amount payable under Clause 48.6 (*Tax equalisation*) to reflect such outcome.
- 48.10 Any increase in the amount of a Compensation Payment which is payable under Clause 48.6 (*Tax equalisation*) shall be paid on the later of five (5) Business Days after a demand therefor (together with evidence in sufficient detail for the Board to satisfy itself of the Relevant Tax Liability and its calculation) is made by Project Co and:

- (a) in the case of an Actual Liability, five (5) Business Days before the date on which the relevant tax must be paid to the tax authority in order to avoid incurring interest and penalties; and
- (b) in the case of a Deemed Liability, five (5) Business Days before the date on which tax which would not have been payable but for the utilisation of the relevant Relief must be paid in order to avoid incurring interest or penalties (whether by Project Co or otherwise) and, for the purposes of determining when the Relief would otherwise have been utilised, Reliefs shall be regarded as utilised in the order in which they arise.

48.11 The Board shall have the right to pay the amount payable under Clause 48.6 (*Tax equalisation*) direct to the HM Revenue and Customs in satisfaction of the relevant tax due by Project Co.

Rights of Set-Off

48.12 To avoid doubt, the Board's obligations to make any payment of compensation to Project Co pursuant to this Clause are subject to the Board's rights under Clause 35.6 (*Set-Off*), save that the Board agrees not to set-off any amount agreed or determined as due and payable by Project Co to the Board against any payment of termination compensation under Clauses 48.1 (*Force Majeure*), 48.3 (*Board Events of Default*), 48.4 (*Voluntary Termination*) and 48.5 (*Corrupt Gifts*), except to the extent that such termination payment exceeds the Senior Debt Amount.

Full and final settlement

48.13 Subject to the provisions of paragraph 2.1 of Section E of Part 23 of the Schedule (*Compensation on Termination*):

- (a) any compensation paid pursuant to this Clause shall be in full and final settlement of any claim, demand and/or proceedings of Project Co in relation to any termination of this Agreement, the Licence and/or any Project Document (and the circumstances leading to such termination) and Project Co shall be excluded from all other rights and remedies in respect of any such termination; and
- (b) the compensation payable (if any) pursuant to any of Clauses 48.1 to 48.5 above shall be the sole remedy of Project Co and Project Co shall not have any other right or remedy in respect of such termination.

49. HANDBACK PROCEDURE

The provisions of Part 24 of the Schedule (*Handback Procedure*) shall apply to the handback of the Facilities to the Board on expiry of this Agreement.

PART L: MISCELLANEOUS**50. ASSIGNATION, SUB-CONTRACTING AND CHANGES IN CONTROL***Assignment*

- 50.1 This Agreement, the Licence and any other agreement in connection with the Project to which both the Board and Project Co are a party shall be binding on, and shall enure to the benefit of, Project Co and the Board and their respective successors and permitted transferees and assigns. In the case of the Board, its successors shall include any person to whom the Scottish Ministers, in exercising their statutory powers to transfer property, rights and liabilities of the Board upon the Board ceasing to exist, transfers the property, rights and obligations of the Board under this Agreement, the Licence and such other agreements in connection with the Project to which the Board and Project Co are both a party.
- 50.2 Subject to Clause 50.3, Project Co shall not, without the prior written consent of the Board, assign, transfer, sub-contract or otherwise dispose of any interest in this Agreement, the Licence, the Independent Tester Contract, the Construction Contract, the Service Contracts and any other contract entered into by Project Co for the purposes of performing its obligations under this Agreement.
- 50.3 The provisions of Clause 50.2 do not apply to the grant of any security, in a form approved by the Board prior to its grant (such approval not to be unreasonably withheld or delayed), for any loan made to Project Co under the Initial Funding Agreements provided that any assignee shall enter into the Funders' Direct Agreement in relation to the exercise of its rights, if the Board so requires.
- 50.4 The Board shall not assign or otherwise dispose of the benefit of the whole or part of this Agreement or any agreement in connection with this Agreement to which Project Co and the Board are a party to any person, save:
- (a) to the Scottish Ministers, another Health Board or any other person or body replacing any of the foregoing (or to whom the Scottish Ministers exercising their statutory rights would be entitled to transfer such benefits) covered by the National Health Service (Residual Liabilities) Act 1996; or
 - (b) with the prior written consent of Project Co (such approval not to be unreasonably withheld or delayed),

provided that nothing in this Clause shall restrict the rights of the Scottish Ministers to effect a statutory transfer.

Sub-contractors

- 50.5 Project Co shall:
- (a) not terminate or agree to the termination of the engagement and/or employment of (or the replacement of) the Contractor or any Service Provider under the Ancillary Documents; and
 - (b) without prejudice to Clause 50.1 (*Assignment*), procure that none of the persons listed below shall sub-contract all (or substantially all) of their obligations under or in the agreement set out next to its name:

Person	Contract
Contractor	Construction Contract
Service Provider	Service Contract

without, in each case, the prior written consent of the Board (such consent not to be unreasonably withheld or delayed). To avoid doubt, (i) any failure to comply with Clause 50.7 shall be a reasonable ground for withholding consent and (ii) consent shall, without prejudice to the other provisions of Clause 50.5, not be required in respect of the appointment of any party currently approved by the Board as a suitable replacement.

- 50.6 If the contract set out next to the name of any person referred to in Clause 50.5 shall at any time lapse, terminate or otherwise cease to be in full force and effect (whether by reason of expiry or otherwise), with the effect that such person shall cease to act in relation to the Project, Project Co shall forthwith appoint a replacement (subject to compliance with Clause 50.5 (*Sub-contractors*)).
- 50.7 Project Co shall procure that any replacement for any person referred to in Clause 50.5 shall enter into a contract upon the same or substantially similar terms as the person so replaced and shall also enter into a collateral agreement on the same or substantially the same terms as the Collateral Agreement entered into by the person so replaced.

Changes in Control

- 50.8 Subject to Clause 50.9, prior to the expiry of a period of twelve (12) months commencing on the Actual Completion Date, no Change in Control in any or all of the shares in Project Co and/or Holdco (or any company of which Project Co or Hold Co is a subsidiary excluding publicly quoted parent companies whose equity securities are listed on a recognised investment exchange as defined in Section 285 of the Financial Services and Markets Act 2000)) shall be permitted without the prior written approval of the Board.
- 50.9 No Change in Control (at any time) in any or all of the shares in Project Co or Hold Co (or any company (other than a public quoted company whose equity securities are listed on a recognised investment exchange, as defined in Section 285 of the Financial Services and Markets Act 2000) of which Project Co or Hold Co is a subsidiary) shall be permitted without the prior written approval of the Board where the person acquiring control is a Restricted Person.

51. INTELLECTUAL PROPERTY

Project Data

- 51.1 Project Co shall make available to the Board free of charge (and hereby irrevocably licences the Board to use) all Project Data that might reasonably be required by the Board and Project Co shall ensure that it obtains all necessary licences, permissions and consents to ensure that it can make the Project Data available to the Board on these terms, for the purposes of:
- (a) the Board carrying out the Clinical Services (and its operations relating to the performance of the Clinical Services), its duties under this Agreement and/or any statutory duties which the Board may have; and
 - (b) following termination of this Agreement, the design or construction of the Facilities, the operation, maintenance or improvement of the Facilities and/or the carrying out of operations the same as, or similar to, the Project Operations,

(together, the "Approved Purposes"), and in this Clause "use" shall include the acts of copying, modifying, adapting and translating the material in question and/or incorporating them with other materials and the term "the right to use" shall be construed accordingly.

Intellectual Property Rights

- 51.2 Project Co:
- (a) hereby grants to the Board, free of charge, an irrevocable, non-exclusive and transferable (but only to any assignee or transferee of any rights or benefits under this

Agreement or upon or at any time following termination of this Agreement) licence (carrying the right to grant sub-licences) to use the Intellectual Property Rights which are or become vested in Project Co; and

- (b) shall, where any Intellectual Property Rights are or become vested in a third party, use all reasonable endeavours to procure the grant of a like licence to that referred to in Clause 51.2(a) above to the Board,

in both cases, solely for the Approved Purposes.

- 51.3 Project Co shall use all reasonable endeavours to ensure that any Intellectual Property Rights created, brought into existence or acquired during the term of this Agreement vest, and remain vested throughout the term of this Agreement, in Project Co and Project Co shall enter into appropriate agreements with any Project Co Party (or other third parties) that may create or bring into existence, or from which it may acquire, any Intellectual Property Rights.

Maintenance of data

- 51.4 To the extent that any of the data, materials and documents referred to in this Clause are generated by or maintained on a computer or similar system, Project Co shall:

- (a) use all reasonable endeavours to procure for the benefit of the Board, at no charge or at the lowest reasonable fee, the grant of a licence or sub-licence for any relevant software to enable the Board or its nominee to access and otherwise use (subject to the payment by the Board of the relevant fee, if any) such data for the Approved Purposes. As an alternative, Project Co may provide such data, materials or documents in a format which may be read by software generally available in the market at the relevant time or in hard copy format; and
- (b) enter into the NCC's then current multi-licence escrow deposit agreement or standard single licence escrow deposit agreement as appropriate in each case.

- 51.5 Project Co shall ensure the back-up and storage in safe custody of the data, materials and documents referred to in Clause 51.4 in accordance with Good Industry Practice. Without prejudice to this obligation, Project Co shall submit to the Board's Representative for approval its proposals for the back-up and storage in safe custody of such data, materials and documents and the Board shall be entitled to object if the same is not in accordance with Good Industry Practice. Project Co shall comply, and shall cause all Project Co Parties to comply, with all procedures to which the Board's Representative has given its approval. Project Co may vary its procedures for such back-up and storage subject to submitting its proposals for change to the Board's Representative, who shall be entitled to object on the basis set out above.

Claims

- 51.6 Where a claim or proceeding is made or brought against the Board which arises out of the infringement of any rights in or to any Intellectual Property (other than any Disclosed Data) or because the use of any materials, Plant, machinery or equipment in connection with the Project Operations infringes any rights in or to any Intellectual Property of a third party then, unless such infringement has arisen out of the use of any Intellectual Property by or on behalf of the Board otherwise than in accordance with the terms of this Agreement, Project Co shall indemnify the Board at all times from and against all such claims and proceedings and the provisions of Clause 8.3 (*Conduct of Claims*) shall apply.

Data Protection

- 51.7 For the purpose of the following Clauses, the term "personal data" shall have the meaning given to it in the Data Protection Act 1998.

- 51.8 Project Co undertakes to the Board that it shall comply with the obligations of a "data controller" under the provisions of the Seventh Data Protection Principle as set out in Schedule 1 of the Data Protection Act 1998. In addition, Project Co:
- (a) warrants that it has, or will have at all material times, (and it shall use best endeavours to procure that all Sub-Contractors (and their agents and sub-contractors of any tier have or will have at all material times)) the appropriate technical and organisational measures in place against unauthorised or unlawful processing of personal data and against accidental loss or destruction of, or damage to, personal data held or processed by it and that it has taken, or will take at all material times, all reasonable steps to ensure the reliability of any of its staff which will have access to personal data processed as part of the Project Operations;
 - (b) undertakes that it will act only on the instructions of the Board in relation to the processing of any personal data made available by or on behalf of the Board as part of the Project Operations;
 - (c) undertakes that it will only obtain, hold, process, use, store and disclose personal data as is necessary to perform its obligations under this Agreement and (without prejudice to Clause 5.2 (*General standards*)) that such data will be held, processed, used, stored and disclosed only in accordance with the Data Protection Act 1998 and any other applicable Law; and
 - (d) undertakes to allow the Board access to any relevant premises on reasonable notice to inspect its procedures described at (a) above.

52. CONFIDENTIALITY

Confidential Information

- 52.1
- (a) The parties agree that the provisions of this Agreement and each Ancillary Document, subject to paragraph (b) below, not be treated as Confidential Information and may be disclosed without restriction.
 - (b) Paragraph (a) above shall not apply to provisions of this Agreement or an Ancillary Document designated as Commercially Sensitive Information and listed in Part 33 of the Schedule (*Commercially Sensitive Information*) which shall, subject to Clause 52.2, be kept confidential for the periods specified in that Part.
 - (c) The parties shall keep confidential all Confidential Information received by one party from the other party relating to this Agreement and Ancillary Documents or the Project and shall use all reasonable endeavours to prevent their employees and agents from making any disclosure to any person of any such Confidential Information.

Permitted Disclosure

52.2 Paragraphs (b) and (c) of Clause 52.1 shall not apply to:

- (a) any disclosure of information that is reasonably required by any person engaged in the performance of their obligations under this Agreement for the performance of those obligations;
- (b) any matter which a party can demonstrate is already or becomes generally available and in the public domain otherwise than as a result of a breach of this Clause;
- (c) any disclosure to enable a determination to be made under Schedule 26 (*Dispute Resolution Procedure*) or in connection with a dispute between Project Co and any of its subcontractors;

- (d) any disclosure which is required pursuant to any Law or Parliamentary obligation placed upon the party making the disclosure or the rules of any stock exchange or governmental or regulatory authority having the force of law or, if not having the force of law, compliance with which is in accordance with the general practice of persons subject to the stock exchange or governmental or regulatory authority concerned;
- (e) any disclosure of information which is already lawfully in the possession of the receiving party, prior to its disclosure by the disclosing party;
- (f) any provision of information to the parties' own professional advisers or insurance advisers or insurers or to the Senior Funders or the Senior Funders' professional advisers or insurance advisers or, where it is proposed that a person should or may provide funds (whether directly or indirectly and whether by loan, equity participation or otherwise) to Project Co to enable it to carry out its obligations under this Agreement, or may wish to acquire shares in Project Co and/or Holdco in accordance with the provisions of this Agreement to that person or their respective professional advisers but only to the extent reasonably necessary to enable a decision to be taken on the proposal;
- (g) any disclosure by the Board of information relating to the design, construction, operation and maintenance of the Project and such other information as may be reasonably required for the purpose of conducting a due diligence exercise, to any proposed new contractor, its advisers and lenders, should the Board decide to retender this Agreement;
- (h) any registration or recording of the Consents and property registration required;
- (i) any disclosure of information by the Board to any other department, office or agency of the Government or their respective advisers or to any person engaged in providing services to the Board for any purpose related to or ancillary to this Agreement;
- (j) any disclosure for the purpose of:
 - (i) the examination and certification of the Board's or Project Co's accounts;
 - (ii) any examination pursuant to Section 6(1) of the National Audit Act 1983 of the economy, efficiency and effectiveness with which the Board has used its resources;
 - (iii) complying with a proper request from either party's insurance adviser, or insurer on placing or renewing any insurance policies; or
 - (iv) (without prejudice to the generality of paragraph (d) above) compliance with the FOI(S)A and/or the Environmental Information (Scotland) Regulations;
- (k) disclosure pursuant to Clause 52.10 (*Scottish Executive Health Department Disclosure*); or
- (l) disclosure to the extent required pursuant to Clause 38.2 (*Information and Audit Access*),

provided that, to avoid doubt, neither paragraph (j)(iv) nor paragraph (d) above shall permit disclosure of Confidential Information otherwise prohibited by Clause 52.1(c) (*Confidential Information*) where that information is exempt from disclosure under section 36 of the FOI(S)A.

- 52.3 Where disclosure is permitted under Clause 52.2 (*Permitted disclosure*), other than under paragraphs (b), (d), (e), (h) and (j), the party providing the information shall procure that the recipient of the information shall be subject to the same obligation of confidentiality as that contained in this Agreement.

- 52.4 Project Co shall not make use of this Agreement or any information issued or provided by or on behalf of the Board in connection with this Agreement otherwise than for the purpose of this Agreement, except with the written consent of the Board.
- 52.5 Where Project Co, in carrying out its obligations under this Agreement, is provided with information relating to patients or any Board Party, Project Co shall not disclose or make use of any such information otherwise than for the purpose for which it was provided, unless Project Co has sought the prior written consent of that person and has obtained the prior written consent of the Board.
- 52.6 On or before the Expiry Date, Project Co shall ensure that all documents or computer records in its possession, custody or control, which contain information relating to any patient or Board Party including any documents in the possession, custody or control of a Sub-Contractor, are delivered up to the Board.
- 52.7 The parties acknowledge that the National Audit Office has the right to publish details of this Agreement (including Commercially Sensitive Information) in its relevant reports to Parliament.
- 52.8 The provisions of this Clause 52 are without prejudice to the application of the Official Secrets Acts 1911 to 1989.

Announcements

- 52.9 Unless otherwise required by any Law or any regulatory or governmental authority (but only to that extent), neither party shall make or permit or procure to be made any public announcement or disclosure (whether for publication in the press, the radio, television screen or any other medium) of any Confidential Information or in the case of Project Co of its (or any Project Co Party's) interest in the Project or, in any such case, any matters relating thereto, without the prior written consent of the other party (which shall not be unreasonably withheld or delayed).

Scottish Executive Health Department Disclosure

- 52.10 Subject to Clause 52.11, the Board shall be free to disclose the terms of this Agreement, the Independent Tester Contract, the Funders' Direct Agreement and the Collateral Agreements to the Scottish Executive Health Department and/or HM Treasury and the parties agree that the Board shall be free to use and disclose such information on such terms and in such manner as the Scottish Executive Health Department and/or HM Treasury see fit.
- 52.11 The Board shall notify Project Co in writing not less than ten (10) Business Days prior to any intended disclosure of the terms of any of the documents referred to in Clause 52.10 to the Scottish Executive Health Department and/or HM Treasury. Project Co shall notify the Board in writing of any terms of such documents (the "Sensitive Information") that Project Co objects to being disclosed within five (5) Business Days of any such notification by the Board (failing which Project Co shall be deemed to have notified the Board that it has no objection to any such disclosure). Without prejudice to the Board's right to disclose the Sensitive Information pursuant to Clause 52.2, the Board shall consult with Project Co following receipt of a notification from Project Co that it objects to disclosure of such Sensitive Information with a view to agreeing whether or not part or all of the Sensitive Information can be removed from the information to be disclosed.

52A. FREEDOM OF INFORMATION

- 52A.1 Project Co acknowledges that the Board is subject to the requirements of the FOI(S)A and the Environmental Information (Scotland) Regulations and shall facilitate the Board's compliance with its Information disclosure requirements pursuant to the same in the manner provided for in Clauses 52A.2 to 52A.8.

- 52A.2 Where the Board receives a Request for Information in relation to Information that Project Co is holding on its behalf and which the Board does not hold itself the Board shall refer to Project Co such Request for Information that it receives as soon as practicable and in any event within five (5) Business Days of receiving a Request for Information and Project Co shall:
- (a) provide the Board with a copy of all such Information in the form that the Board requires as soon as practicable and in any event within ten (10) Business Days (or such other period as the Board acting reasonably may specify) of the Board's request; and
 - (b) provide all necessary assistance as reasonably requested by the Board in connection with any such Information, to enable the Board to respond to a Request for Information within the time for compliance set out in section 10 of the FOI(S)A or Regulation 5 of the Environmental Information (Scotland) Regulations.
- 52A.3 Following notification under Clause 52A.2, and up until such time as Project Co has provided the Board with all the Information specified in Clause 52A.2(a), Project Co may make representations to the Board as to whether or not or on what basis Information requested should be disclosed, and whether further information should reasonably be provided in order to identify and locate the information requested, provided always that the Board shall be responsible for determining at its absolute discretion:
- (a) whether Information is exempt from disclosure under the FOI(S)A and the Environmental Information (Scotland) Regulations;
 - (b) whether Information is to be disclosed in response to a Request for Information, and
- in no event shall Project Co respond directly, or allow its Sub-Contractors to respond directly, to a Request for Information unless expressly authorised to do so by the Board.
- 52A.4 Project Co shall ensure that all Information held on behalf of the Board is retained for disclosure for at least the number of years (from the date it is acquired) specified in the Board Policy "Destruction of Records" and shall permit the Board to inspect such Information as requested from time to time.
- 52A.5 Project Co shall transfer to the Board any Request for Information received by Project Co as soon as practicable and in any event within two (2) Business Days of receiving it.
- 52A.6 Project Co acknowledges that any lists provided by it listing or outlining Confidential Information are of indicative value only and that the Board may nevertheless be obliged to disclose Confidential Information in accordance with the requirements of FOI(S)A and the Environmental (Scotland) Regulations.
- 52A.7 In the event of a request from the Board pursuant to Clause 52A.2, Project Co shall as soon as practicable, and in any event within five (5) Business Days of receipt of such request, inform the Board of Project Co's estimated costs of complying with the request to the extent these would be recoverable if incurred by the Board under Section 12(1) of the FOI(S)A and the Fees Regulations. Where such costs (either on their own or in conjunction with the Board's own such costs in respect of such Request for Information) will exceed the appropriate limit referred to in Section 12(1) of the FOI(S)A and as set out in the Fees Regulations (the "Appropriate Limit") the Board shall inform Project Co in writing whether or not it still requires Project Co to comply with the request and where it does require Project Co to comply with the request the ten (10) Business Days period for compliance shall be extended by such number of additional days for compliance as the Board is entitled to under Section 10 of the FOI(S)A. In such case, the Board shall notify Project Co of such additional days as soon as practicable after becoming aware of them and shall reimburse Project Co for such costs as Project Co incurs in complying with the request to the extent it is itself entitled to reimbursement of such costs in accordance with its own FOI(S)A policy from time to time.
- 52A.8 Project Co acknowledges that (notwithstanding the provisions of Clause 52 (*Confidentiality*)) the Board may, acting in accordance with the Scottish Ministers Code of Practice on the Discharge of Functions of Public Authorities under Part 6 of the Freedom of Information (Scotland) Act 2002 (the "Code"), be obliged under the FOI(S)A, or the Environmental Information (Scotland) Regulations to disclose Information concerning Project Co or the Project:

- (a) in certain circumstances without consulting with Project Co; or
- (b) following consultation with Project Co and having taken their views into account,

provided always that where paragraph (a) above applies the Board shall, in accordance with the recommendations of the Code, draw this to the attention of Project Co prior to any disclosure.

53. TAXATION

VAT

- 53.1 All amounts stated to be payable by either party under this Agreement shall be exclusive of any VAT properly chargeable on any amount.
- 53.2 Each party shall pay to the other party any VAT properly chargeable on any supply made to it under this Agreement provided that it shall first have received from the other party a valid tax invoice in respect of that supply which complies with the requirements of Part III VAT Regulations 1995.
- 53.3 If either party (referred to in this Clause as the "First Party") shall consider that any VAT which the other party (referred to in this Clause as the "Second Party") claims to be properly chargeable to the First Party in connection with this Agreement is not in fact properly so chargeable, the First Party shall be entitled to require the Second Party to obtain a ruling from the Commissioners for Customs and Excise (or, if relevant, such other body as is charged at the time with the collection and management of VAT) (referred to in this Clause as the "Commissioners") as to the VAT (if any) properly so chargeable. The Second Party shall forthwith request the Commissioners for such a ruling.
- 53.4 The following further provisions shall apply in respect of the application for a ruling in accordance with Clause 53.3:
- (a) prior to submitting its request for such a ruling and any further communication to the Commissioners in connection with the obtaining of the ruling, the Second Party shall first obtain the agreement of the First Party to the contents of such request and any such further communication, such agreement not to be unreasonably withheld or delayed;
 - (b) the Second Party shall provide to the First Party copies of all communications received from the Commissioners in connection with the application for a ruling as soon as practicable after receipt; and
 - (c) the Second Party shall use all reasonable endeavours (including without limitation the provision of such additional information as the Commissioners may require) to obtain such a ruling as soon as reasonably practicable following the initial request.
- 53.5 If a ruling is required by the First Party under Clause 53.3, the First Party shall not be obliged to pay the VAT so claimed by the Second Party unless and until a ruling is received from the Commissioners which states that a sum of VAT (the "VAT Sum") is properly so chargeable or the Commissioners state that they are not prepared to give any ruling on the matter. In this case, then subject to Clauses 53.6 and 53.7 and provided that the First Party shall first have received a valid tax invoice which complies with the requirements of Part III VAT Regulations 1995 and which states the VAT Sum to be the amount of VAT chargeable to the First Party, the First Party shall pay the VAT Sum (and any interest or penalties attributable to the VAT Sum) to the Second Party.
- 53.6 If the First Party disagrees with any ruling obtained pursuant to Clause 53.3 by the Second Party from the Commissioners, then the Second Party (provided that it is indemnified to its reasonable satisfaction against all costs and expenses including interest and penalties which it may incur in relation thereto) shall take such action and give such information and assistance to the First Party as the First Party may require to challenge such ruling or otherwise to resist or avoid the imposition of VAT on the relevant supply.

- 53.7 The following further provisions shall apply if the First Party shall exercise its rights under Clause 53.6:
- (a) the action which the First Party shall be entitled to require the Second Party to take shall include (without limitation) contesting any assessment to VAT or other relevant determination of the Commissioners before any VAT tribunal or court of competent jurisdiction and appealing any judgement or decision of any such tribunal or court;
 - (b) if the Second Party shall be required to pay to or deposit with the Commissioners a sum equal to the VAT assessed as a condition precedent to its pursuing any appeal, the First Party shall, at its election, either pay such sum to the Commissioners on behalf of the Second Party or on receipt of proof in a form reasonably satisfactory to the First Party that the Second Party has paid such sum to or deposited such sum with the Commissioners the First Party shall pay such sum to the Second Party;
 - (c) save as specifically provided in Clause 53.5, the First Party shall not be obliged to pay to the Second Party any sum in respect of the VAT in dispute to the Second Party or in respect of VAT on any further supplies made by the Second Party to the First Party which are of the same type and raise the same issues as the supplies which are the subject of the relevant dispute unless and until the final outcome of the relevant dispute is that it is either determined or agreed that VAT is properly chargeable on the relevant supply or supplies; and
 - (d) the Second Party shall account to the First Party for any costs awarded to the Second Party on any appeal, for any sum paid to or deposited with the Commissioners in accordance with Clause 53.7(b) which is repayable to the Second Party and for any interest to which the Second Party is entitled in respect of such sums.

Changes in recoverability of VAT

- 53.8 Subject to Clause 53.9, if, following a Change in Law, Project Co becomes unable to recover VAT attributable to supplies to be made to the Board by Project Co pursuant to this Agreement, the Board shall ensure that Project Co is left in no better and no worse position than it would have been had such Change in Law not occurred (including but not limited to making such amendments to the Agreement as Project Co and the Board shall agree acting reasonably), provided that Project Co shall use all reasonable endeavours to mitigate the adverse effects of any such Change in Law.
- 53.9 The provisions of Clause 53.8 shall apply only if (and to the extent that) the Change in Law was not reasonably foreseeable at the date of this Agreement by an experienced contractor performing operations similar to the relevant Project Operations on the basis of draft bills published in Government green or white papers or other Government departmental consultation papers, bills, draft statutory instruments or draft instruments or proposals published in the Official Journal of the European Union, in each case published:
- (a) prior to the date of this Agreement; and
 - (b) in substantially the same form as the Change in Law.

53.10 NOT USED

Construction Industry Tax Deduction Scheme

- 53.11 This Clause relates to the Construction Industry Tax Deduction Scheme:
- (a) In this Clause (but not otherwise):
 - (i) "the Act" means the Income and Corporation Taxes Act 1988;
 - (ii) "the Regulations" means the Income Tax (Sub-Contractors in the Construction Industry) Regulations 1993 (SI 1993/743);

- (iii) "contractor" means a person who is a contractor for the purposes of the Act and the Regulations;
 - (iv) "evidence" means such evidence as is required by the Regulations to be produced to a contractor for the verification of a sub-contractor's tax certificate;
 - (v) "statutory deduction" means the deduction referred to in Section 559(4) of the Act or such other deduction as may require to be made at the relevant time;
 - (vi) "sub-contractor" means a person who is a sub-contractor for the purposes of the Act and the Regulations; and
 - (vii) "tax certificate" is a certificate issued under Section 561 of the Act;
- (b) not later than fifteen (15) Business Days before the first payment under this Agreement is due to be made to Project Co or after this Clause applies for the first time and on each occasion when this Clause applies following a period when it has not so applied, Project Co shall either:
- (i) provide the Board with the evidence that Project Co is entitled to be paid without the statutory deduction; or
 - (ii) inform the Board in writing that it is not entitled to be paid without the statutory deduction;
- (c) if the Board is not satisfied with the validity of the evidence submitted in accordance with Clause 53.11(b)(i), it shall within ten (10) Business Days of Project Co submitting such evidence notify Project Co in writing that it intends to make the statutory deduction from payments due under this Agreement to Project Co and give its reasons for that decision, and thereupon Clause 53.11(h) below shall apply;
- (d) where Clause 53.11(b)(ii) applies, Project Co shall immediately inform the Board if it obtains a tax certificate and thereupon Clause 53.11(c) above will apply;
- (e) if the period for which the tax certificate has been issued to Project Co expires before the final payment is made to Project Co under this Agreement and provided that this Clause applies at that time, Project Co shall not later than twenty (20) Business Days before the date of expiry either:
- (i) provide the Board with evidence that Project Co, from the said date of expiry, is entitled to be paid for a further period without the statutory deduction, in which case the provisions of this Clause shall apply if the Board is not satisfied with the evidence; or
 - (ii) inform the Board in writing that it will not be entitled to be paid without the statutory deduction after the said date of expiry;
- (f) Project Co shall immediately inform the Board in writing if its current tax certificate is cancelled and give the date of such cancellation, and thereupon Clause 53.11(h) below will apply;
- (g) the Board shall, as a "contractor" in accordance with the Regulations, send promptly to the HM Revenue and Customs any voucher which, in compliance with the obligations of Project Co as a "sub-contractor" under the Regulations, Project Co gives to the Board;
- (h) the Board shall be entitled to make a deduction at the rate specified in Section 559(4) of the Act or at such other rate as may be in force from time to time from the whole of any payment to Project Co (and not just that part of such payment which does not represent the direct cost to Project Co or any other person of materials used or to be used in carrying out the construction operations to which the relevant payment relates) unless prior to making such payment the Board shall have received written

confirmation from the HM Revenue and Customs (obtained by and at the expense of Project Co) in a form which is reasonably satisfactory to the Board directing the Board to make the deduction against only a specified amount or proportion of any such payment to Project Co;

- (i) where any error or omission has occurred in calculating or making the statutory deduction then:
 - (i) in the case of an over deduction, the Board shall correct that error by repayment of the sum over deducted to Project Co; and
 - (ii) in the case of an under deduction, Project Co shall correct that error or omission by repayment of the sum over deducted to the Board;
- (j) Project Co shall at the request of the Board produce to the Board the original of any current tax certificate which it holds and shall permit the Board to make a copy of such tax certificate and/or to record such details in respect of such tax certificate as the Board may consider appropriate; and
- (k) if compliance with this Clause involves the Board or Project Co in not complying with any other of the terms of this Agreement, then the provisions of this Clause shall prevail.

54. CORRUPT GIFTS AND PAYMENTS

Prohibition on corruption

54.1 The term "Prohibited Act" means:

- (a) offering, giving or agreeing to give to the Board or any other public body or to any person employed by or on behalf of the Board or any other public body any gift or consideration of any kind as an inducement or reward:
 - (i) for doing or not doing (or for having done or not having done) any act in relation to the obtaining or performance of this Agreement or any other agreement with the Board or any other public body; or
 - (ii) for showing or not showing favour or disfavour to any person in relation to this Agreement or any other agreement with the Board or any other public body;
- (b) entering into this Agreement or any other agreement with the Board or any other public body in connection with which commission has been paid or has been agreed to be paid by Project Co or on its behalf, or to its knowledge, unless before the relevant agreement is entered into particulars of any such commission and of the terms and conditions of any such agreement for the payment of such commission have been disclosed in writing to the Board;
- (c) committing any offence:
 - (i) under the Prevention of Corruption Acts 1889-1916;
 - (ii) under any Law creating offences in respect of fraudulent acts; or
 - (iii) at common law, in respect of fraudulent acts in relation to this Agreement or any other agreement with the Board or any other public body; or
- (d) defrauding or attempting to defraud or conspiring to defraud the Board or any other public body.

Warranty

- 54.2 Project Co warrants that in entering into this Agreement it has not committed any Prohibited Act.

Remedies

- 54.3 If Project Co or any Project Co Party (or anyone employed by or acting on behalf of them) commits any Prohibited Act, then the Board shall be entitled to act in accordance with Clauses 54.3(a) to (f) below:
- (a) if a Prohibited Act is committed by Project Co or by an employee not acting independently of Project Co, then the Board may terminate the Agreement with immediate effect by giving written notice to Project Co;
 - (b) if the Prohibited Act is committed by an employee of Project Co acting independently of Project Co, then the Board may give written notice to Project Co of termination and the Agreement will terminate, unless within twenty (20) Business Days of receipt of such notice Project Co terminates the employee's employment and (if necessary) procures the performance of the relevant part of the Services by another person;
 - (c) if the Prohibited Act is committed by a Contracting Associate or by an employee of that Contracting Associate not acting independently of that Contracting Associate then the Board may give written notice to Project Co of termination and the Agreement will terminate, unless within twenty (20) Business Days of receipt of such notice Project Co terminates the relevant Sub-Contract and procures the performance of the relevant part of the Services by another person, where relevant, in accordance with Clause 50 (*Assignment, Sub-contracting and Change in Control*);
 - (d) if the Prohibited Act is committed by an employee of a Contracting Associate acting independently of that Contracting Associate, then the Board may give notice to Project Co of termination and the Agreement will terminate, unless within twenty (20) Business Days of receipt of such notice Project Co procures the termination of the employee's employment and (if necessary) procures the performance of the relevant part of the Services by another person;
 - (e) if the Prohibited Act is committed by any other person not specified in Clauses 54.3(a) to (d) above, then the Board may give notice to Project Co of termination and the Agreement will terminate unless within twenty (20) Business Days Project Co procures the termination of such person's employment and of the appointment of their employer (where the employer is not the Board and such person is not employed by Project Co or the Contracting Associate) (if necessary) procures the performance of the relevant part of the Services by another person; and
 - (f) any notice of termination under this Clause shall specify:
 - (i) the nature of the Prohibited Act;
 - (ii) the identity of the party who the Board believes has committed the Prohibited Act; and
 - (iii) the date on which the Agreement will terminate in accordance with the applicable provisions of this Clause.
- 54.4 Without prejudice to its other rights or remedies under this Clause, the Board shall be entitled to recover from Project Co:
- (a) the amount or value of any such gift, consideration or commission; and
 - (b) any other loss sustained in consequence of any breach of this Clause.

Permitted payments

- 54.5 Nothing contained in this Clause shall prevent Project Co from paying any proper commission or bonus to its employees within the agreed terms of their employment.

Notification

- 54.6 Project Co shall notify the Board of the occurrence (and details) of any Prohibited Act promptly on Project Co becoming aware of its occurrence.

Interim management

- 54.7 Where Project Co is required to replace any Sub-Contractor pursuant to this Clause, the provisions of Clause 44.7 (*Project Co Events of Default*) shall apply and be construed accordingly.

55. RECORDS AND REPORTS

The provisions of Part 25 of the Schedule (*Record Provisions*) shall apply to the keeping of records and the making of reports.

56. DISPUTE RESOLUTION PROCEDURE

Except where expressly provided otherwise in this Agreement, any dispute arising out of or in connection with this Agreement shall be resolved in accordance with the procedure set out in Part 26 of the Schedule (*Dispute Resolution Procedure*).

57. NOTICES

- 57.1 All notices under this Agreement shall be in writing and all certificates, notices or written instructions to be given under the terms of this Agreement shall be served by sending the same by first class post, facsimile or by hand, leaving the same at:

If to Project Co	Care of the Finance Director Robertson Capital Projects Limited Lomond Court Castle Business Park Stirling FK9 4TU Fax No: 01786 431650
If to the Board	The Chief Executive of the Board NHS Forth Valley (NHS Board) Carseview House, Castle Business Park Stirling FK9 4SW Fax No: 01786 471337
If to the Scottish Executive Health Department	Scottish Executive Health Department Private Finance and Capital Unit Basement Rear St Andrew's House Regent Road Edinburgh EH1 3DG Fax: 0131 244 3993

- 57.2 Where any information or documentation is to be provided or submitted to the Board's Representative or the Project Co Representative it shall be provided or submitted by sending the same by first class post, facsimile or by hand, leaving the same at:

If to Project Co's Representative

Care of the Finance Director
Robertson Capital Projects Limited
Lomond Court
Castle Business Park
Stirling
FK9 4TU

Fax No: 01786 431650

If to the Board's Representative

Robert Cairney
NHS Forth Valley (NHS Board)
Carseview House,
Castle Business Park
Stirling
FK9 4SW

Fax No: 01786 471337

If to the Scottish Executive Health Department

Scottish Executive Health Department
Private Finance and Capital Unit
Basement Rear
St Andrew's House
Regent Road
Edinburgh
EH1 3DG

Fax: 0131 244 3993

(copied in each case to the Board)

- 57.3 Either party to this Agreement (and either Representative or the Scottish Executive Health Department) may change its nominated address or facsimile number by prior notice to the other party.

- 57.4 Notices given by post shall be effective upon the earlier of (i) actual receipt, and (ii) five (5) Business Days after mailing. Notices delivered by hand shall be effective upon delivery. Notices given by facsimile shall be deemed to have been received where there is confirmation of uninterrupted transmission by a transmission report and where there has been no telephonic communication by the recipient to the senders (to be confirmed in writing) that the facsimile has not been received in legible form:

- (a) within two (2) hours after sending, if sent on a Business Day between the hours of 9am and 4pm; or
- (b) by 11am on the next following Business Day, if sent after 4pm, on a Business Day but before 9am on that next following Business Day.

58. AMENDMENTS

This Agreement may not be varied except by an agreement in writing signed by duly authorised representatives of the parties.

59. WAIVER

Any waiver of any party in exercising any right shall not be construed as a waiver of the right and shall not affect the ability of that party subsequently to exercise that right or to pursue any

remedy, nor shall any indulgence constitute a waiver of any other right (whether against that party or any other person).

60. NO AGENCY

60.1 Nothing in this Agreement shall be construed as creating a partnership or as a contract of employment between the Board and Project Co.

60.2 Save as expressly provided otherwise in this Agreement, Project Co shall not be, or be deemed to be, an agent of the Board and Project Co shall not hold itself out as having authority or power to bind the Board in any way.

60.3 Without limitation to its actual knowledge, Project Co shall for all purposes of this Agreement, be deemed to have such knowledge in respect of the Project as is held (or ought reasonably to be held) by any Project Co Party.

61. ENTIRE AGREEMENT

61.1 Except where expressly provided otherwise in this Agreement, this Agreement constitute the entire agreement between the parties in connection with its subject matter and supersedes all prior representations, communications, negotiations and understandings concerning the subject matter of this Agreement.

61.2 Each of the parties acknowledges that:

- (a) it does not enter into this Agreement on the basis of and does not rely, and has not relied, upon any statement or representation (whether negligent or innocent) or warranty or other provision (in any case whether oral, written, express or implied) made or agreed to by any person (whether a party to this Agreement or not) except those expressly repeated or referred to in this Agreement and the only remedy or remedies available in respect of any misrepresentation or untrue statement made to it shall be any remedy available under this Agreement; and
- (b) this Clause shall not apply to any statement, representation or warranty made fraudulently, or to any provision of this Agreement which was induced by fraud, for which the remedies available shall be all those available under the law governing this Agreement.

62. CONFLICTS OF AGREEMENTS

Subject to Clause 25.8 (*Quality Plans and Systems*), in the event of any conflict between this Agreement and the Project Documents and/or the Licence, the provisions of this Agreement shall prevail.

63. SEVERABILITY

If any provision of this Agreement shall be declared invalid, unenforceable or illegal by the courts of any jurisdiction to which it is subject, such provision may be severed and such invalidity, unenforceability or illegality shall not prejudice or affect the validity, enforceability and legality of the remaining provisions of this Agreement.

64. COSTS AND EXPENSES

Each party shall be responsible for paying its own costs and expenses incurred in connection with the negotiation, preparation and execution of this Agreement.

65. THIRD PARTY RIGHTS

Save to the extent expressly provided in this Agreement and, to avoid doubt, without prejudice to the terms of the Lender's Direct Agreement or the rights of any permitted successor to the rights

of Project Co or of any permitted assignee, it is expressly declared that no rights shall be conferred under and arising out of this Agreement upon any person other than the Board and Project Co and without prejudice to the generality of the foregoing, there shall not be created by this Agreement a *jus quaesitum tertio* in favour of any person whatsoever.

66. MITIGATION

Each of the Board and Project Co shall at all times take all reasonable steps to minimise and mitigate any loss for which the relevant party is entitled to bring a claim against the other party pursuant to this Agreement.

66A. NO LOSS

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.

67. GOVERNING LAW AND JURISDICTION

- 67.1 This Agreement shall be considered as a contract made in Scotland and shall be subject to the laws of Scotland.
- 67.2 Subject to the provisions of the Dispute Resolution Procedure, both parties agree that the courts of Scotland shall have exclusive jurisdiction to hear and settle any action, suit, proceeding or dispute in connection with this Agreement and irrevocably submit to the jurisdiction of those courts.

PART 1 OF THE SCHEDULE: DEFINITIONS AND INTERPRETATIONS

Section 1: Definitions

In this Agreement unless the context otherwise requires:

"5 Year Maintenance Plan"	means the plan, to be prepared by or on behalf of Project Co, for any works for the maintenance or repair of the Facilities, including the renewal or replacement of plant or equipment as necessary, during each five year period for the duration of the Project Term, which shall be updated not later than twenty (20) Business Days prior to the commencement of each Contract Year
"Actual Completion Date"	means the date on which the Works have been completed in accordance with this Agreement, as such date shall be stated in the Certificate of Practical Completion or, in the event of dispute, as such date may be determined in accordance with Part 26 of the Schedule (<i>Dispute Resolution Procedure</i>)
"Actual Liability"	has the meaning given in Clause 48.7(c)(i) (Compensation on Termination)
"Additional De Minimis Amount"	has the meaning given in Clause 39.6(a) (Changes in Law)
"Additional Permitted Borrowing"	<p>means on any date, the amount equal to any amount of principal outstanding under the Senior Funding Agreements (as the same may from time to time be amended, whether or not with the approval of the Board) in excess of the amount of principal scheduled under the Senior Funding Agreements at Financial Close to be outstanding at that date,</p> <p>but only to the extent that:</p> <ul style="list-style-type: none">(i) this amount is less than or equal to the Additional Permitted Borrowings Limit; and(ii) in respect of any Additional Permitted Borrowing the Agent (as defined in the Funders' Direct Agreement) 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, <p>and provided further that any such excess amount of principal which is (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 Additional Permitted Borrowing</p>

"Additional Permitted Borrowings Limit"

means an amount equal to:

- (a) 10% of the Original Senior Commitment, for any Additional Permitted Borrowing subsisting in the period from the date of Financial Close to the date on which the amount outstanding under the Senior Funding Agreements is **reduced to 50%** or less of the Original Senior Commitment; and thereafter
- (b) the higher of:
 - (i) 5% of the Original Senior Commitment; and
 - (ii) the amount of any Additional Permitted Borrowing outstanding on the last day of the period referred to in (a)

"Adverse Law"

means any Change in Law which would if passed into Law have the following effects, and any administrative act of the Government or any minister of the Crown, department, agency, regulator or other public body or official not amounting to a Change in Law but which has (or would, if made, have) the following effects:

- (a) remove, transfer to another party or otherwise have a material adverse effect upon the Board's legal capacity (or obligation) to perform any of its material obligations in relation to the Project which are material to the interests of Project Co and/or its Funders; or
- (b) amend or repeal (without re-enactment, consolidation or replacement by Law having an equivalent effect) the National Health Service (Residual Liabilities) Act 1996 or the National Health Service (Private Finance) Act 1997;

provided that,

- (i) in the circumstances referred to in paragraph (a), where a Change in Law would have the effect of transferring the legal capacity or obligation of the Board in relation to such material obligations to a new entity (a "Board Substitute"), the relevant Law shall not be an Adverse Law if:
 - (aa) either:
 - (i) the provisions of the National Health Service (Residual Liabilities) Act 1996 and the National Health Service (Private Finance) Act 1997 (together the "Protective Legislation") apply to such Board Substitute in full (as applied to the Board as at the

date of this Agreement); or

(ii) the relevant Law has the same effect in relation to the Board Substitute as the Protective Legislation; and

(bb) the relevant Law does not otherwise have any adverse material effect on the legal capacity or obligation of the Board Substitute which affects (or could reasonably be expected to affect) the Board Substitute's ability to perform any material obligations owed to Project Co and/or the Funders in relation to the Project which are material to the interests of Project Co and/or its Funders, when compared to the material obligations of the Board under this Agreement

"Allowable Expenses"	has the meaning given in Clause 39.7 (Changes in Law)
"Ancillary Documents"	means the Construction Contract, the Service Contracts and the Performance Guarantees, all as the same may be amended or replaced from time to time
"Ancillary Rights"	has the meaning given in Section 2 of Part 7 of the Schedule (Land Matters)
"APB Distribution"	means, for the period during which the Additional Permitted Borrowing subsists, an amount equal to the aggregate of all Distributions made during that period up to an amount equal to the principal of the Additional Permitted Borrowing on the first day of that period
"Approved RDD Item"	means an item of Reviewable Design Data which has been returned or has been deemed to have been returned endorsed either "Level A - no comment" or "Level B – proceed subject to amendment as noted" by the Board's Representative pursuant to the provisions of Clause 17.7 (Design, Construction and Commissioning Process) and Part 10 of the Schedule (<i>Review Procedure</i>) (provided that in the case of any item of Reviewable Design Data which has been returned or has been deemed to have been returned endorsed "Level B – proceed subject to amendment as noted" Project Co has taken account of the Board's Representative's comments), as such item of Reviewable Design Data may be varied or amended from time to time in accordance with Part 22 of the Schedule (<i>Variation Procedure</i>)
"Associated Companies"	means, in respect of a relevant company, a company which is a Subsidiary, a Holding Company or a company that is a Subsidiary of the ultimate Holding Company of that relevant company, and in the case of Project Co shall include HoldCo and each of the Shareholders, and the term "Associate" shall be interpreted accordingly

"Base Date"	has the meaning given in Section 2 to Part 1 of the Schedule (<i>Definitions and Interpretation</i>)
"Beneficiary"	has the meaning given in Clause 8.3 (<i>Conduct of Claims</i>)
"Board Additional Works Confirmation"	has the meaning given in Part 22 of the Schedule (<i>Variation Procedure</i>)
"Board Additional Works Enquiry"	has the meaning given in Part 22 of the Schedule (<i>Variation Procedure</i>)
"Board Additional Works Item"	has the meaning given in Part 22 of the Schedule (<i>Variation Procedure</i>)
"Board Additional Works Variation"	has the meaning given in Part 22 of the Schedule (<i>Variation Procedure</i>)
"Board Assets"	means the Facilities and any other assets and equipment or other property used by, or on behalf of, the Board or any Board Party
"Board Events of Default"	has the meaning given in clause 45.1 (Board Events of Default)
"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
"Board Policies"	means, subject to Clause 32.7 (Exclusion of Board Policies), the policies of the Board set out in the document annexed to this Agreement as Attachment A as amended from time to time
"Board Service Variation"	has the meaning given in Part 22 of the Schedule (<i>Variation Procedure</i>)
"Board Service Variation Enquiry"	has the meaning given in Part 22 of the Schedule (<i>Variation Procedure</i>)
"Board Works Variation"	has the meaning given in Part 22 of the Schedule (<i>Variation Procedure</i>)
"Board Works Variation Confirmation"	has the meaning given in Part 22 of the Schedule (<i>Variation Procedure</i>)
"Board Works Variation Enquiry"	has the meaning given in Part 22 of the Schedule (<i>Variation Procedure</i>)
"Board's Commissioning"	means the Board's pre-completion commissioning activities to be carried out by the Board in accordance with Clause 22 (<i>Pre-Completion Commissioning and Completion</i>)
"Board's Construction Requirements"	means the requirements of the Board set out or identified in Section 3 of Part 8 of the Schedule (<i>Construction Matters</i>) as amended from time to time in

	accordance with the terms of this Agreement
"Board's Cost Share"	has the meaning given in Clause 39.7 (<i>Changes in Law</i>)
"Board's Representative"	means the person so appointed by the Board pursuant to Clause 11 (Representatives)
"Business Day"	means a day other than a Saturday, Sunday or a bank holiday in Edinburgh
"Capital Cost of the Facilities"	has the meaning given in Clause 39.7 (Changes in Law)
"Capital Expenditure"	has the meaning given in Part 22 of the Schedule (<i>Variation Procedure</i>)
"CDM Regulations"	has the meaning given in Section 2 of Part 8 of the Schedule (<i>Construction Matters</i>)
"Certificate of Commencement"	means the certificate to be issued and delivered by the Board in accordance with Clause 2.1 (<i>Execution and Delivery of Documents</i>)
"Certificate of Practical Completion"	means the certificate to be issued by the Independent Tester in accordance with Clause 22.12 (<i>Pre-Completion Commissioning and Completion</i>) in the form set out in Part 28 of the Schedule (<i>Certificates</i>)
"Change in Control"	means any sale or other disposal of any legal, beneficial or equitable interest in any or all of the equity share capital of a corporation (including the control over the exercise of voting rights conferred on that equity share capital or the control over the right to appoint or remove directors)
"Change in Law"	means the coming into effect or repeal (without re-enactment or consolidation) in Scotland of any Law, or any amendment or variation to any Law, or any judgement of a relevant court of law which changes binding precedent in Scotland in each case after the date of this Agreement
"Clinical Functionality"	<p>(a) the following matters as shown on the 1:500 scale development control plan:</p> <ul style="list-style-type: none"> (i) the points of access to and within the Site and to the Facilities; (ii) the relationship between the buildings that comprise the Facilities; and (iii) the adjacencies between the different functional areas within the Facilities as set out in drawing L(06)001 included in Section 4 of Schedule Part 8 and as referenced in Section 9 of Schedule Part 8 <p>(b) the following matters as shown on the 1:200 scale L (05) series plans included in Section 4 of Schedule Part 8 and as referenced in Section 9 of Schedule 8:</p> <ul style="list-style-type: none"> (i) the points of access to and within the Site and

- to the Facilities;
 - (ii) the relationship between the buildings that comprise the Facilities; and
 - (i) the adjacencies between the different functional areas within the Facilities as set out in the above drawings; and
 - (ii) the adjacencies between rooms within the functional areas;
- (c) the quantity, description and areas (in square metres) of those rooms and spaces shown on the Schedule of Accommodation;
- (d) 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 plans included in Section 4 of Schedule Part 8 and as referenced in Section 9 of the Schedule Part 8 all in respect of:
- (i) all bed and trolley positions; and
 - (ii) internal room elevations..

but only insofar as each of the matters listed in (a) to (d) above relate to or affect Clinical Use

"Clinical Services"	means management, responsibility, administration and carrying out of the clinical and medical services provided at the Facilities by the Board from time to time and which are not services to be provided by Project Co to the Board under this Agreement
"Clinical Use"	means the use of a room or space to the extent that it is used by the Board or its employees, tenants, agents and/ or contractors (but not, to avoid doubt, Project Co) for carrying out the Clinical Services
"Collateral Agreements"	means the Contractor's Collateral Agreement and the Service Provider's Collateral Agreements
"Commencement Date"	has the meaning given in Part 22 of the Schedule (<i>Variation Procedure</i>)
"Commercially Sensitive Information"	means the sub set of Confidential Information listed in column 1 of Section 1 (<i>Commercially Sensitive Contractual Provisions</i>) and column 1 of Section 2 (<i>Commercially Sensitive Material</i>) of Part 33 of the Schedule (<i>Commercially Sensitive Information</i>) in each case for the period specified in column 2 of Sections 1 and 2 of Part 33 of the Schedule
"Commissioners"	has the meaning given in Clause 53.3 (VAT)
"Compensation Event"	has the meaning given in Clause 41 (Delay Events)
"Compensation Payment"	has the meaning given in Clause 48.6 (Compensation on Termination)
"Completion Criteria"	means the Completion Tests as defined in Appendix 1 of Part 12 of the Schedule (<i>Outline Commissioning Programme</i>)

"Completion Date"	means 28 th November 2008 or such revised date as may be fixed pursuant to Clause 41
"Completion Process"	means the process and procedures for carrying out the notifications, testing, inspections and completion certification as defined in Part 12 of the Schedule (<i>Outline Commissioning Programme</i>) as may be applicable to the Works
"Confidential Information"	means:- <ul style="list-style-type: none"> (a) information that ought to be considered as confidential (however it is conveyed or on whatever media it is stored) and may include information whose disclosure would, or would be likely to, prejudice the commercial interests of any person, trade secrets, Intellectual Property Rights and know-how of either party and all personal data and sensitive personal data within the meaning of the Data Protection Act 1988 and (b) Commercially Sensitive Information.
"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
"Construction Contract"	means the design and build contract dated the same date as this Agreement between Project Co and the Contractor as amended from time to time in accordance with this Agreement
"Construction Quality Plan"	means the document at Section 8 of Part 8 of the Schedule (<i>Construction Matters</i>)
"Construction Phase"	means the period of the Project Term during which the Works are being carried out
"Contamination"	means all or any pollutants or contaminants, including any chemical or industrial, radioactive, dangerous, toxic or hazardous substance, waste or residue (whether in solid, semi-solid or liquid form or a gas or vapour) and including without limitation genetically modified organisms
"Contracting Associate"	means the Contractor and/or any Service Provider
"Contract Month"	means a calendar month, provided that <ul style="list-style-type: none"> (a) the first Contract Month shall be the period from and including the Payment Commencement Date to and including the last day of the calendar month in which the Payment Commencement Date falls; and (b) the last Contract Month shall be the period

	from and including the first day of the calendar month in which the Expiry Date or Termination Date (as the case may be) falls to and including the Expiry Date or Termination Date (as the case may be)
"Contract Year"	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:- <ul style="list-style-type: none"> (a) the first Contract Year shall be such period as commences on and includes the date of this Agreement 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 1 April that falls in the year in which this Agreement expires or is terminated (for whatever reason) and ends on the date of expiry or earlier termination of this Agreement (as the case may be)
"Contractor"	means Robertson Construction Central Limited (Company No SC249933) engaged by Project Co to carry out the Works and any substitute design and/or building contractor engaged by Project Co as may be permitted by this Agreement
"Contractor's Collateral Agreement"	means the collateral agreement between the Board, Project Co and the Contractor in the form set out in Part 11 of the Schedule (<i>Collateral Agreements</i>)
"Contractor's Site Manager"	means the manager to be appointed by the Contractor for purposes of supervision of all day-to-day activities on Site
"Contractor's Site Rules"	means the Contractor's rules, applicable on Site to the Board, Project Co, the Contractor and their respective sub-contractors and suppliers of every tier during the construction of the Facilities
"Convictions"	means other than in relation to minor road traffic offences, any previous or pending prosecutions, convictions, cautions and binding-over orders (including any spent convictions as contemplated by section 1(1) of The Rehabilitation of Offenders Act 1974 by virtue of the exemptions specified in Part II of Schedule 1 of the Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975 (SI 1975/1023) and the Rehabilitation of Offenders Act 1974 (Exclusions and Exceptions) (Scotland) Order 2003 Scottish SI 2003/231) or any replacement or amendment to those Orders)
"Cumulative Allowable Expenses"	has the meaning given in Clause 39.7 (Changes in Law)
"Deemed Liability"	has the meaning given in Clause 48.7(c)(ii) (Compensation on Termination)
"Default Interest"	means any increased margin that is payable to the Senior Funders or which accrues as a result of any

	payment due to the Senior Funders not being made on the date on which it is due
"Default Interest Rate"	means 2% over LIBOR
"Defects"	means any defect or fault in the Works and/or the Facilities (not being a Snagging Matter) which occurs due to a failure by Project Co to meet the Board's Construction Requirements and/or Project Co's Proposals or otherwise to comply with its obligations under this Agreement
"Delay Event"	has the meaning given in Clause 41.3 (Delay Events)
"Demolition Contract"	means the demolition contract between the Board and David Morton (Larbert) Ltd dated around 8 February 2005
"Demolition Contract Carve Outs"	means:- <ul style="list-style-type: none"> (a) failure to remove all 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)
"De Minimis Amount"	has the meaning given in Clause 39.6(a) (Changes in Law)
"Design Data"	means all drawings, reports, documents, plans, software, formulae, calculations and other data relating to the design, construction, testing and/or operation of the Facilities
"Design Quality Plan"	means the document at Section 8 of Part 8 of the Schedule (<i>Construction Matters</i>)
"Directive"	has the meaning given in Part 22 of the Schedule (<i>Variation Procedure</i>)
"Direct Losses"	means, subject to the provisions of Clause 9.1 (<i>Limits on Liability</i>) all damage, losses, liabilities, claims, actions, costs, expenses (including the cost of legal or professional services, legal costs being on an agent/client, client paying basis), proceedings, demands and charges whether arising under statute, contract or at common law but, to avoid doubt, excluding Indirect Losses
"Disaster Plan"	means the document called "Emergency Procedures"

	set out Part 5 of the Schedule (<i>Disaster Plan</i>)
"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 in 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 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
"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
"Discriminatory Change in Law"	<p>means any Change in Law the effect of which is to discriminate directly against:</p> <ul style="list-style-type: none"> (a) hospitals whose design, construction, financing and operation are procured by a contract under the PFI (or any similar successor programme) in relation to other similar hospital projects; or (b) companies undertaking projects procured by contracts under the PFI (or any similar successor programme) in relation to other companies undertaking similar projects; or (c) the Facilities in relation to other healthcare facilities; or (d) Project Co in relation to other companies, <p>save that:</p> <ul style="list-style-type: none"> (i) such action shall not be a Discriminatory Change in Law where it is in response to any act or omission on the part of Project Co which is illegal (other than an act or omission rendered illegal by virtue of the Discriminatory Change in Law itself); (ii) such action shall not be deemed to be discriminatory solely on the basis that its effect on Project Co is greater than its effect on other companies; and (iii) a change in taxes or the introduction of a tax affecting companies generally or a change in VAT shall be deemed not to be discriminatory in any circumstances to avoid doubt, such changes being given effect in accordance with Clause 53 (<i>Taxation</i>)
"Dispute"	has the meaning given in paragraph 1 of Part 26 of the Schedule (<i>Dispute Resolution Procedure</i>)
"Dispute Resolution Procedure"	means the procedure set out in Part 26 of the Schedule (<i>Dispute Resolution Procedure</i>)

"Diversion Order"	means 'The Clackmannanshire Council (Various Footways and Footpaths, Sauchie) (Temporary Redetermination of Means of Exercise of Public Right of Passage) Order 2007
"Economic Reinstatement Test"	means the test carried out pursuant to Clause 5 of the Funder's Direct Agreement
"Employee Transfer"	means a relevant transfer of an undertaking in accordance with the Transfer Regulations
"Encumbrance"	means any option, right of pre-emption, pledge, security, interest, lien, charge, mortgage, lease, licence, claim, condition, retention or other encumbrance or restriction whether imposed by agreement, by law or otherwise
"Environmental Information (Scotland) Regulations"	means the Environmental Information (Scotland) Regulations 2004 together with any guidance and/or codes of practice issued by the Scottish Information Commissioner or relevant Government Department in relation to such regulations
"Equipment"	means the equipment identified in Part 13 of the Schedule (<i>Equipment</i>)
"Estimated Increased Maintenance Costs"	has the meaning given in Clause 28.7 (<i>Maintenance</i>)
"Executive"	has the meaning given in Part 22 of the Schedule (<i>Variation Procedure</i>)
"Excusing Cause"	has the meaning given in Clause 8.7 (<i>Excusing Causes</i>)
"Expert"	means the individual(s) appointed in accordance with Part 26 of the Schedule (<i>Dispute Resolution Procedure</i>)
"Expiry Date"	means the date on which this Agreement will terminate in accordance with Clause 46.3 (<i>Non-Default Termination</i>)
"Facilities"	means the buildings and other facilities, together with all supporting infrastructure (including the Plant and Project Co Equipment) and amenities located on the Site as required to enable Project Co to comply with its obligations under this Agreement, all as the same may be varied, amended or supplemented from time to time in accordance with this Agreement
"Facilities Manager"	means Project Co's duty manager who shall be present at the Facilities in accordance with the Service Level Specifications
"Fair Value"	means the amount at which an asset or liability could be exchanged in an arms length transaction between informed and willing parties, other than in a forced or liquidated sale
"Fees Regulations"	means the Freedom of Information Fees for Required Disclosure (Scotland) Regulations 2004

"Final Commissioning Programme"	means the programme to be jointly developed and agreed by the Board and Project Co in accordance with the provisions of Clause 22.2 (<i>Pre-Completion Commissioning and Completion</i>)
"Final Reinstatement Plan"	has the meaning given in Clause 36.20F
"Financial Close"	means the date of this Agreement
"Financial Model"	means the computer spreadsheet model for the Project incorporating statements of Project Co's cashflows including all expenditure, revenues, financing and taxation of the Project Operations together with the profit and loss accounts and balance sheets for Project Co throughout the Project Term accompanied by details of all assumptions, calculations and methodology used in their compilation and any other documentation necessary or desirable to operate the model, as amended from time to time in accordance with the terms of Clause 37 (<i>Custody of Financial Model</i>), the output from which at the date of this Agreement is shown at Part 19 of the Schedule (<i>Financial Model</i>) and a copy of which is attached to this Agreement on disk as Attachment B
"Finishes"	means those finishes listed at Table A of Part 10 of the Schedule (<i>Review Procedure</i>)
"FOI(S)A"	means the Freedom of Information (Scotland) Act 2002 and any subordinate legislation (as defined in section 73 of the Freedom of Information (Scotland) Act 2002) made under the Freedom of Information (Scotland) Act 2002 from time to time together with any guidance and/or codes of practice issued by the Scottish Information Commissioner or relevant Government Department in relation to such Act
"Force Majeure"	has the meaning given in Clause 43 (<i>Force Majeure</i>)
"Funders"	means all or any of the persons who provide financing or funding in respect of the Project Operations under the Funding Agreements including The Co-operative Bank plc as a Bank, the Agent, the Security Trustee, the Account Bank and the Hedging Counterparty (as such terms are defined in the loan agreement forming one of Initial Funding Agreements) and the parties to the Senior Funding Agreements performing all or any of these roles from time to time and, where the context so permits, prospective financiers or funders
"Funders' Direct Agreement"	means the agreement to be entered into between the Board, the Senior Funders and Project Co in the form set out in Part 6 of the Schedule (<i>Funders' Direct Agreement</i>)
"Funding Agreements"	means all or any of the agreements or instruments to be entered into by Project Co or any of its Associated Companies relating to the financing of the Project Operations (including the Initial Funding Agreements and any agreements or instruments to be entered into by Project Co or any of its Associated Companies relating to the rescheduling of their indebtedness or the

	refinancing of the Project Operations)
"Funding Shortfall"	has the meaning given in Part 22 of the Schedule (<i>Variation Procedure</i>)
"Gate Piers"	means the gate piers depicted on the Site Plan A and Site Plan B
"General Procedure"	has the meaning given in Part 22 of the Schedule (<i>Variation Procedure</i>)
"Good Industry Practice"	means using standards, practices, methods and procedures conforming to the Law and exercising that degree of skill and care, diligence, prudence and foresight which would reasonably and ordinarily be expected from a skilled and experienced person engaged in a similar type of undertaking under the same or similar circumstances
"Government"	means the government of the United Kingdom or the Scottish Ministers
"Ground Physical and Geophysical Investigation"	means the investigation of all the conditions of and surrounding the Site and of any extraneous materials in, on or under the Site (including its surface and subsoil) to enable the Facilities to be designed and constructed and the Works to be carried out with due regard for those conditions and the seismic activity (if any) in the region of the Site
"Grouting Works Contract"	means the contract so entitled between the Board and the Contractor dated 4 th and 24 th May 2007, relating to ground stabilisation works at the Site
"Handback"	means the return of the Facilities by Project Co to the Board on the Expiry Date in accordance with this Agreement
"Handback Amount"	has the meaning given in Part 24 of the Schedule (<i>Handback Procedure</i>)
"Handback Bond"	has the meaning given in Part 24 of the Schedule (<i>Handback Procedure</i>)
"Handback Certificate"	means the certificate of confirmation that the Facilities comply with the Handback Requirements to be issued by the Board in accordance with Part 24 of the Schedule (<i>Handback Procedure</i>)
"Handback Procedure"	means the procedure for Handback described in Part 24 of the Schedule (<i>Handback Procedure</i>)
"Handback Programme"	has the meaning given in Part 24 of the Schedule (<i>Handback Procedure</i>)
"Handback Requirements"	has the meaning given in Part 24 of the Schedule (<i>Handback Procedure</i>)
"Handback Works"	has the meaning given in Part 24 of the Schedule (<i>Handback Procedure</i>)

"Health and Safety Regime"	means the Food Safety Act 1990 (and associated regulations), the Health & Safety at Work etc Act 1974 (and associated regulations), the Fire Precautions Act 1971, the Environmental Protection Act 1990 and the Water Industry (Scotland) Act 2002 and any similar or analogous health, safety or environmental legislation in force from time to time
"Health Board"	means a Health Board established under Section 2 of the National Health Service (Scotland) Act 1978 (or any successor body to any such body established with substantially the same powers or duties)
"H&S Conviction"	has the meaning given in Clause 44.1(f) (<i>Project Co Events of Default</i>)
"HoldCo"	means Robertson Health (Clackmannanshire) Holdings Limited (Registered Number SC315451) having its registered office at 10 Perimeter Road, Pinefield Industrial Estate, Elgin, Moray, IV30 6AE
"Holding Company"	has the meaning given to it in Section 736 of the Company Act 1985, as amended by Section 144 of the Companies Act 1989
"Hospital Facilities"	has the meaning given in Part 18 of the Schedule (Payment Mechanism)
"Indemnifier"	has the meaning given in Clause 8.3 (<i>Conduct of Claims</i>)
"Indemnity Period"	means the period commencing from the time direct physical damage by an insured event occurs and ending when the claimant ceases to be affected in consequence of the damage, such indemnity period to be no longer than the maximum indemnity period as stated in Part 21 of the Schedule (Insurance Requirements)
"Independent Tester"	means Faithful and Gould Limited or such substitute independent tester as may be permitted pursuant to this Agreement
"Independent Tester Contract"	means the contract dated the same date as this Agreement in the form set out in Part 15 of the Schedule (<i>Independent Tester Contract</i>) between Project Co, the Board and the Independent Tester
"Indirect Losses"	has the meaning given in Clause 9 (<i>Limits on Liability</i>)
"Information"	has the meaning given under Section 73 of the Freedom of Information (Scotland) Act 2002
"Initial Funding Agreements"	means those agreements or instruments entered into on or around the date of this Agreement by Project Co or any of its Associated Companies relating to the financing of the Project Operations and in the form that they are in on or around the date of this Agreement in connection with the financing of the Project as listed in Part 3 of this Part 1 of the Schedule

"Insurance Proceeds Account"	means the account numbered _____ in the joint names of Project Co and the Board with the Account Bank (as defined in the Senior Funding Agreements)
"Insurance Proceeds Accounts Agreement"	means the agreement in the form set out in Part 32 of the Schedule (<i>Insurance Proceeds Account Agreement</i>)
"Insurances"	means, as the context requires, all or any of the insurances required to be maintained by Project Co pursuant to this Agreement
"Insurance Term"	means any terms and/or conditions required to be included in a policy of insurance
"Intellectual Property"	means all registered or unregistered trade marks, service marks, patents, registered designs, utility models, applications for any of the foregoing, copyrights, unregistered designs, the sui generis rights of extraction relating to databases, trade secrets and other confidential information or know-how
"Intellectual Property Rights"	means the Intellectual Property which (or the subject matter of which) is created, brought into existence, acquired, used or intended to be used by Project Co, any Project Co Party or by other third parties (for the use by or on behalf of or for the benefit of Project Co) for the purposes of the design or construction of the Facilities, the operation, maintenance, improvement and/or testing of the Facilities or the conduct of any other Project Operation or otherwise for the purposes of this Agreement
"IRR"	has the meaning given in Part 22 of the Schedule (<i>Variation Procedure</i>)
"Junior Debt"	has the meaning given in Section F of Part 23 of the Schedule (<i>Compensation on Termination</i>)
"Law"	means: <ul style="list-style-type: none"> (a) any applicable statute or proclamation or any delegated or subordinate legislation; (b) any enforceable community right within the meaning of section 2(1) European Communities Act 1972; (c) any applicable guidance, direction or determination with which the Board and/or Project Co is bound to comply to the extent that the same are published and publicly available or the existence or contents of them have been notified to Project Co by the Board; and (d) any applicable judgement of a relevant court of law which is a binding precedent in Scotland, <p>in each case in force in Scotland</p>

"Liaison Committee"	has the meaning given to it in Clause 12.1
"Liaison Procedure"	means the procedure referred to in Clause 12 (<i>Liaison</i>)
"LIBOR"	means the rate per annum determined by Co-operative Bank plc to be the offered rate for six month sterling deposits in the London interbank market which appears on Telerate Page 3750 (or such other page as may replace that page on the Dow Jones Telerate service)
"Licence"	means the licence granted by the Board pursuant to Clauses 14.1 and 14.2 and in the form set out in Part 7 of the Schedule
"Liquid Market"	means that there are sufficient willing parties (being at least two parties, each of whom is capable of being a Suitable Substitute Contractor) in the market for PFI contracts or similar contracts for the provision of services (in each case the same as or similar to this Agreement) for the price that is likely to be achieved through a tender to be a reliable indicator of Fair Value provided always that any vehicle controlled and established by the Senior Funders specifically for the purposes of the Project and to which this Agreement may be novated shall be discounted in assessing whether there are sufficient willing bidders in the market for such purposes
"Listed Boundary Walls"	means the boundary walls outlined in blue on the Site Plan A and Site Plan B
"Lodge Site"	means that area outlined in red and coloured purple on Site Plan A and Site Plan B
"Maintenance Works"	means any works for maintenance or repair of the Facilities that are necessary to ensure that the Facilities are maintained in accordance with Service Level Specifications and Method Statements for Estates Services and Grounds and Gardens Services and that the Facilities comply with the Board's Construction Requirements and Project Co's Proposals (including, without limitation, the renewal or replacement of any Plant or equipment) throughout the Project Term
"Material Damage"	for the purposes of Clause 36.20 and 36.21 (<i>Reinstatement Plan</i>) only shall have the meaning given in Clause 36.20A
"Medical Contamination"	means a disease carrying agent which cleaning and prevention of infection or contamination techniques in use in accordance with Good Industry Practice and this Agreement cannot substantially prevent or cannot substantially remove with the result that: <ul style="list-style-type: none"> (a) it is unsafe to admit patients or staff to the relevant area or to use the area for the purpose for which it is intended; and (b) the area cannot be made safe for the admission of patients or staff

"Method Statements"	means the method of providing a Service as set out or identified in Section 2 of Part 14 of the Schedule (<i>Service Requirements</i>) as amended from time to time in accordance with Clause 40 (<i>Variation Procedure</i>) and Clause 27 (<i>The Services</i>)
"Monthly Service Payment"	has the meaning given in Part 18 of the Schedule (<i>Payment Mechanism</i>)
"NHS Board"	means a body established pursuant to Section 12A of the National Health Service (Scotland) Act 1978
"NHS"	means the National Health Service
"NHS Requirement"	means: <ul style="list-style-type: none"> (a) in relation to the Works, Health Building Notes and Health Technical Memoranda and such other requirements as are designated as NHS Requirements in the Board's Construction Requirements; and (b) in relation to the Project Operations (other than the Works), Health Building Notes, Health Technical Memoranda, all Executive Letters, Health Service Guidelines, Health Circulars of the NHS and any similar official requests, requirements and guidance having similar status for the time being in force, but only to the extent the same are published and publicly available or the existence and contents of them have been notified to Project Co by the Board
"NHS Specific Change in Law"	means any Change in Law which principally affects or principally relates only to the provision or operation of healthcare premises and any change in a NHS Requirement (other than any NHS Requirement which merely gives effect to Law generally and does not principally affect or principally relate to the provision or operation of the Facilities or healthcare premises)
"Operational Term"	means the period from the Actual Completion Date until the end of the Project Term
"Original Reinstatement Plan"	shall have the meaning given in Clause 36.20C (<i>Reinstatement Plan</i>)
"Original Senior Commitment"	means the amount committed under the Senior Funding Agreements as at Financial Close (as adjusted to take into account any Qualifying Variation)
"Outline Commissioning Programme"	means the programme setting out the standards, specifications, procedures and other requirements for the carrying out and completion of the commissioning activities of the parties set out in outline in Part 12 of the Schedule (<i>Outline Commissioning Programme</i>)
"Patient Rights and Responsibilities"	means the document entitled "The NHS and You" Version 2, produced by the Scottish Executive Health Department, July 2006.

"Payment Commencement Date"	means the later of the Completion Date (or such earlier date as may be agreed by the parties in their absolute discretion) and the Actual Completion Date
"Payment Mechanism"	has the meaning given in Part 18 of the Schedule (<i>Payment Mechanism</i>)
"Performance Guarantees"	means the guarantees to Project Co in respect of the Construction Contract and the Service Contract
"Performance Monitoring System"	has the meaning given in Part 14 of the Schedule (<i>Service Requirements</i>)
"Permitted Borrowing"	<p>means without double counting any:</p> <ul style="list-style-type: none"> (a) advance to Project Co under the Senior Funding Agreements; (b) Additional Permitted Borrowing; and (c) interest and, in respect of the original Senior Funding Agreements only (as entered into at the date of this Agreement prior to any subsequent amendment), other amounts accrued or payable under the terms of such original Senior Funding Agreements <p>except where the amount referred to in paragraphs (a) to (d) above is or is being used to fund a payment of Default Interest on any Additional Permitted Borrowing</p>
"PFI"	has the meaning given in Recital E
"Planning Approval"	means detailed planning consent for the Project issued by Clackmannanshire Council on 21 December 2006 and annexed as Attachment C
"Planning Permission"	means any planning permission, approval of reserved matters, listed building consent, conservation areas consent and/or other consent or approval reasonably required from time to time for construction and/or operation of the Facilities (including without limitation for any Board Additional Works Item or Works Changes and the Planning Approval)
"Plant"	means the plant and equipment to be provided and/or maintained by Project Co pursuant to this Agreement
"Post Completion Commissioning"	means, as appropriate, Project Co's Post Completion Commissioning and/or the Board's Post Completion Commissioning
"Procurement Legislation"	means the Public Contracts (Scotland) Regulations 2006 (SI No. 2006/1) and any other legislation or rules which may from time to time regulate the procurement activities of the Board
"Programme"	means the programme set out in Part 9 of the Schedule (<i>The Programme</i>) as revised and issued by Project Co (or on its behalf) from time to time pursuant to Clause 19 (<i>Programme and Dates for Completion</i>)

"Programmed Maintenance"	means the maintenance work which Project Co is to carry out in accordance with the Schedule of Programmed Maintenance
"Programmed Maintenance Information"	has the meaning given in Clause 28.3 (<i>Maintenance</i>)
"Prohibited Act"	has the meaning given in Clause 54 (<i>Corrupt Gifts and Payments</i>)
"Project"	has the meaning given in Recital B
"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
"Project Co Event of Default"	has the meaning given in Clause 44 (<i>Project Co Events of Default</i>)
"Project Co Party"	means Project Co's agents and contractors (including without limitation the Contractor and the Service Providers) and its or their sub-contractors of any tier and its or their directors, officers, employees and workmen in relation to the Project. "Project Co Parties" shall be construed accordingly
"Project Co's Pre-Completion Commissioning"	means Project Co's commissioning activities to be carried out in accordance with Clause 22 (<i>Pre Completion Commissioning and Completion</i>)
"Project Co's Proposals"	means the document at Section 4 of Part 8 of the Schedule (<i>Construction Matters</i>) as amended from time to time in accordance with Clause 40 (<i>Variation Procedure</i>)
"Project Co's Representative"	means the person appointed by Project Co pursuant to Clause 11 (<i>Representatives</i>)
"Project Data"	means: <ul style="list-style-type: none"> (a) all Design Data; (b) all drawings, reports, documents, plans, software, formulae, calculations and other data relating to the provision of the Services; and (c) any other materials, documents and or data acquired, brought into existence or used in relation to the Project Operations or this Agreement;
"Project Documents"	means the Ancillary Documents and the Funding Agreements
"Project Operations"	means the carrying out of the Works, the carrying out of Project Co's Pre-Completion Commissioning and Project Co's Post-Completion Commissioning, the maintenance of the Facilities (including the renewal or replacement of Plant), the management and provision of the Services and the performance of all other obligations of Project Co under this Agreement from

	time to time
"Project Term"	means the period commencing at midnight on the date of this Agreement and expiring at midnight on the date falling 30 years following date of agreement or on such other date as may be determined in accordance with this Agreement
"Proposal"	means: <ul style="list-style-type: none"> (a) in the case of a bill, the bill being introduced by the Government or receiving the support of the Government at its second reading in the first House of Parliament into which it is introduced or the bill passing a second reading in the first House of Parliament into which it is introduced; or (b) in the case of subordinate legislation, the proposed statutory instrument or order being laid before Parliament in draft; or (c) in the case of a directive, regulation or decision of the European Union, its adoption; or (d) in the case of an administrative act as referred to in the definition of Adverse Law, any of the following prior or preparatory to the making of such an act: <ul style="list-style-type: none"> (i) the taking by the Board, the Government, a minister of the Crown, or a department, agency, regulator or other public body or official of any step in a process defined by Law for the making of such administrative acts, other than any early stages of such process (such as, without limitation, consultation or information gathering) following the completion of which further substantive steps remain in such process before the making of such an administrative act can occur; or (ii) any communication from the Government, a minister of the Crown, or the department, agency, regulator or other public body or official responsible for making such administrative acts, to the effect that such an administrative act will be made.
"Protective Legislation"	means each of the National Health Service (Residual Liabilities) Act 1996 and the National Health Service (Private Finance) Act 1997

"Qualifying Variation"	has the meaning given in Part 22 of the Schedule (<i>Variation Procedure</i>)
"Quality Manager"	means the quality manager appointed pursuant to Clause 25 (<i>Quality Assurance</i>)
"Quality Plans"	means the Design Quality Plan and Construction Quality Plan, prepared in accordance with Part 9 of Part 8 of the Schedule (<i>Construction Matters</i>), and the Services Quality Plan, prepared in accordance with Section 3 of Part 14 of the Schedule (<i>Service Requirements</i>), as required to be implemented by Project Co in accordance with Clause 25 (<i>Quality Assurance</i>)
"Range of Finishes"	has the meaning given in paragraph 1.2(c)(i) of Part 10 of the Schedule (<i>Review Procedure</i>)
"Rectification"	has the meaning given in Part 18 of the Schedule (<i>Payment Mechanism</i>)
"Reinstatement Plan"	has the meaning given in Clause 36.20 (<i>Reinstatement Plan</i>)
"Reinstatement Works"	shall have the meaning given in Clause 36.20C
"Refinancing"	has the meaning given in Part 29 of the Schedule (<i>Refinancing</i>)
"Relevant Change in Law"	has the meaning given in Clause 39 (<i>Changes in Law</i>)
"Relevant Tax Liability"	has the meaning given in Clause 48.7(c) (<i>Compensation on Termination</i>)
"Relevant Works Change in Law"	has the meaning given in Clause 39.6 (<i>Changes in Law</i>)
"Relief"	has the meaning given in Clause 48.7(a) (<i>Compensation on Termination</i>)
"Relief Events"	has the meaning given to it in Clause 42 (<i>Relief Events</i>)
"Requests for Information"	shall have the meaning set out in the FOI(S)A or the Environmental Information Scotland Regulations as relevant (where the meaning set out for the term "request" shall apply)
"Restricted Person"	means either: <ul style="list-style-type: none"> (a) a person providing or proposing to provide healthcare services of a similar nature to those provided or contemplated by the Board at the time in question; or (b) any person who has a material interest in the production of tobacco products and/or alcoholic beverages
"Retained Services"	means the catering, domestic, on-site laundry and linen, portering and security guard services to be provided and/or procured by Project Co for the Board in accordance with Part 14 of the Schedule (<i>Service</i>)

	<i>Requirements</i>) as subsequently amended or adjusted in accordance with this Agreement
"Review Procedure"	means the procedure set out in Part 10 of the Schedule (<i>Review Procedure</i>)
"Reviewable Design Data"	means the Design Data listed at Section 5 of Part 8 of the Schedule (<i>Construction Matters</i>)
"Room Data Sheets"	has the meaning given in Part 22 of the Schedule (<i>Variation Procedure</i>)
"RPI"	means the Retail Prices Index (All Items) as published by the Office for National Statistics from time to time (the "Index"), or, failing such publication or in the event of a fundamental change to the Index, such other index as the parties may agree, or such adjustments to the Index as the parties may agree (in each case with the intention of putting the parties in no better nor worse position than they would have been in had the Index not ceased to be published or the relevant fundamental change not made) or, in the event that no such agreement is reached, as may be determined in accordance with the Dispute Resolution Procedure
"Scottish Executive Health Department" or "SEHD"	means the Scottish Executive Health Department, or such body that may supersede or replace the Scottish Executive Health Department from time to time
"Security Trustee"	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
"Senior Debt Amount"	has the meaning given in Section F of Part 23 of the Schedule (<i>Compensation on Termination</i>)
"Schedule of Programmed Maintenance"	means the programme referred to in Clause 28.1 to be submitted to the Board's Representative by Project Co in accordance with Part 10 of the Schedule (<i>Review Procedure</i>)
"Selection Period"	has the meaning given in paragraph 1.2.(c)(i) of Part 10 of the Schedule (<i>Review Procedure</i>)
"Senior Funders"	means any person providing finance to Project Co under the Senior Funding Agreements
"Senior Funding Agreements"	has the meaning given in Section F of Part 23 of the Schedule (<i>Compensation on Termination</i>)
"Sensitive Information"	has the meaning given in Clause 52.11 (<i>Confidentiality</i>)
"Service Contracts"	means the contracts dated the same date as this Agreement between Project Co and each Service Provider, by which Project Co will procure the performance of the Services (as amended or replaced from time to time in accordance with this Agreement)
"Service Failure"	means a Performance Failure and/or an Unavailability Event, as each term is defined in Part 18 of the

Schedule (*Payment Mechanism*)

"Service Failure Points"	has the meaning given in Part 18 of the Schedule (<i>Payment Mechanism</i>)
"Service Level Specifications"	means the requirements of the Board set out in Section 1 of Part 14 of the Schedule (<i>Service Requirements</i>) as amended from time to time in accordance with Clause 40 (<i>Variation Procedure</i>)
"Service Payments"	means Annual Service Payment or Monthly Service Payment each having the meaning given in Part 18 of the Schedule (<i>Payment Mechanism</i>), as the context requires
"Service Payment Statement"	means the service payment statement to be submitted by Project Co in accordance with the requirements of the Performance Monitoring System
"Service Provider"	means each of Robertson Facilities Management Limited or any other person engaged by Project Co from time to time as may be permitted by this Agreement to procure the provision of the Services (or any of them)
"Service Providers' Collateral Agreements"	means the collateral agreements between the Board, Project Co and each Service Provider in the form set out in Part 11 of the Schedule (<i>Collateral Agreements</i>)
"Service Variation"	has the meaning given in Part 22 of the Schedule (<i>Variation Procedure</i>)
"Services"	means the services to be provided, managed and/or procured by Project Co for the Board in accordance with Part 14 of the Schedule (<i>Service Requirements</i>) as subsequently amended or adjusted in accordance with this Agreement and including the Retained Services
"Services Quality Plan"	means the document set out in Section 3 of Part 14 of the Schedule (<i>Service Requirements</i>)
"Shareholder(s)"	means a party listed as such in Part 27 of the Schedule (<i>Project Co Information</i>) as changed from time to time in accordance with this Agreement
"Site"	means in the period up to the Completion Date, the site outlined red on Site Plan A; and following the Completion Date, the site outline red on Site Plan B
"Site Conditions"	means the condition of the Site including (but not limited to) climatic, hydrological, hydrogeological, ecological, environmental, geotechnical and archaeological conditions
"Site Interruption Event"	means <ul style="list-style-type: none"> A. any action, or damage caused, by the utility provider in exercising its rights on or after the Commencement Date relative to the following:-

- (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;
 - (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;
 - (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(b) of the Schedule to the Certificate of Title; and
 - (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
- 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;
- 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;
- D. the exercise or enforcement by any third party of the rights contained in the following between the Commencement Date and the Completion Date:-
- (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;
 - (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;
 - (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;

- (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
- (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;

E. the exercise or enforcement by any third party of the rights contained in the following on or after the Commencement Date:-

- (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;
- (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;
- (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;
- (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
- (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.

	any of which prevents, hinders or delays Project Co or any Project Co Party from complying with its obligations under this Agreement, or obtaining access to the Site in accordance with the terms of this Agreement and the Licence
"Site Plan A"	means the plan entitled "Site Plan A" in the agreed form as in attachment D of this Agreement
"Site Plan B"	means the plan entitled "Site Plan B" in the agreed form as in attachment D of this Agreement
"Small Works"	has the meaning given in Section 1A of Part 22 of the Schedule (<i>Variation Procedure</i>)
"Snagging Matters"	means minor items of outstanding work (including in relation to landscaping) which would not materially impair the Board's use and enjoyment of the Facilities or the carrying out by the Board of the Clinical Services or the performance of the Services by Project Co
"Snagging Notice"	means the notice to be issued by the Independent Tester in accordance with Clause 22.13 (<i>Completion Certificate</i>)
"Sub-Contracts"	means the contracts entered into by or between Project Co, the Contractor and/or a Service Provider and other third parties in relation to any aspect of the Project Operations
"Sub-Contractors"	means any third party (including the Contractor and a Services Provider) who enters into any Sub-Contract
"Subsidiary"	has the meaning given to it in Section 736 of the Companies Act 1985, as amended by Section 144 of the Companies Act 1989
"Termination Date"	means the date on which termination of this Agreement takes effect in accordance with its terms
"Title Deeds"	means of the title deeds to the Site which have been exhibited to (and examined by) Project Co and with which Project Co is deemed by its execution of this Agreement to be satisfied with regard to their content, validity and completeness
"Transfer Regulations"	means the Transfer of Undertaking (Protection of Employment) Regulations 2006 (SI No. 2006/246)
"Transferring Staff"	has the meaning given to it in Clause 30.2
"Uninsurable PL Risk"	means an Uninsurable Risk under a public liability policy
"Uninsurable"	means a risk against which Project Co is required to insure by Clause 36.1 or 36.2 (<i>Insurance</i>) (other than any risks insured under any professional indemnity insurances) and for which, after the date of this Agreement: <ul style="list-style-type: none"> (a) insurance is not available within the worldwide insurance market with reputable

insurers of good standing in respect of that risk; or

- (b) the insurance premium payable for insuring such risk is at such a level that the risk is not generally being insured against in the worldwide insurance market with reputable insurers of good standing by contractors in the United Kingdom;

to the extent that Project Co has demonstrated to the Board that Project Co and a prudent board of directors of a company operating the same or substantially similar PFI businesses in the United Kingdom to that operated by Project Co would in similar circumstances (in the absence of the type of relief envisaged by Clause 36 (*Insurance*)) be acting reasonably and in the best interests of the company if they resolved to cease to operate such businesses as a result of that risk becoming uninsured, taking into account *inter alia* (and without limitation) the likelihood of the risk occurring (if it has not already occurred), the financial consequences for such company if such risk did occur (or has occurred) and other mitigants against such consequences which may be available to such company

"Unprogrammed Maintenance Work"	has the meaning given in Clause 28.8 (<i>Maintenance</i>)
"Unreasonable Act"	means any act or omission which is contrary to any reasonable instruction, guidance or rules for the operation or management of the Facilities
"Variation"	has the meaning given in Part 22 of the Schedule (<i>Variation Procedure</i>)
"Variation Confirmation"	has the meaning given in Part 22 of the Schedule (<i>Variation Procedure</i>)
"Variation Enquiry"	has the meaning given in Part 22 of the Schedule (<i>Variation Procedure</i>)
"Variation Procedure"	means the procedure set out in Part 22 of the Schedule (<i>Variation Procedure</i>)
"VAT"	means value added tax at the rate prevailing at the time of the relevant supply charged in accordance with the provisions of the Value Added Tax Act 1994
"VAT Sum"	has the meaning given in Clause 53.5 (<i>VAT</i>)
"Viability Statement"	means a case made by the Board and accepted in writing by the Scottish Executive that the Facilities (or substantially all of them) are no longer needed on the grounds of the healthcare needs of the Board's geographical area
"Ward 4 Area"	means the area hatched in red on Site Plan A
"Warning Notice"	has the meaning given in Clause 29.4 (<i>Monitoring of Performance</i>)

"Works"	means the design (including the preparation of all Design Data), construction, testing, commissioning and completion of the Facilities (including any temporary works) and the installation of the Equipment to be performed by Project Co in accordance with this Agreement (as varied, amended or supplemented from time to time in accordance with this Agreement)
"Works Variation Capital Limit"	has the meaning given in Part 22 of the Schedule (<i>Variation Procedure</i>); and
"Works Variation Delay Limit"	has the meaning given in Part 22 of the Schedule (<i>Variation Procedure</i>)

Part 2: Interpretation

This Agreement shall be interpreted according to the following provisions, unless the context requires a different meaning:

1. The headings and marginal notes and references to them in this Agreement shall be deemed not to be part of this Agreement and shall not be taken into consideration in the interpretation of this Agreement.
2. Except where the context expressly requires otherwise, references to Clauses, Sub-clauses, paragraphs, sub-paragraphs, parts and Schedules are references to Clauses, Sub-clauses, paragraphs, sub-paragraphs and parts of and Schedules to this Agreement and references to Sections, Appendices and Attachments (if any) are references to Sections, Appendices and Attachments to or contained in this Agreement.
3. The Schedules to this Agreement are an integral part of this Agreement and a reference to this Agreement includes a reference to the Schedules.
4. Words importing persons shall, where the context so requires or admits, include individuals, firms, partnerships, trusts, corporations, governments, governmental bodies, authorities, agencies, unincorporated bodies of persons or associations and any organisations having legal capacity.
5. Where the context so requires words importing the singular only also include the plural and vice versa and words importing the masculine shall be construed as including the feminine or the neuter or vice versa.
6. The language of this Agreement is English. All correspondence, notices, drawings, Design Data, test reports, certificates, specifications and information shall be in English. All operating and maintenance instructions, name plates, identification labels, instructions and notices to the public and staff and all other written, printed or electronically readable matter required in accordance with, or for purposes envisaged by, this Agreement shall be in English.
7. References to any agreement or document include (subject to all relevant approvals and any other provisions of this Agreement concerning amendments to agreements or documents) a reference to that agreement or document as amended, supplemented, substituted, novated or assigned.
8. References to any Law are to be construed as references to that Law as from time to time amended or to any Law from time to time replacing, extending, consolidating or amending the same provided that the provisions of this paragraph shall be without prejudice to the operation of Clause 39 (Changes in Law) and Schedule 22 (Variation Procedure) which shall operate in relation to a Change in Law on the basis set out in this Agreement.
9. References to a public organisation (other than the Board) shall be deemed to include a reference to any successor to such public organisation or any organisation or entity which has taken over either or both the functions and responsibilities of such public organisation. References to other persons (other than the Board) shall include their successors and assignees.
10. References to a deliberate act or omission of the Board or any Board Party shall be construed having regard to the interactive nature of the activities of the Board and of Project Co and the expression shall exclude acts or omissions which were within the contemplation of the parties or which were otherwise provided for in this Agreement.
11. The words in this Agreement shall bear their natural meaning. The parties have had the opportunity to take legal advice on this Agreement and no term shall, therefore, be construed contra proferentem.

12. Reference to "parties" means the parties to this Agreement and references to "a party" mean one of the parties to this Agreement.
13. In construing this Agreement, the rule known as the ejusdem generis rule shall not apply nor shall any similar rule or approach to the construction of this Agreement and accordingly general words introduced or followed by the word "other" or "including" or "in particular" shall not be given a restrictive meaning because they are followed or preceded (as the case may be) by particular examples intended to fall within the meaning of the general words.
14. All of Project Co's obligations, duties and responsibilities shall be construed as separate obligations, duties and responsibilities owed to the Board and to be performed at Project Co's own cost and expense.
15. References to amounts or sums expressed to be "index linked" are references to amounts or sums in April 2006 ("**Base Date**") prices which require to be adjusted whenever the provision containing the amount or sum is given effect in accordance with this Agreement to reflect the effects of inflation after that date. The adjustment shall be measured by changes in the relevant index published for that Contract Year as calculated in accordance with the following formula:
- $$\text{Amount or sum in Base Date prices} \times \frac{\text{RPI}_d}{\text{RPI}_0}$$
- Where RPI_d is the value of the Retail Prices Index published or determined with respect to the month of February most recently preceding the date when the provision in question is to be given effect and RPI_0 is the value of the Retail Prices Index in respect of the Base Date.
16. Reference to a document being in the Agreed Form is a reference to the form of the relevant document agreed between the parties and for the purpose of identification initialled by each of them or on their behalf.
17. Where this Agreement states that an obligation shall be performed "no later than" or "within" or "by" a stipulated date or event which is a prescribed number of Business Days after a stipulated date or event the latest time for performance shall be noon on the last Business Day for performance of the obligations concerned.
18. Where this Agreement states that an obligation shall be performed "no later than" or "by" a prescribed number of Business Days before a base date or "by" a date which is a prescribed number of Business Days before a base date, the latest time for performance shall be noon on the last Business Day for performance of the obligations concerned.
19. The operation of the Act (referred to in Recital F of the Agreement) upon any Project Document shall not affect the rights or obligations of the parties under this Agreement.

PART 3 OF PART 1 OF THE SCHEDULE

Terms used in this Part 3 of Part 1 of the Schedule shall have the same meaning given to them in the Senior Funders Agreements.

- 1 Loan Agreement
- 2 Subordination Agreement
- 3 Lenders Board Direct Agreement
- 4 Lenders Construction Direct Agreement
- 5 Lenders FM Direct Agreement
- 6 HoldCo Assignment in Security
- 7 Shares Pledge
- 8 HoldCo Floating Charge
- 9 HoldCo Guarantee
- 10 Borrower Assignment in Security
- 11 Borrower Floating Charge
- 12 Fixed Charge over Bank Accounts
- 13 Hedging Agreement
- 14 HoldCo Loan Stock Instrument
- 15 Loan Stock Instrument

ATTACHMENT A

Board Policies

ATTACHMENT B

Financial Model

ATTACHMENT C

Planning Approval

ATTACHMENT D

Site Plans

PART 2 OF THE SCHEDULE: Completion Documents
Section 1: Documents to be delivered by Project Co

Unless an original document is specifically requested, a copy (certified by an officer of Project Co as being a true copy) of each of the following documents is to be delivered by Project Co to the Board in accordance with Clause 2.1 (*Execution and Delivery of Documents*) of the Agreement:

- 1 The Consents and other authorisations, licences, permits, and approvals listed below:
 - 1.1 Planning Approval; and
 - 1.2 Listed Building Consent.
- 2 [Not used]
- 3 The Funding Agreements and certification from Project Co that (1) the Funding Agreements have become unconditional (other than any condition relating to the conditionality of this Agreement) and (2) that all conditions to the initial availability of funds to Project Co under the Funding Agreements have been satisfied or waived, accompanied by evidence of the same.
- 4 The Construction Contract, the Service Contract and the Performance Guarantees, executed by the parties to such agreements.
- 5 An original of the Funders' Direct Agreement, the Independent Tester Contract, the Collateral Agreements and the brokers letters of undertaking relating to the Insurances referred to in paragraph 11 below in the Agreed Form, executed by the parties to such agreements (other than the Board).
- 6 Extracts from the minutes of the meeting of the board of directors (certified as true and accurate by the Secretary of the relevant company) of each of Project Co, each Shareholder, HoldCo and each of the other parties (other than the Senior Funders) to the documents listed in Section 1 of Part 2 of the Schedule, at which resolutions were passed approving the execution, delivery and performance of each relevant document to which such person is expressed to be a party and in each case authorising a named person or persons to execute and deliver each such document and any other documents to be delivered by it pursuant to it.
- 7 A certificate of the Secretary of each of the companies referred to in paragraph 6 above setting out the names and specimen signatures of the person or persons named in the relevant certified extract.
- 8 Evidence of the share subscriptions required under the shareholder funding commitments having been made by the Shareholders in Project Co and HoldCo.
- 9 Project Co's and HoldCo's Certificate of Incorporation and of any Certificate of Incorporation on Change of Name.
- 10 The Memorandum and Articles of Association of Project Co and HoldCo.
- 11 Evidence of the insurances required in accordance with Clause 36 (*Insurances*) having been taken out by Project Co and that the policies comply with the requirements of this Agreement.
- 12 Two copies of the Financial Model audited by Baker Tilly and a computer disk copy.
- 13 Evidence that an election has been made for Project Co to act as "client" for the Project for the purposes of the CDM Regulations.
- 14 Evidence that the Insurance Proceeds Account has been opened.
- 15 An original copy of the Licence, duly executed by ProjectCo.

16 An original duly executed copy of this Agreement.

Section 2: Documents to be delivered by the Board

The Board shall deliver to Project Co the following documents:

- 1 An original duly executed Certificate of Commencement.
- 2 An original copy of the Funders' Direct Agreement, the Collateral Agreements, the Independent Tester Contract and this Agreement, duly executed by the Board.
- 3 A certificate of the Scottish Ministers issued pursuant to the National Health Service (Private Finance) Act 1997.
- 4 An original copy of the Licence, duly executed by or on behalf of the Scottish Ministers.
- 5 A certified copy of the board resolution of the Board approving the execution, delivery and performance of the documents referred to in paragraphs 1 and 2 above and in each case authorising a named person or persons to execute and deliver each such document and any documents to be delivered by it pursuant thereto.
- 6 A certificate of the relevant officer of the Board setting out the names and specimen signatures of the person or persons named in the Board Resolution of the Board.
- 7 Evidence of the approval of the Full Business Case for the Project by NHS Executive in Scotland.
- 8 A letter from the Scottish Ministers authorising the Board to execute the Licence on its behalf.
- 9 A certified copy of the Servitude as defined in the Licence
- 10 A certified copy of the Licence by Clackmannanshire Council

PART 3 OF THE SCHEDULE: NOT USED

PART 4 OF THE SCHEDULE: KEY WORKS PERSONNEL

Robertson Health (Clackmannanshire) Ltd – Gary Gallacher, Project Manager

Contact Details:

Gary Gallacher
Robertson Health (Clackmannanshire) Ltd
Castle Business Park
Stirling
FK9 4TU

Telephone Number: 01786 431600

Robertson FM – Sean Hunter, Regional Manager

Contact Details:

Sean Hunter
Robertson FM
2/6 Springfield House
Laurelhill Business Park
Stirling
FK7 9JQ

Telephone number: 01786 406356

Robertson Construction Central Ltd – Fergus Anscombe, Senior Project Manager

Contact Details (for duration of Works):

Fergus Anscombe
C/o Robertson Construction Central Ltd
Clackmannanshire Community Hospital
Parkhead Road
Sauchie
Clackmannanshire

Telephone number: 01259 219475

PART 5 OF THE SCHEDULE: DISASTER PLAN**1 Disaster Plan**

- 1.1 The Disaster Plan set out in this Part 5 of the Schedule shall only apply during the Operational Phase.
- 1.2 If a disaster occurs, the Board Representative shall be entitled to instruct Project Co and Project Co Parties to take or desist from taking action. Project Co and all Project Co Parties shall follow such instructions from the Board Representative wherever possible, subject to their competence and without endangering their own health and safety, notwithstanding that following the instruction would result in a breach of this Agreement by Project Co, but for clause 1.4 of this Part 5 of the Schedule.
- 1.3 The Board Representative shall issue instructions to Project Co's Representative and to the Helpdesk, but may if required in the case of emergency issue instructions directly to Project Co Parties provided that the Board Representative informs the Project Co Representative as soon as reasonably practicable of such instructions.
- 1.4 Project Co and Project Co Parties shall co-operate with the Board and may suggest courses of action intended to mitigate the effects of the disaster. Such actions shall only be carried out if confirmed by the Board Representative.
- 1.5 To the extent that the disaster was not attributable to an act or omission of Project Co or a Project Co Party, the Board shall not apply any Deductions, Warning Notices or Service Failure Points which result from complying with instructions issued under Clause 1.1 of this Part 5 of the Schedule and compliance with such instructions shall be deemed to be an Excusing Cause for the purpose of this Agreement.
- 1.6 To the extent that the disaster was not attributable to an act or omission of Project Co or a Project Co Party, and to the extent that proceeds recoverable under Insurances do not cover the consequences of the disaster, the Board shall reimburse Project Co all additional costs reasonably and properly incurred by Project Co or a Project Co Party in complying with instructions issued under Clause 1.1 of this Part 5 of the Schedule. For the avoidance of doubt, the Board will reimburse to Project Co any expenditure not recoverable by it under the proceeds of any insurance policy, including as a result of the existence of any deductible.
- 1.7 Nothing in this Part 5 of the Schedule shall affect the rights and obligations of the parties except to the extent expressly set out in this Part 5 of the Schedule.
- 1.8 A disaster shall be deemed to occur if the Board Representative designates an event to be a disaster. Project Co shall not be entitled to designate an event a disaster.

PART 6 OF THE SCHEDULE: FUNDERS' DIRECT AGREEMENT

THIS AGREEMENT IS MADE ON

AMONG:

- (1) **FORTH VALLEY HEALTH BOARD** of Carseview House, Castle Business Park, Stirling, FK9 4SW (the "Board");
- (2) **THE CO-OPERATIVE BANK P.L.C**, acting through its office at PO Box 101, 1 Balloon Street, Manchester M60 4EP (the "Agent" for the Senior Funders) on behalf of itself and the Senior Funders;
- (3) **THE CO-OPERATIVE BANK P.L.C**, acting through its office at PO Box 101, 1 Balloon Street, Manchester M60 4EP (the "**Security Trustee**" for the Senior Funders) on behalf of itself and the Senior Funders; and
- (4) **ROBERTSON HEALTH (CLACKMANNANSHIRE) LIMITED**, a company incorporated under the Companies Acts with registered number SC312130 and having its registered office at 10 Perimeter Road, Pinefield Industrial Estate, Elgin, Moray, IV30 6AE ("Project Co").

IT IS AGREED AS FOLLOWS:

1 Interpretations

1.1 Definitions

In this Agreement, unless the context otherwise requires:

"Appointed Representative"	means a Representative that has been notified to the Board pursuant to a Step-In Notice;
"Board Project Documents"	means the Project Agreement and all other documents to which the Board and Project Co are parties pursuant to the Project Agreement;
"Collateral Agreement Counterparty"	means a party to a Collateral Agreement (other than the Board and Project Co);
"Enforcement Event"	means that an Event of Default has occurred and the Agent has given notice to Project Co under Clause 13.4 of the Loan Agreement and/or the commencement of any enforcement procedure under any of the Security Documents;
"Enforcement Event Notice"	has the meaning given in Clause 3.3;
"Event of Default"	has the meaning ascribed to it in the Loan Agreement;
"Final Payment Date"	means the Senior Debt Discharge Date (as defined in the Loan Agreement);
"Loan Agreement"	means the loan agreement dated on or around the date hereof among inter alia Project Co and the Senior Funders;
"Loan Life Cover Ratio"	has the meaning given to it in the Loan Agreement;
"No Liquid Market Notice"	has the meaning given in Clause 4.1;
"Project Agreement"	means an agreement so entitled dated on or around the

date hereof between Project Co and the Board relating to the development of new Clackmannanshire community health facilities and the provision of services;

"Representative"

means:

- (a) the Agent, the Security Trustee, any Senior Funder and/or any of their Affiliates;
- (b) an administrative receiver, receiver or receiver and manager of Project Co appointed under the Security Documents;
- (c) an administrator of Project Co;
- (d) a person directly or indirectly owned or controlled by the Agent and/or any Senior Funders; or
- (e) any other person approved by the Board (such approval not to be unreasonably withheld or delayed);

"Required Period"

means the period starting on the date of a Termination Notice or an Enforcement Event Notice and:

- (a) prior to the Payment Commencement Date, ending eighty (80) Business Days later; and
- (b) following the Payment Commencement Date, ending sixty (60) Business Days later

"Security Documents"

has the meaning ascribed to it in the Loan Agreement and shall include any subsequent security documents created in accordance with the terms of the Loan Agreement;

"Step-In Date"

means the date on which the Agent gives the Board a Step-In Notice;

"Step-In Notice"

means the notice given by the Agent to the Board pursuant to Clause 6 (*Representative*) stating that the Agent is exercising the step-in rights under this Agreement and identifying the Appointed Representative;

"Step-In Period"

means the period from the Step-In Date up to and including the earlier of:

- (a) the Step-Out Date;
- (b) the date of any transfer under Clause 9 (*Novation*);
- (c) the date of any termination for breach under Clause 7 (*Step-In Period*); and
- (d) the date of expiry of the Project Agreement;

"Step-Out Date"

means the date falling twenty (20) Business Days after the date of a Step-Out Notice;

"Step-Out Notice"

means a notice from the Agent or Appointed Representative to the Board pursuant to Clause 8 (*Step*

	<i>Out</i>);
"Suitable Substitute Contractor"	means a person approved by the Board (such approval not to be unreasonably withheld or delayed) as: <ul style="list-style-type: none"> (a) having the legal capacity, power and authority to become a party to and perform the obligations of Project Co under the Board Project Documents; and (b) employing persons having the appropriate qualifications, experience and technical competence and having the resources available to it (including committed financial resources and sub-contracts) which are sufficient to enable it to perform the obligations of Project Co under the Board Project Documents;
"Termination Notice"	means a notice given by the Board to the Agent under Clause 3.2 (<i>No Termination without Notice</i>).

1.2 Interpretation

- 1.2.1 Capitalised terms defined in the Project Agreement shall have the same meaning in this Agreement.
- 1.2.2 The clause and paragraph headings in this Agreement are for ease of reference only and are not to be taken into account in the construction or interpretation of any provision to which they refer.
- 1.2.3 Unless the context otherwise requires:
- (1) a reference in this Agreement to any clause, sub-clause, paragraph, schedule or annex is, except where it is expressly stated to the contrary, a reference to such clause, sub-clause, paragraph, schedule or annex of this Agreement;
 - (2) references to this Agreement or to any other such document shall include any permitted variation, amendment or supplements to such document;
 - (3) references to any enactment, order, regulation or other similar instrument shall be construed as a reference to the enactment, order, regulation or instrument (including any EU instrument) as amended or re-enacted;
 - (4) references to a person includes firms and corporations and their successors and permitted assignees or transferees;
 - (5) words in this Agreement importing any one gender include both other genders and may be used interchangeably; and
 - (6) words in this Agreement importing the singular meaning, include the plural meaning and vice versa.

2 Consent to security

- 2.1 The Board acknowledges notice of, and consents to, the security interest granted over Project Co's rights under the Board Project Documents and the Insurances effected by Project Co in favour of the Security Trustee on behalf of the Senior Funders under the Security Documents.

- 2.2 The Board confirms that it has not received notice of any other security interest granted over Project Co's rights under the Board Project Documents or the Insurances.
- 2.3 Except as specifically provided for in this Agreement and the Insurance Proceeds Account Agreement, the Board has no obligations (whether express, implied, collateral or otherwise) to the Agent and/or the Senior Funders in connection with this Agreement or the Board Project Documents or the Project.
- 2.4 The Board acknowledges notice of and consents to the security interest granted by HoldCo in favour of the Security Trustee on behalf of the Senior Funders over the entire issued share capital of Project Co.
- 2.5 For the purposes of Clause 35.3 (*Manner of Payment*) of the Project Agreement, Project Co and the Agent hereby authorise and instruct the Board (and the Board agrees) to pay all sums payable to Project Co under the Board Project Documents to the account of Project Co entitled "Proceeds Account" numbered [REDACTED], sort code [REDACTED],¹ or to such other account or accounts as the Agent may on giving reasonable prior written notice to the Board designate from time to time other than any sums payable in accordance with clauses 2.6 and 2.7 below..
- 2.6 All other amounts received by the Board and/or Project Co in respect of any insurance policy (other than as referred to at Clause 36.18 of the Project Agreement) maintained by or on behalf of Project Co pursuant to the Project Agreement shall be paid to the credit of the account of Project Co entitled "Insurance Account" numbered [REDACTED], sort code [REDACTED].²
- 2.7 Any sums payable by the Board pursuant to Part K and/or Schedule 23 of the Project Agreement shall be paid directly to the credit of the account of Project Co entitled "Compensation Account" numbered 0000000, sort code 000000,³ or to such other account as the Agent may from time to time designate on giving reasonable prior written notice to the Board of the same. Project Co agrees that payments to the Compensation Account in accordance with this Clause 2.7 shall constitute a good discharge of the Board's obligations to Project Co in respect of such payments.
- 2.8 The Board shall not be obliged to make any enquiry as to the authority of the Agent in doing any act or entering into any document or making any agreement under of in connection with this Agreement and the Board shall be entitled to assume that the Agent is duly authorised by each of the Senior Funders to assume the obligations expressed to be assumed by it under this Agreement and to undertake on behalf of each Senior Funder in the terms of this Agreement so as to bind each Senior Funder as if it were a party hereto.
- 2.9 The rights of the Agent under this Agreement shall be extinguished upon the Final Payment Date.

3 No Termination Without Notice

- 3.1 Subject only to Clause 3.2, the Board may serve notice terminating the Project Agreement at any time if it is entitled to do so under the terms of the Project Agreement.
- 3.2 The Board shall not terminate or serve notice terminating the Project Agreement in respect of a Project Co Event of Default without giving to the Agent:
- 3.2.1 at least the Required Period of prior written notice (a "Termination Notice") stating:
- (1) that a Project Co Event of Default has occurred and the proposed Termination Date; and
- (2) the grounds for termination in reasonable detail, and
- 3.2.2 not later than the date falling twenty (20) Business Days after the date of a Termination Notice a notice containing details of any amount owed by Project Co to the Board, and

⁰ Information with held under section 33 (1)(b) of the Freedom of Information (Scotland) Act 2002

¹ Information with held under section 33 (1)(b) of the Freedom of Information (Scotland) Act 2002

² Information with held under section 33 (1)(b) of the Freedom of Information (Scotland) Act 2002

any other liabilities or obligations of Project Co of which the Board is aware (having made proper enquiry) which are:

- (1) accrued and outstanding at the time of the Termination Notice; and/or
- (2) which will fall due on or prior to the end of the Required Period, under the Project Agreement; and/or
- (3) which involve disputes between the Board and Project Co and which have been submitted to but not determined in accordance with the Dispute Resolution Procedure.

3.3 On becoming aware of an Enforcement Event the Agent shall give notice thereof to the Board stating that an Enforcement Event has occurred and giving reasonable details thereof (an "Enforcement Event Notice") whereupon the provisions of Clause 3.2.2 apply as if references therein to a Termination Notice were to an Enforcement Event Notice provided that the Board shall have first received its reasonable estimated costs and expenses which it may incur in complying with this Clause 3.3 from Project Co. All reasonable costs and expenses additional to those estimated shall be reimbursed on demand and on an indemnity basis by Project Co.

4 No Liquid Market

4.1 At any time during the Required Period the Agent may issue a written notice (the "No Liquid Market Notice") to the Board setting out the reasons why the Agent does not believe that a Liquid Market exists.

4.2 On or before the date falling fourteen (14) Business Days after the date on which a No Liquid Market Notice is received by the Board, the Board shall notify the Agent of its opinion as to whether or not a Liquid Market exists. Where the Board believes that a Liquid Market does exist, such notice shall set out the reasons for the Board's belief. If the parties do not agree whether or not a Liquid Market exists, then either party may refer the dispute to be determined in accordance with Clause 56 (*Dispute Resolution Procedure*) of the Project Agreement.

4.3 If the parties agree or it is determined in accordance with Clause 56 (*Dispute Resolution Procedure*) of the Project Agreement that no Liquid Market exists, the Project Agreement shall automatically terminate and the provisions of paragraph 4 of Part B of Part 23 of the Schedule to the Project Agreement (*No Retendering*) shall apply.

4.4 If any dispute relating to this Clause 4 is determined under Clause 56 (*Dispute Resolution Procedure*) of the Project Agreement, the Required Period shall be extended by the period of time spent determining such dispute under Clause 56 (*Dispute Resolution Procedure* of the Project Agreement).

5 Economic Reinstatement Test

5.1 If all the Facilities are destroyed or substantially destroyed in a single event and the insurance proceeds (when taken together with any other funds available to Project Co) are equal to or greater than the amount required to repair or reinstate the Facilities, then Project Co shall calculate the Loan Life Cover Ratio (on the assumption that the Facilities are repaired or reinstated in accordance with Clause 36.19 (*Application of Proceeds*) of the Project Agreement.

5.2 If the calculation referred to in Clause 5.1 above shows that the Loan Life Cover Ratio is greater than or equal to [REDACTED]⁴:1 then Project Co shall be subject to the procedure set out in Clauses 36.19 to 36.21 (*Application of Proceeds*) of the Project Agreement.

5.3 If the calculation referred to in Clause 5.1 above shows that the Loan Life Cover Ratio is less than [REDACTED]⁵:1 then an amount equal to the lesser of:

3 ⁴ Information withheld under Section 36(2) of the Freedom of Information (Scotland) Act 2002

4 ⁵ Information withheld under Section 36(2) of the Freedom of Information (Scotland) Act 2002

- 5.3.1 the insurance proceeds; and
- 5.3.2 the greater of the Base Senior Debt Termination Amount and the Revised Senior Debt Termination Amount (both as defined in Schedule Part 23 of the Project Agreement)

shall be released from the Insurance Proceeds Account to Project Co.

- 5.4 The Agent on behalf of the Senior Funders confirms that it will release monies from the Insurance Proceeds Account, to allow Clause 36.19A of the Project Agreement to be complied with.

6 Representative

- 6.1 Subject to Clause 6.2 and without prejudice to the Security Trustee's rights under the Security Documents, the Security Trustee may give the Board a Step-In Notice at any time:

- 6.1.1 during which a Project Co Event of Default or an Enforcement Event is subsisting (whether or not a Termination Notice has been served); or

- 6.1.2 during the Required Period.

- 6.2 The Security Trustee shall give the Board not less than 5 Business Days prior notice of:

- 6.2.1 its intention to issue a Step-In Notice; and

- 6.2.2 the identity of the proposed Appointed Representative.

- 6.3 On the issue of the Step-In Notice, the Appointed Representative shall assume jointly with Project Co the rights of Project Co under the Board Project Documents and thereafter, until the end of the Step-In Period the Board shall deal with the Appointed Representative and not Project Co.

7 Step-In Period

- 7.1 Notwithstanding Clause 3, the Board may terminate the Project Agreement if:

- 7.1.1 any amount referred to in Clause 3.2.2(1) has not been paid to the Board on or before the Step-In Date; or

- 7.1.2 any amount referred to in Clause 3.2.2(2) has not been paid on or before the last day of the Required Period; or

- 7.1.3 amounts, of which the Board was not aware (having made proper enquiry) at the time of the Termination Notice, subsequently become payable and are not discharged on or before the date falling twenty (20) Business Days after the date on which the liability of Project Co for these amounts is notified to the Agent or if later the Step-In Date; or

- 7.1.4 grounds arise after the Step-In Date in accordance with the terms of the Project Agreement provided that Service Failure Points and/or Warning Notices that arose pursuant to Part 18 of the Schedule to the Project Agreement prior to the Step-In Date shall not be taken into account during the Step-In Period but such Service Failure Points and/or Warning Notices (to the extent applicable under the terms of the Project Agreement) shall be taken into account after the Step-Out Date.

- 7.2 The Board shall not terminate the Project Agreement during the Step-In Period on grounds:

- 7.2.1 that the Agent or the Security Trustee has served a Step-In Notice or enforced any Security Document; or

- 7.2.2 arising prior to the Step-In Date of which the Board was aware (having made proper enquiry) and whether or not continuing at the Step-In Date unless:

- (1) the grounds arose prior to the Actual Completion Date, and the Actual Completion Date does not occur on or before the date twelve (12) months after the date on which the Board would have been entitled to terminate the Project Agreement for non-completion of the Works under Clause 44.1(b) of the Project Agreement; or
- (2) the grounds arose after the Actual Completion Date, and neither the Appointed Representative nor Project Co is using all reasonable endeavours (including implementation of any remedial programme) to remedy any breach of the Project Agreement that:
 - (a) arose prior to the Step-In Date; and
 - (b) which is continuing (and capable of remedy); and
 - (c) which would have entitled the Board to terminate the Project Agreement; or
- (3) the grounds (whenever they first arose) did not give rise to any right to terminate until after the Step-In Notice; or

7.2.3 arising solely in relation to Project Co.

8 Step-Out

- 8.1 The Appointed Representative may at any time during the Step-In Period deliver to the Board a Step-Out Notice which shall specify the Step-Out Date.
- 8.2 On expiry of the Step-In Period (which is on the Step-Out Date):
 - 8.2.1 the Appointed Representative will be released from all of its obligations and liabilities to the Board under the Board Project Documents arising prior to the Step-Out Date and rights of the Appointed Representative against the Board will be cancelled; and
 - 8.2.2 the Board shall no longer deal with the Appointed Representative and shall deal with Project Co in connection with the Board Project Documents.
- 8.3 Project Co shall continue to be bound by the terms of the Project Agreement, notwithstanding the occurrence of a Step-In Notice, a Step-In Period, a Step-Out Notice, Step-Out Date, any action by the Agent or Appointed Representative or the Senior Funders and/or any provision of this Agreement.

9 Novation

- 9.1 Subject to Clause 9.2, at any time:
 - 9.1.1 after an Enforcement Event has occurred; or
 - 9.1.2 during the Step-In Period,

the Agent may, subject to Clause 9.2, on not less than twenty (20) Business Days' prior notice to the Board and any Appointed Representative, procure the transfer of Project Co's rights and liabilities under the Board Project Documents to a Suitable Substitute Contractor in accordance with the provisions of Clause 9.4.
- 9.2 The Board shall notify the Agent as to whether any person to whom the Agent proposes to transfer Project Co's rights and liabilities under the Board Project Documents is a Suitable Substitute Contractor, on or before the date falling twenty (20) Business Days after the date of receipt from the Agent of all information reasonably required by the Board to decide whether the proposed transferee is a Suitable Substitute Contractor.

- 9.3 The Board shall not unreasonably withhold or delay its decision on whether the proposed transferee is a Suitable Substitute Contractor and it shall, without limitation, be reasonable for the Board to withhold its consent if there are unremedied breaches under the Board Project Documents and there is no rectification plan reasonably acceptable to the Board in respect of the breaches.
- 9.4 Upon the transfer referred to in Clause 9.1 becoming effective:
- 9.4.1 Project Co and the Board will be released from their obligations under the Board Project Documents to each other (the "discharged obligations");
- 9.4.2 the Suitable Substitute Contractor and the Board will assume obligations towards each other which differ from the discharged obligations only insofar as they are owed to or assumed by the Suitable Substitute Contractor instead of Project Co;
- 9.4.3 the rights of Project Co against the Board under the Board Project Documents and vice versa (the "discharged rights") will be cancelled;
- 9.4.4 the Suitable Substitute Contractor and the Board will acquire rights against each other which differ from the discharged rights only insofar as they are exercisable by or against the Suitable Substitute Contractor instead of Project Co;
- 9.4.5 any then subsisting ground for termination of the Project Agreement by the Board shall be deemed to have no effect and any subsisting Termination Notice shall be automatically revoked;
- 9.4.6 the Board shall enter into a direct agreement with the Suitable Substitute Contractor and a representative of Senior Funders lending to the Suitable Substitute Contractor on substantially the same terms as this Agreement; and
- 9.4.7 any Service Failure Points and/or Warning Notices and/or Deductions that arose pursuant to Schedule Part 18 of the Project Agreement prior to that time shall not be taken into account in determining whether a Project Co Event of Default has occurred.

10 Miscellaneous

- 10.1 The Board shall at Project Co's expense, take whatever action the Agent, an Appointed Representative or a Suitable Substitute Contractor taking a transfer in accordance with Clause 9.1 may require for perfecting any transfer or release under Clause 6 (*Representative*), Clause 8 (*Step-Out*) and Clause 9 (*Novation*) including the execution of any transfer or assignment, and the giving of any notice, order or direction and the making of any registration which, in each case, the Agent or Appointed Representative or Suitable Substitute Contractor reasonably requires.
- 10.2 The Board shall not take any action to wind up, appoint an administrator or sanction a voluntary arrangement (or similar) in relation to Project Co.
- 10.3 This Agreement shall remain in effect until the earlier of:
- 10.3.1 the date on which all amounts which may be or become owing by Project Co to the Senior Funders under the Financing Agreements have been irrevocably paid in full;
- 10.3.2 the date of termination of the Project Agreement; or
- 10.3.3 the date of transfer of Project Co's rights and liabilities under the Project Documents to a Suitable Substitute Contractor pursuant to paragraph 9 (*Novation*) above.
- 10.4 The Agent, in respect of Clauses 10.4.1, 10.4.2 and 10.4.3 and Project Co, in respect of Clause 10.4.4, shall promptly notify the Board of:

- 10.4.1 any action taken in connection with any Event of Default, any decisions to accelerate the maturity of any amounts owing by Project Co to the Senior Funders under the Senior Funding Agreements and/or any decisions to demand repayment;
- 10.4.2 the date referred to in Clause 10.3.1 above on or before the date falling twenty (20) Business Days after its occurrence;
- 10.4.3 the details and amount of any proposed Additional Permitted Borrowing, including
- (a) the circumstances giving rise to it and reasons for it; and
 - (b) the terms on which it will be borrowed; and
- 10.4.4 on the first Business Day of each calendar month during which any Additional Permitted Borrowing is, or may be, subsisting, the amount outstanding under the Senior Funding Agreements and, to the extent it is aware (having made reasonable and proper enquiry):
- (a) the amount of any Distribution made by Project Co; and
 - (b) the amount of any credit balance on any account of Project Co.
- 10.5 Project Co joins in this Agreement to acknowledge and consent to the arrangements set out and agrees not knowingly to do or omit to do anything that may prevent any party from enforcing its rights under this Agreement.
- 10.6 For the avoidance of doubt, if there is any conflict or inconsistency between the provisions of this Agreement and the Project Agreement, the provisions of this Agreement shall prevail.
- 10.7 Without prejudice to Clause 10.8, the Board shall not prior to the Final Payment Date:
- 10.7.1 claim, recover, retain or receive (or seek to claim, recover, retain or receive) any amount under the Collateral Agreements (and/or the Construction Contract and/or the Service Contracts) from any Collateral Agreement Counterparty;
 - 10.7.2 petition for or otherwise be a party to any proceedings for winding-up any Collateral Agreement Counterparty or any other insolvency proceedings in respect of any Collateral Agreement Counterparty; or
 - 10.7.3 compete with the Security Trustee's rights on a winding up or other insolvency of any Collateral Agreement Counterparty nor claim to be subrogated to any rights of the Security Trustee or any Senior Funder;
- The Board agrees and undertakes that if it receives any amount in contravention of the provisions of this Clause 10.7 it will immediately turn the same over to the Security Trustee for the account of the Security Trustee and the Senior Funders and pending such payment hold the same on trust for the Security Trustee and the Senior Funders provided that such trust shall not create any registerable security interest over such amount.
- 10.8 Notwithstanding any provision in the Collateral Agreements, the Board hereby undertakes that it will not, and it will procure that no permitted successor or assignee of it will exercise any rights it may have under or arising out of any of the Collateral Agreements, except as provided in Clause 10.8.1 to Clause 10.8.3 inclusive:
- 10.8.1 Following termination of the Project Agreement in accordance with this Agreement, the Board shall from such date (the "Exercise Date") be entitled to exercise its rights under the Collateral Agreements to step in to and/or novate the Construction Contract(s), and/or the Services Contracts in accordance with the Collateral Agreements.

- 10.8.2 Until the Final Payment Date, but following the Exercise Date, the Board shall not do anything to prejudice the rights which are not transferred to it pursuant to the Collateral Agreements.
- 10.8.3 Notwithstanding the terms of the Collateral Agreements and any other provisions of this Clause 10.8, each of the Contractor and the Service Providers (and any guarantors thereof) shall remain responsible, and be liable, to Project Co in respect of all costs, claims, damages, losses and liabilities which shall have arisen out of or in connection with the Construction Contract(s) and/or the Services Contracts in respect of the period prior to the Exercise Date in relation to which the Agent acting on behalf of Project Co or the Senior Funders shall retain the benefit of all and any rights to all such costs, claims, damage, losses and liabilities.
- 10.9 Notwithstanding any terms of the Funding Agreements, the parties agree that all insurance proceeds received by Project Co under the insurances referred to in Part 1 paragraph 1 or Part 2 paragraphs 1 and 4 of Part 21 of the Schedule to the Project Agreement (*Insurance Requirements*) shall be paid into the Insurance Proceeds Account and applied in accordance with the Project Agreement and this Agreement.

11 Assignment

- 11.1 No party to this Agreement may assign or transfer any part of its rights or obligations under this Agreement save as provided in this Clause 11.
- 11.2 The Security Trustee may assign, or transfer its rights and obligations under this Agreement and in respect of the Security Documents to a successor Security Trustee in accordance with the Funding Agreements without the consent of the Board and any such assignment or transfer shall not constitute a Change of Control for the purposes of Clause 50.8 of the Project Agreement. Without prejudice to Clause 50 of the Project Agreement, the Board also agrees that any enforcement by the Security Trustee of the security referred to in Clause 2.5 above (and any subsequent transfer of share capital in Project Co) following an Event of Default shall not constitute a Project Co Event of Default under Clauses 44.1(g) or 44.1(h) of the Project Agreement.
- 11.3 Any Senior Funder may assign or transfer its rights under the Senior Funding Agreements in accordance with the terms of the Senior Funding Agreements.
- 11.4 The Board may transfer its rights and obligations under this Agreement to any permitted assignee of its interest in the Project Agreement and the Security Trustee and the Senior Funders shall co-operate with the Board in completing the formalities of any transfer or assignment including by executing any additional documents as may be required by the Board.
- 11.5 If Clause 11.2 applies in relation to the Security Trustee, the Board shall enter into a new direct Agreement with the new Security Trustee on substantially the same terms as this Agreement.

12 Entire Agreement

Unless otherwise stated in this Agreement, this Agreement and the Board Project Documents constitutes the entire agreement between the parties in connection with its subject matter and supersedes all prior representations, communications, negotiations and understandings concerning the subject matter of this Agreement. No party has relied on any representation except as expressly set out in this Agreement.

13 Waiver

- 13.1 The failure of any party to exercise any contractual right or remedy shall not constitute a waiver thereof until communication in writing under Clause 13.2.
- 13.2 No waiver shall be effective unless it is communicated in writing to the other party.
- 13.3 A waiver of any right or remedy arising from a breach of contract shall not constitute a waiver of any right or remedy arising from any other breach of this Agreement.

13.4 **Severability**

If any term, condition or provision contained in this Agreement shall be held to be invalid, unlawful or unenforceable to any extent, such term, condition or provision shall not affect the validity, legality or enforceability of the remaining parts of this Agreement.

14 **Confidentiality**

The Agent shall be bound to comply with the obligations on the part of Project Co contained in Clause 52 (*Confidentiality*) of the Project Agreement in relation to all information and matters obtained from any other party under or in connection with the Project.

15 **Notices Consents and Approvals**

15.1 Any notice served under or in connection with this Agreement is to be in writing and shall be deemed to have been served:-

15.1.1 if delivered at the time of delivery; or

15.1.2 if posted at noon (Greenwich mean time) one Business Day after posting; or

15.1.3 if set by fax at the time shown in the relevant transmission report for the complete fax.

provided that a notice or other communication received on a non-Business Day or after 5p.m. in the place of receipt shall be deemed to be received at 9a.m. on the next following Business Day in such place.

15.2 Any notice to be given to the Board should be marked for the attention of Robert Cairney and delivered to Carseview House, Castle Business Park, Stirling, FK9 4SW or faxed to 01786 471337 or such other party or address or fax number as notified in writing to the Agent by the Board.

15.3 Any notice to be given to the Agent should be marked for the attention of Senior Manager – PFI & Project Finance and delivered to The Co-operative Bank plc, PO Box 101, 1 Balloon Street, Manchester, M60 4EP or faxed to 0161 835 4117 or such other party address or fax number as notified in writing to the Board by the Agent.

15.4 Any consent or approval under this Agreement is required to be obtained before the act or event to which it applies is carried out or done and is to be treated as effective only if the consent or approval is given in writing.

15.5 Any notification required pursuant to this Agreement is to be treated as effective only if given in writing.

16 **Survivorship**

16.1 Notwithstanding any other terms of this Agreement, Clauses 10.7 to 10.9 (inclusive) (*Miscellaneous*) shall survive termination of this Agreement.

17 **Governing Law**

17.1 This Agreement is governed by the laws of Scotland.

17.2 The parties agree that the courts of Scotland shall have exclusive jurisdiction to hear and settle any action, suit, proceeding or dispute in connection with this Agreement and irrevocably submit to the jurisdiction of that court.

IN WITNESS WHEREOF this Agreement consisting of this page and the preceding 11 pages is executed as follows:

Subscribed for and on behalf of **Forth Valley Health Board:**

.....
Signature of Authorised Signatory Full name of Authorised Signatory

Date when signed:

Town where signed:

In the presence of this witness:

Signature of witness

Full name of witness:

Address of witness:

Subscribed for and on behalf of **Co-operative Bank plc as Agent**

.....
Signature of Power of Attorney Full name of Power of Attorney

Date when signed:

Town where signed:

in the presence of this witness:

Signature of witness

Full name of witness:

Address of witness:

Subscribed for and on behalf of **Co-operative Bank plc as Security Trustee**

.....
Signature of Power of Attorney Full name of Power of Attorney

Date when signed:

Town where signed:

In the presence of this witness:

Signature of witness

Full name of witness:

Address of witness:

Subscribed for and on behalf of **Robertson Health (Clackmannanshire) Limited:**

.....
Signature of Director Full name of Director

Date when signed:

Town where signed:

In the presence of this witness:

Signature of witness

Full name of witness:

Address of witness:

PART 7 OF THE SCHEDULE

Section 1

This is Part 7 of the Schedule comprising the Licence referred to in the Project Agreement relating to the design, financing and construction of, and the provision of services at the Clackmannanshire Hospital PFI Project

Between

FORTH VALLEY HEALTH BOARD

and

ROBERTSON HEALTH (CLACKMANNANSHIRE) LIMITED

LICENCE between

(1) **THE SCOTTISH MINISTERS** (the "**Licensor**")

and

(2) **ROBERTSON HEALTH (CLACKMANNANSHIRE) LIMITED** (registered number SC312130), a company incorporated under the Companies Acts and having its registered office at 10 Perimeter Road, Pinefield Industrial Estate, Elgin, Moray, IV30 6AE ("**ProjectCo**")

WHEREAS

- (A) Project Co and Forth Valley Health Board (the "**Board**") have entered into an agreement dated on or around the date hereof (the "**Project Agreement**") for the financing, design construction and provision of certain services in connection with the development of community health facilities and provision of services (the "**Project**") at Clackmannanshire Community Hospital at Sauchie Hospital, Sunnyside, Alloa and Hall Park Mills, Hall Park Road, Alloa, being the subjects shown outlined in red on the Plan under exception of the Lodge Site (as after defined) (the "**Site**")
- (B) Pursuant to Transfer of Heritable Property order numbers V019/A and V085/A dated 10 September 2004 and 4 July 2005 respectively all of the rights and interests in and to the Site were transferred to the Licensor
- (C) Pursuant to the Project Agreement, the Board has agreed to procure the grant of certain rights of access and occupation in favour of Project Co for the purposes of carrying out the Project Co upon the terms of this Licence.

IT IS AGREED as follows:-

1. DEFINITIONS AND INTERPRETATION

1.1 Definitions

In this Licence unless the context requires otherwise words and expressions defined in the Project Agreement shall have the same meaning when used in this Licence and further:-

"**Authorised Purpose**" means the carrying out of Project Operations;

"**Commencement Date**" means the date of issue of the Certificate of Commencement;

"**Lodge Site**" means the lodge house shown outlined in red and coloured purple on the Plan;

"**Period of this Licence**" means the Project Term;

"**Plan**" means the plan annexed and executed as relative hereto;

"**Project Operations**" means the carrying out of the Works, the carrying out of Project Co's Pre-Completion Commissioning and Project Co's Post-Completion Commissioning, the maintenance of the Facilities (including the renewal or replacement of Plant), the management and provision of the Services and the performance of all other obligations of Project Co under this Agreement from time to time;

"**Reservations**" means the rights reserved to the Board and/or the Licensor as follows, in all cases (excluding point 1) to be exercised at reasonable times and on reasonable prior notice to ProjectCo except in the case of emergency:-

1. a right of access over the Site to the Lodge Site at all times for pedestrians and vehicles;

2. a right of access over the Site for the purposes of inspecting, maintaining, repairing, renewing and/or replacing the Lodge Site or any part thereof;
3. a right to use and connect into all existing pipes, cables, wires, ducts and other service media located in, on, under or through the Site which serve the Lodge Site, together with a right of pedestrian and vehicular access with or without workmen and equipment for the purposes of inspecting, maintaining, repairing, renewing and/or replacing same;
4. a right to install/lay new pipes, cables, wires, ducts and other service media in, on, under or through the Site to serve the Lodge Site along specified routes approved in writing by Project Co, with a right to use same in all time coming, together with a right of pedestrian and vehicular access with or without workmen and equipment for the purposes of inspecting, maintaining, repairing, renewing, and/or replacing same;
5. in the event of a sale or other disposal of the Licensor's interest as heritable proprietor of the Lodge Site or any part thereof the Licensor shall be entitled to constitute the rights set out in paragraphs 1, 2, 3 and 4 of this definition as real burdens affecting the Site as the burdened property and benefiting the Lodge Site as benefited property.

1.2 Interpretation

Save to the extent that the context or the express provisions of this Licence requires or require otherwise, in this Licence:-

- 1.2.1 words importing any gender shall include all other genders;
- 1.2.2 words importing the singular number only shall include the plural number and vice versa;
- 1.2.3 where at any one time there are two or more persons included in the expression "Project Co" obligations contained in this Licence which are expressed to be made by Project Co shall be binding jointly and severally on them and their respective executors and representatives whomsoever without the necessity of discussing them in their order;
- 1.2.4 in the case where Project Co is a firm or partnership the obligations of Project Co hereunder shall be binding jointly and severally on all persons who are or become partners of the firm at any time during the Period of this Licence and their respective executors and representatives whomsoever as well as on the firm and its whole stock, funds, assets and estate without the necessity of discussing them in their order and such obligations shall subsist and remain in full force and effect notwithstanding the dissolution of the firm or partnership or any change or changes which may take place in the firm or partnership whether by the assumption of a new partner or partners or by the retiral, bankruptcy or death of any individual partner or by a change in the firm name;
- 1.2.5 words importing persons include corporations and vice versa;
- 1.2.6 references to this Licence or to any other document shall be construed as reference to this Licence or to that other document as modified, amended, varied, supplemented, assigned, novated or replaced from time to time;
- 1.2.7 reference to the parties shall be construed as reference to the parties to this Licence at that time;
- 1.2.8 unless expressly stated to the contrary in this Licence, reference to any statute or statutory provision (including any subordinate legislation) includes any statute or

statutory provision which amends, extends, consolidates or replaces the same, or which has been amended, extended, consolidated or replaced by the same, and shall include any orders, legislation, instruments or other subordinate legislation made under the relevant statute or statutory provision;

- 1.2.9 any phrase introduced by the words “including”, “include”, “in particular” or any similar expression shall be construed as illustrative only and shall not be construed as limiting the generality of any preceding words; and
- 1.2.10 any obligation on, or right granted or reserved to, the Licensor under this Licence may be fulfilled or exercised by an agent for the Licensor in place of or in addition to the Licensor.

1.3 **Headings**

The table of contents and the headings in this Licence are included for convenience only and shall be ignored in construing this Licence.

2. **GRANT OF LICENCE**

IN CONSIDERATION of the Board entering into the Project Agreement with Project Co and the due observance by Project Co of the obligations contained herein and in the Project Agreement, the Licensor shall permit and licence Project Co (which expression shall for the purposes of exercise of the rights granted pursuant to this Clause 2 include the Project Co Parties and any other party to whom Project Co's interest in the Board Project Documents (as defined in the Funder Direct Agreement) is transferred or novated from time to time in accordance with the terms of this Licence but subject always to the Reservations):-

- 2.1 From the date of issue of the Certificate of Commencement until the Actual Completion Date to:
 - 2.1.1 exercise the Ancillary Rights as outlined in section 2 of Part 7 of the Schedule to the Project Agreement; and
 - 2.1.2 enter upon the Site

in each case for the purposes of implementing the Works and carrying out Project Co Pre-Completion Commissioning.
- 2.2 After the occurrence of the Actual Completion Date until the Expiry Date (or if earlier the Termination Date) to:
 - 2.2.1 enter upon the Site solely for the purposes of:
 - 2.2.1.1 the carrying out of Project Operations (other than those Project Operations which Project Co is licensed to carry out pursuant to Clause 2.1 above); and
 - 2.2.1.2 remedying defects and the carrying out of Snagging Matters; and
 - 2.2.2 exercise the Ancillary Rights.
- 2.3 The Scottish Ministers undertake that from the Commencement Date until the Expiry Date (or if earlier the Termination Date), the Scottish Ministers as heritable proprietors and licensees of the areas making up the Site and the areas over which the Ancillary Rights are to be exercised and shall not take any action on or affecting the Site or the exercise of the Ancillary Rights granted hereunder which would interfere with the Project Operations or prevent or restrict the use of the Site for the Authorised Purpose.

3. **CONDITIONS ON GRANT OF LICENCE**

3.1 **Period of the Licence**

Subject to the provisions of the Project Agreement, the Licensor and Project Co confirm that notwithstanding the provisions of Clause 2, this Licence shall endure until the end of the Expiry Date (or if Earlier the Termination Date).

3.2 **Authorised Purpose**

Project Co shall use the Site for the Authorised Purpose and for no other purpose whatsoever which has not received the prior written consent of the Licensor. No warranty shall be implied by or against the Licensor that:-

3.2.1 the Site or the Facilities are suitable for the Authorised Purpose; and

3.2.2 the Authorised Purpose is or will remain a permitted use of the Site of the Facilities within the provisions of the Town and Country Planning (Scotland) Act 1997.

3.3 **Title Deeds**

The rights granted to Project Co pursuant to Clause 2 above are granted only insofar as such rights are capable of being granted by the Licensor whether as a result of any restrictions in the Title Deeds or otherwise.

3.4 **Project Co Obligations**

Project Co shall procure that:

3.4.1 all Project Operations carried out at the Site by or on behalf of Project Co (whether before, during or after completion of the Works) shall be carried out in a manner which does not breach the Title Deeds (except to the extent that the exercise or breach of any condition of the Title Deeds is a Site Interruption Event); and

3.4.2 there shall be no action or omission to act which shall give rise to a right for any person to obtain title to the Site or any part of it.

3.5 **Project Agreement**

The Licensor (1) acknowledges that this Licence is entered into pursuant to and in order to procure performance of obligations and undertakings contained in the Project Agreement and (2) undertakes to liaise with and consult the Board in respect of any matters arising under this Licence and/ or relating to exercise of the rights granted to Project Co hereunder.

4. **TRANSMISSIONS**

4.1 This Licence is personal to Project Co and the rights and obligations conferred and imposed by this Licence shall not be capable of assignation or other transmission by Project Co either wholly or partially provided that Project Co shall be entitled to transfer or assign this Licence in whole to any party to whom Project Co has assigned the Interest of the Project Agreement in accordance with Clause 50 of the Project Agreement.

4.2 **Licensor**

The Licensor undertakes to take bound any party to whom it sells, transfers, leases or otherwise disposes of or grants any interest in the whole or any part of the Site to be bound by this Licence.

5. **FUNDER DIRECT AGREEMENT**

On the issue of Step-In Notice pursuant to the Funder Direct Agreement, the Appointed Representative (as defined in the Funder Direct Agreement) shall assume jointly with Project Co the rights of Project Co under this Licence and thereafter, until the end of the Step-In Period the Licensor shall deal with the Appointed Representative and not Project Co.

6. **NO TENANCY RIGHTS**

The parties agree that this Licence shall not be construed as a Lease or as conferring any tenancy rights upon Project Co and Project Co shall not have or be entitled to have exclusive possession or any estate right title interest in and to the Site or the Facilities.

7. **NOTICES**

Any notice (which expression shall include a demand, request, consent or approval) under this Licence shall be in writing. Any notice to Project Co shall be sufficiently served if sent by recorded delivery post or delivered by hand to the address specified in clause 57 of the Project Agreement for delivery of notices to the Board. Any notice to the Licensor shall be sufficiently served if sent by recorded delivery post or delivered by hand to (address details to be inserted). Any notice sent by recorded delivery post shall be deemed to have been duly served at the expiry of three days after the date of posting. In proving service, it shall be sufficient to prove that the envelope containing the notice was duly addressed to Project Co or Licensor (as the case may be) in accordance with this clause and posted or hand delivered to the address to which it was addressed.

8. **REMEDIES**

The parties agree that notwithstanding any provision of this Licence to the contrary:

- 8.1 Pursuant to Clause 14.7 of the Project Agreement, a breach of this Licence by the Licensor is deemed to constitute a breach by the Board of the Project Agreement and, in respect of such a breach, Project Co shall be entitled to exercise rights and remedies against the Board available to Project Co in respect of a breach or deemed breach of the Project Agreement by the Board and Project Co in respect thereof hereby waives its remedies hereunder against the Licensor.
- 8.2 Project Co shall indemnify and keep the Licensor indemnified at all times from and against all Direct Losses sustained by the Licensor 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.
- 8.3 The Licensor hereby waives all remedies against Project Co hereunder and acknowledge that this Licence is to be construed as part of the Project Agreement and the Board shall be entitled to exercise the remedies available to the Board in respect of a breach of the Project Agreement by Project Co in respect of a breach by Project Co of this Licence.

9. **LAW OF SCOTLAND TO APPLY**

This Licence shall be interpreted in accordance with the Law of Scotland and any dispute, difference or question of any kind which may arise between the parties shall be determined in accordance with the Law of Scotland and the procedure set out in the part 26 of the Schedule to the Project Agreement as if the same were set out in this Licence, with reference to the Board therein being treated as references to the Licensor.

10. **CONSENT TO REGISTRATION**

The parties consent to the registration of this Licence for the preservation and execution: IN WITNESS WHEREOF these presents on this and the preceding pages together with the Plan annexed as relative hereto are executed as follows:-

Executed for and on behalf of)
The Scottish Ministers at)
On the [insert day] of [insert month]
By its duly authorised signatory:

.....
Authorised Signatory

.....
Signatory Full Name

.....
Authorised Signatory

.....
Signatory Full Name

EXECUTED for and on behalf of ProjectCo
at
on the [] day of [insert month] [insert year]

.....
Director/Secretary

.....
Signatory Full Name

.....
Director/Secretary

.....
Signatory Full Name

Section 2: Ancillary Rights

The Ancillary Rights granted in terms of Clause 2.1.1 are as follows:

- (1) the rights granted under the Licence between Clackmannanshire Council and the Scottish Ministers dated 9 July 2007 and to be registered in the Books of Council and Session;
- (2) the rights granted under the Deed of Servitude by Clackmannanshire Council in favour of the Scottish Ministers dated 9 July 2007 and to be recorded in the Division of the General Register of Sasines for the County of Clackmannan and registered in the Land Register of Scotland under Title Number CLK6537.

Letter of Authority to be issued by the Scottish Ministers

[Scottish Executive Health Department headed paper]

Health Department
Directorate of Finance

Finance Directorate
St Andrew's House
Regent Road
Edinburgh EH1 3DG

Forth Valley Health Board
Carseview House
Castle Business Park
Stirling
FK9 4SW

Telephone: 0131-244 3464
Fax: 0131-244 3993
alex.smith@scotland.gsi.gov.uk
<http://www.scotland.gov.uk>

Date

Dear Sirs

Clackmannanshire Community Hospital (the "Project")

We refer to the Project and the project agreement (the "Project Agreement") to be entered into between Robertson Health (Clackmannanshire) Limited ("ProjectCo") and Forth Valley Health Board ("the Board"). We note that pursuant to the Project Agreement, the Board obliged to procure the grant of a licence over the site required for the Project (the "Site"). We are the heritable proprietor of the Site and as such have agreed to grant a licence in favour of ProjectCo over the Site.

We hereby authorise Chief Executive and/or Director of Finance of the Board to execute on our behalf:-

1. A licence in favour ProjectCo in the form attached to this letter subject to such minor amendments as the Board shall consider appropriate in the circumstances; and
2. Any related documentation required to give full effect to the licence referred to in 1 above.

Yours faithfully

ALEX SMITH
For and on behalf of
the Scottish Ministers

PART 8 OF THE SCHEDULE : CONSTRUCTION MATTERS

Section 1: Planning/ Consents

The Planning/ Consents are set out in the Agreed Form document comprising one volume labelled "Planning/ Consents", which shall have effect as if expressly set out in this Section 1 of Part 8 of the Schedule.

PART 8 OF THE SCHEDULE

Section 2: Safety During Construction

- 1 In this Section 2 of Part 8 of the Schedule and wherever used elsewhere in this Agreement:
 - (a) "CDM Regulations" means the Construction (Design and Management) Regulations 2007 (and "CDM Regulation" shall be construed accordingly); and
 - (b) "the CDM Co-ordinator", "the client", and "the Executive" shall have the same meanings as are ascribed to them in the CDM Regulations.

- 2 In so far as not already done, within twenty (20) Business Days of the date of execution of this Agreement, Project Co shall elect in writing to be treated as the only client and the Board shall consent to such election in writing in terms of Regulation 8 of the CDM Regulations.. Project Co shall forthwith send a copy of the election to the Board's Representative and to the CDM Co-ordinator During the Project Term, Project Co shall not, and shall not seek to, withdraw, terminate or in any manner derogate from its election that it will act as, and its acceptance of its responsibilities as, the client in relation to the Works for all the purposes of the CDM Regulations.

- 3 The Board warrants that it has complied with and will continue to comply with Regulations 5(1)b, 10(1), 15 and 17(1) of the CDM Regulations.

- 4 During the Project Term Project Co will, as and when required, serve upon the Executive such further declarations elections under CDM Regulation 8 as may be necessary in order to procure that in respect of the Works and the provision of the Services Project Co will act as the only client for all the purposes of the CDM Regulations.

- 5 Project Co warrants that it has the competence, resources and capacity to, and shall, observe, perform and discharge or shall procure the observance, performance and discharge of:
 - (a) all the obligations, requirements and duties of the client arising under the CDM Regulations in connection with the Works and, where necessary, the provision of the Services; and
 - (b) any obligations incumbent on the client under the Approved Code of Practice for the time being approved by the Health and Safety Commission pursuant to the Health and Safety at Work etc. Act 1974 issued in connection with the CDM Regulations.

- 6 Project Co shall issue to the Board's Representative within five (5) Business Days of its delivery to Project Co, one electronic copy (on computer disk, tape or other format) of each and every construction phase plan as required by Regulation 23(1)a, and health and safety file to be prepared by it pursuant to the CDM Regulations in relation to the Works and the Services and electronic or paper copies of every amendment or update made to such file during the Project Term.

PART 8 OF THE SCHEDULE

Section 3 : Board's Construction Requirements

The Board's Construction Requirements are set out in the Agreed Form document comprising one volume labelled "Board's Construction Requirements", which shall have effect as if expressly set out in this Section 3 of Part 8 of the Schedule.

PART 8 OF THE SCHEDULE

Section 4 : Project Co Proposals

PART 8 OF THE SCHEDULE

Section 5: Reviewable Design Data

Reviewable Design Data are set out in the Agreed Form document comprising one volume labelled "Reviewable Design Data", which shall have effect as if expressly set out in this Section 5 of Part 8 of the Schedule.

PART 8 OF THE SCHEDULE

Section 6: Room data sheets

PART 8 OF THE SCHEDULE

Section 7: Thermal and energy efficiency testing procedure

Thermal and energy efficiency testing procedure are set out in the Agreed Form document comprising one volume labelled "Thermal and energy efficiency testing procedure", which shall have effect as if expressly set out in this Section 7 of Part 8 of the Schedule.

PART 8 OF THE SCHEDULE

Section 8: Quality Plans (Design and Construction)

Quality Plans (Design and Construction) are set out in the Agreed Form document comprising one volume labelled "Quality Plans Design and Construction", which shall have effect as if expressly set out in this Section 8 of Part 8 of the Schedule.

PART 8 OF THE SCHEDULE

Section 9: Board's Comments on Project Co's Proposals

Board's Comments on Project Co's Proposals are set out in the Agreed Form document comprising one volume labelled "Board's Comments on Project Co's Proposals", which shall have effect as if expressly set out in this Section 9 of Part 8 of the Schedule.

PART 8 OF THE SCHEDULE

Section 10: Energy Principles

Energy Principles are set out in the Agreed Form document comprising one volume labelled “Energy Principles”, which shall have effect as if expressly set out in this Section 10 of Part 8 of the Schedule.

PART 9 OF THE SCHEDULE : THE PROGRAMME

PART 10 OF THE SCHEDULE : REVIEW PROCEDURE

1 Review Procedure

1.1 The provisions of this Part 10 of the Schedule shall apply whenever any item, document or course of action is required to be reviewed, approved or otherwise processed in accordance with Part 10 of the Schedule (*Review Procedure*).

1.2 Subject to any express provision of this Agreement, the manner, form and timing of any submission to be made by Project Co to the Board's Representative for review under the Review Procedure shall be a matter for Project Co to determine. Each submission under the Review Procedure shall be accompanied by a copy of the proposed document to be reviewed (including, where applicable, any Reviewable Design Data) or a statement of the proposed course of action (the entire contents of a submission being referred to in the Schedule as a "Submitted Item"). In relation to each Submitted Item, the following procedure shall apply:

(a) as soon as possible and, if the Submitted Item comprises:

- (i) an item of Reviewable Design Data;
- (ii) a revised Programme submitted pursuant to Clause 19 (*Programme and Dates for Completion*) of this Agreement; or
- (iii) a document or proposed course of action submitted in the case of (an emergency),

within ten (10) Business Days of the date of receipt of a submission (or re-submission, as the case may be) or, within twenty (20) Business Days of the date of the receipt of an item of Reviewable Design Data submitted not in accordance with the Programme (or re-submission, as the case may be), of the Submitted Item to the Board's Representative (or such other period as the parties may agree), the Board's Representative shall return one copy of the relevant Submitted Item to Project Co endorsed "no comment" or (subject to and in accordance with paragraph 3 (*Grounds for Objection*)) "comments" as appropriate; and

(b) subject to paragraph 1.4, if the Board's Representative fails to return a copy of any Submitted Item (including any re-submitted Submitted Item) duly endorsed in accordance with paragraph (a), within ten (10) Business Days or, within twenty (20) Business Days for an item of Reviewable Design Data submitted not in accordance with the Programme, (or within such other period as the parties may agree in writing) of the date of its submission to the Board's Representative, then the Board's Representative shall be deemed to have returned the Submitted Item to Project Co endorsed "no comment" (and, in the case of Reviewable Design Data, endorsed "Level A - no comment"); and

(c) in relation to Finishes:

- (i) Project Co shall, within the period set out in Table A below, propose to the Board's Representative a range or selection of aspects of finishes ("Range of Finishes") listed in Table A below in accordance with the Board's Construction Requirements and Project Co's Proposals for selection by the Board in accordance with paragraph 3(d) of Part 10 of the Schedule (*Review Procedure*) and within the relevant selection period listed in Table A below ("Selection Period");
- (ii) the Board's Representative shall notify Project Co of its selection within the Selection Period set out in Table A below for each of the Finishes. If Project Co fail to adhere to the period set out in Table A below, the Selection Period shall be forty five (45) Business Days from receipt of the Range of Finishes;

Table A

Finishes	Aspects	Period from the Effective Date within which the proposal shall be made (Programme Week No) ie latest date	Selection Period
external finishes (roof, windows and external elevations)	colour and material	All wk 3	15 Business Days
wall finishes	Colour	Wk 20	15 Business Days
floor finishes	colour and type	Wk 20	15 Business Days
ironmongery	style and colour	Wk 5	15 Business Days
tapware	style and content	Wk 5	15 Business Days
bed head arrangement	layout and content	Wk 5	15 Business Days
nurses station	colour, content, style and material	Wk 5	15 Business Days
main public light fittings	specification and style	Wk 5	15 Business Days
external signage	size, style, colour and location	Wk 3	15 Business Days
internal signage	size, style, colour and location	Wk 5	15 Business Days
light switches and sockets	style and colour	Wk 5	15 Business Days
light fittings in clinical areas	style and colour	Wk 5	15 Business Days
hard landscaping	colour and material	Wk 3	15 Business Days

and

- (iii) if no selection of a Finish has been made by the Board's Representative and notified to Project Co in accordance with paragraph 1.2 (c) (ii) by the end of the relevant Selection Period, Project Co shall be entitled to make a selection of the particular Finish. After the end of the relevant Selection Period, should the Board wish to vary any selection previously made by Project Co or by the Board, such variation shall be effected as a Variation in accordance with Part 22 of the Schedule (*Variation Procedure*).

1.3 If the Board's Representative raises comments on any Submitted Item in accordance with paragraph 3 (*Grounds for Objection*) he shall state the ground upon which such comments are based and the evidence or other information necessary to substantiate that ground. To the extent that the Board's Representative comments on a Submitted Item other than on the basis set out in this Part 10 of the Schedule, or fails to comply with the provisions of this paragraph, Project Co may, in its discretion, either:

- (a) request written clarification of the basis for such comments and, if clarification is not received within ten (10) Business Days of such request by Project Co, refer the matter for determination in accordance with Part 26 of the Schedule (*Dispute Resolution Procedure*); or
- (b) at its own risk, and without prejudice to Clause 17 (*The Design, Construction and Commissioning Process*), proceed with further design or construction disregarding such comments.

- 1.4 In the case of any Submitted Item of the type referred to in paragraph 3(h) (vi) (*Handback Works*), a failure by the Board's Representative to endorse and return such Submitted Item within the period specified in paragraph 1.2(b) shall be deemed to constitute an objection by the Board's Representative to such Submitted Item. If the parties fail to agree the form and content of such Submitted Item, within ten (10) Business Days following the expiry of the period specified in paragraph 1.2(b), the matter shall be determined in accordance with Part 26 of the Schedule (*Dispute Resolution Procedure*).
- 1.5 For the avoidance of doubt, where the Board selects from Table A colour finishes which (as reserved matters in respect of the Planning Permission) are in conflict with the requirements of the authority granting such planning permission, the views from such authority shall take precedence over the Board's selection.

2 Further Information

Project Co shall submit any further or other information, data and documents that the Board's Representative reasonably requires in order to determine whether he has a basis for raising comments or making objections to any Submitted Item in accordance with this Schedule. If Project Co does not submit any such information, data and documents, the Board's Representative shall be entitled to:

- (a) comment on the Submitted Item on the basis of the information, data and documents which have been provided; or
- (b) object to the Submitted Item on the grounds that insufficient information, data and documents have been provided to enable the Board's Representative to determine whether he has a legitimate basis for commenting or objecting in accordance with this Part 10 of the Schedule (*Review Procedure*).

3 Grounds of Objection

The expression "raise comments" in this paragraph shall be construed to mean "raise comments or make objections" unless the contrary appears from the context. The Board's Representative may raise comments in relation to any Submitted Item on the grounds set out in paragraph 2 (*further information*) above or on the ground that the Submitted Item would (on the balance of probabilities) breach any Law but otherwise may raise comments in relation to a Submitted Item only as follows:

- (a) in relation to any Submitted Item if:
 - (i) Project Co's ability to perform its obligations under this Agreement would (on the balance of probabilities) be adversely affected by the implementation of the Submitted Item; or
 - (ii) the implementation of the Submitted Item would (on the balance of probabilities) adversely affect any right of the Board under this Agreement or its ability to enforce any such right;
- (b) in relation to any Submitted Item submitted pursuant to Clause 4.1 (*Changes to Project Documents*) if:
 - (i) the Board's ability to perform its obligations under the Agreement would be adversely affected by the proposed course of action;
 - (ii) the Board's ability to provide the Clinical Services or to carry out any of its statutory functions would (on the balance of probabilities) be adversely affected by the proposed course of action;
 - (iii) the proposed course of action would be likely to result in an increase to the Board's liabilities or potential or contingent liabilities under this Agreement;

- (iv) the proposed course of action would adversely affect any right of the Board under the Agreement or its ability to enforce any such right; or
 - (v) Project Co's ability to perform its obligations under the Agreement would be materially adversely affected by the proposed course of action;
- (c) in relation to Reviewable Design Data submitted pursuant to Clause 17.7(a) (*Board Design Approval*):
- (i) which does not comprise 1:50 scale Room Layout Drawings the Board's Representative may raise comments, subject to and in accordance with paragraph 4 (*Effect of Review*) on the ground that the Submitted Item is not in accordance with:
 - (aa) the Board's Construction Requirements; and/or
 - (bb) Project Co's Proposals;
 - (ii) which comprises a 1:50 scale Room Layout Drawing in respect of which there is a corresponding generic 1:50 scale Room Layout Drawing for the relevant room type (which has previously been reviewed and commented upon by the Board's Representative in accordance with this Part of the Schedule), the Board's Representative may raise comments, subject to and in accordance with paragraph 4 (*Effect of Review*), on the ground that the Submitted Item does not conform to the generic 1:50 scale Room Layout Drawing; and
 - (iii) which comprises a 1:50 scale Room Layout Drawing in respect of which there is no corresponding generic 1:50 scale Room Layout Drawing for the relevant room type (which has previously been reviewed and commented upon by the Board's Representative in accordance with this Part of the Schedule), the Board's Representative may raise comments, subject to and in accordance with paragraph 4 (*Effect of Review*), on the grounds that the Submitted Item:
 - (aa) is not in accordance with the Board's Construction Requirements and/or Project Co's Proposals; or
 - (bb) is inconsistent with the guidance contained in any current NHS Requirement which is applicable to a room of that function provided that such guidance has not been superseded by and is not inconsistent with any other provisions of the Board's Construction Requirements (including any existing Approved RDD Item);
- (d) in relation to Finishes:
- (i) which have the effect of making a selection from the Range of Finishes (or any alternative range or selection of Finishes submitted by Project Co to the Board's Representative) pursuant to this Schedule Part 10 (Review Procedure); or
 - (ii) where the Submitted Item does not comply with the relevant provisions of the Board's Construction Requirements and/or Project Co's Proposals;
- (e) in relation to the submission of any revised Programme pursuant to Clause 19 (*Programme and Dates for Completion*) on the ground that the revised Programme would not (on the balance of probabilities) enable the Works to be completed by the Completion Date;
- (f) in relation to the submission of any Quality Plan or part of a Quality Plan or any changes to any Quality Plan pursuant to Clause 25.4 or Clause 25.7 (*Quality Assurance*) or any quality manual or procedure in accordance with Clause 25.10 (*Quality Assurance*), on the grounds that such Quality Plans, or parts of or changes to such Quality Plans, quality manuals or procedures, or the quality management systems which they reflect, would not comply with:

- (i) in the case of the Design Quality Plan and the Construction Quality Plan referred to in Clause 25 (*Quality Assurance*), the requirements referred to in Section 9 of Part 8 of the Schedule (*Construction Matters*); and
 - (ii) in the case of the Services Quality Plan referred to in Clause 25 (*Quality Assurance*), the requirements referred to in Section 3 of Part 14 of the Schedule (*Service Requirements*);
- (g) in relation to the submission of any proposed revision or substitution for the Method Statements or any part of any Method Statement (as the case may be) pursuant to Clause 27.3 (*Project Co Services Changes*), on the grounds that:
- (i) the proposed revision or substitution is not in accordance with Good Industry Practice;
 - (ii) the performance of the Service in accordance with the proposed revision or substitution would (on the balance of probabilities):
 - (aa) be materially different from the performance of the Service in accordance with the Method Statement prior to such proposed revision or substitution; or
 - (bb) be less likely to achieve compliance with the Service Level Specification for that Service; or
 - (cc) have an adverse effect on the provision by the Board of the Clinical Services or on the safety of any users of the Facilities; or
 - (iii) the proposed revision or substitution would (on the balance of probabilities) result in an inferior standard of performance of the relevant Service to the standard of performance in accordance with the Method Statement prior to such proposed revision or substitution; and
- (h) in relation to the submission of any Schedule of Programmed Maintenance, any revision to any Schedule of Programmed Maintenance pursuant to Clause 28.1 or 28.6 (*Maintenance*) or any submission of Unprogrammed Maintenance Works pursuant to Clause 28.8 (*Maintenance*), on the grounds that:
- (i) carrying out the Programmed Maintenance or the Unprogrammed Maintenance Works in the period or at the times suggested would (on the balance of probabilities) interfere with the operations of the Board and such interference could be avoided or mitigated by Project Co rescheduling the Programmed Maintenance or the Unprogrammed Maintenance Works; or
 - (ii) in relation to the Schedule of Programmed Maintenance, the proposed hours for carrying out the Programmed Maintenance are not consistent with the principles set out in Appendix 2, Table B to this Part 10 of the Schedule; or
 - (iii) the proposed method of performance of the Programmed Maintenance or the Unprogrammed Maintenance Works would not be in accordance with the Service Level Specifications for that Service; or
 - (iv) the safety of patients or other users of the Facilities would (on the balance of probabilities) be adversely affected; or
 - (v) the period for carrying out the Programmed Maintenance or the Unprogrammed Maintenance Works would (on the balance of probabilities) exceed the period reasonably required for the relevant works; and
 - (vi) in relation to the submission of Project Co's proposals for the Handback Works, the Handback Programme and the Handback Amount, on the grounds that:

- (i) in the case of the Handback Works, Project Co's proposals will not (on the balance of probabilities) ensure that the Handback Requirements are achieved by the Expiry Date;
- (ii) in the case of the Handback Programme, performance of the Handback Works in accordance with the programme is not (on the balance of probabilities) capable of achieving satisfaction of the Handback Requirements by the Expiry Date; and
- (iii) in the case of the Handback Amount, it does not represent the cost of carrying out the Handback Works according to the Handback Programme and the provisions of Part 24 of the Schedule (*Handback Procedure*).

4 Effect of Review

- 4.1 Any Submitted Item which is returned or deemed to have been returned by the Board's Representative endorsed "no comment" (and in the case of Reviewable Design Data, endorsed "Level A - no comment") shall be complied with or implemented (as the case may be) by Project Co.
- 4.2 In the case of any Submitted Item other than Reviewable Design Data, if the Board's Representative returns the Submitted Item to Project Co endorsed "comments", Project Co shall comply with such Submitted Item after amendment in accordance with the comments unless Project Co disputes that any such comment is on grounds permitted by this Agreement, in which case Project Co or the Board's Representative may refer the matter for determination in accordance with Part 26 of the Schedule (*Dispute Resolution Procedure*) and Project Co shall not act on the Submitted Item until such matter is so determined or otherwise agreed.
- 4.3 In the case of a Submitted Item comprising Reviewable Design Data, if the Board's Representative returns the Submitted Item endorsed other than "Level A - no comment", Project Co shall:
- (a) where the Board's Representative has endorsed the Submitted Item "Level B - proceed subject to amendment as noted", either proceed to construct or proceed to the next level of design of the part of the Works to which the Submitted Item relates but take into account any amendments required by the Board's Representative in his comments;
 - (b) where the Board's Representative has endorsed the Submitted Item "Level C - subject to amendment as noted" not act upon the Submitted Item, amend the Submitted Item in accordance with the Board's Representative's comments and re-submit the same to the Board's Representative in accordance with paragraph 4.4; and
 - (c) where the Board's Representative has endorsed the Submitted Item "Level D - rejected" not act upon the Submitted Item, amend the Submitted Item and re-submit the Submitted Item to the Board's Representative in accordance with paragraph 4.4,

unless Project Co disputes that any such comment or proposed amendment is on grounds permitted by this Agreement, in which case Project Co or the Board's Representative may refer the matter for determination in accordance with Part 26 of the Schedule (*Dispute Resolution Procedure*) and Project Co shall not act on the Submitted Item until such matter is so determined or otherwise agreed.

- 4.4 Within 3 Business Days of receiving the comments of the Board's Representative on any Submitted Item comprising Reviewable Design Data, Project Co shall (except in the case contemplated in paragraph 4.3(a) (*Level B*)) send a copy of the Submitted Item as amended to the Board's Representative pursuant to paragraph 4.3 and the provisions of paragraphs 1.2(a) (*Response to Submitted Item*), 4.1 and 4.3 shall apply (changed according to context) to such re-submission.
- 4.5 The return or deemed return of any Submitted Item endorsed "no comment" (or in the case of Reviewable Design Data endorsed "Level A - no comment" or otherwise endorsed in accordance with paragraph 4.3(a) (*Level B*) or (b) (*Level C*)) shall mean that the relevant Submitted Item may be used or implemented for the purposes for which it is intended but, save to the extent expressly

stated in this Agreement including, without limitation, as specified in Appendix 1 Table A to this Part 10 of the Schedule, such return or deemed return of any Submitted Item shall not otherwise relieve Project Co of its obligations under this Agreement nor is it an acknowledgement by the Board that Project Co has complied with such obligations.

5 Documentation management

- 5.1 Project Co shall issue two (2) copies of all Submitted Items to the Board and compile and maintain a register of the date and contents of the submission of all Submitted Items.
- 5.2 Project Co shall compile and maintain a register of the date of receipt and content of all Submitted Items that are returned or deemed to be returned by the Board's Representative.
- 5.3 Save to the extent set out in Appendix A to this Part 10 of the Schedule or elsewhere in this Part 10 of the Schedule, no review, comment or approval by the Board shall operate to exclude or limit Project Co's obligations or liabilities under the Project Agreement (or the Board's rights under the Project Agreement).

6 Variations

- 6.1 No approval or comment or any failure to give or make an approval or comment under this Part 10 of the Schedule shall constitute a Variation save to the extent provided in this Part 10 of the Schedule.
- 6.2 If, having received comments from the Board's Representative, Project Co considers that compliance with those comments would amount to a Variation, Project Co shall, before complying with the comments, notify the Board of the same and, if it is agreed by the parties or determined pursuant to Part 26 of the Schedule (*Dispute Resolution Procedure*) that a Variation would arise if the comments were complied with, the Board may, if it wishes, implement the Variation and it shall be dealt with in accordance with Part 22 of the Schedule (*Variation Procedure*). Any failure by Project Co to notify the Board that it considers compliance with any comments of the Board's Representative would amount to a Variation shall constitute an irrevocable acceptance by Project Co that any compliance with the Board's comments shall be without cost to the Board and without any extension of time.
- 6.3 No alteration or modification to the design, quality and quantity of the Works arising from the development of detailed design or from the co-ordination of the design shall be construed or regarded as a Variation.

APPENDIX 1

Table A

Approved RDD Item (by category)	Scale	Meaning of "Level A - no comment" and "Level B – proceed subject to amendment as noted" endorsement of Reviewable Design Data under Schedule 10 (<i>Review Procedure</i>) (including both the actual and deemed endorsement).
Room Data Sheets	n/a	A "Level A - no comment" endorsement or a "Level B - proceed subject to amendment as noted" endorsement of any room data sheet means that Project Co may proceed to construct in accordance with the Submitted Item and that the Board is satisfied that the design and other information in the relevant room data sheet satisfies Clinical Functionality.
Drawings - Development Control Plan	1:1500	A "Level A - no comment" endorsement or a "Level B - proceed subject to amendment as noted" endorsement of any 1:1250 scale development control plan means that Project Co may proceed to construct in accordance with the Submitted Item and that the Board is satisfied that the design and other information contained in the relevant drawing satisfies Clinical Functionality.
Drawings - Floor Plans	1:200	A "Level A - no comment" endorsement or a "Level B - proceed subject to amendment as noted" endorsement of any 1:200 scale floor plan means that Project Co may proceed to construct in accordance with the Submitted Item and that the Board is satisfied that the design and other information contained in the relevant drawing satisfies the Clinical Functionality.
Drawings - Room Layouts (including room elevations) & Reflected ceiling plans	1:50	A "Level A - no comment" endorsement or a "Level B - proceed subject to amendment as noted" endorsement of any 1:50 scale room layout and/or reflected ceiling drawing means that Project Co may proceed to construct in accordance with the Submitted Item and that the Board is satisfied (to the extent of the design and other information contained in the relevant drawing) that the design and other information in the relevant drawing satisfies Clinical Functionality.
Drawings - Departmental plans	1:50	A "Level A - no comment" endorsement or a "Level B – proceed subject to amendment as noted" endorsement of any 1:50 scale departmental plan means that Project Co may proceed to construct in accordance with the Submitted Item and that the Board is satisfied (to the extent of the design and other information contained in the relevant drawing) that the design and other information in the relevant drawing satisfies Clinical Functionality.

APPENDIX 2**Normal Working Hours**

- 1 Subject to paragraphs 3 to 5 below, Project Co shall carry out Programmed Maintenance at the Facilities during the hours of 9am to 5pm from Monday to Friday ("Normal Working Hours").
- 2 Project Co may, with the consent of the Board (which consent shall not be unreasonably withheld) carry out Maintenance Works outside the Normal Working Hours provided always that it shall take into account:
 - (i) the likely disturbance to the Board, its staff and patients within the immediate area where the Maintenance Works are to be undertaken;
 - (ii) the likely disturbance to adjacent areas, the Board, its staff and patients in those adjacent areas that may be affected by the Maintenance Works to be undertaken in the area(s) identified in (i) above; and
 - (iii) compliance with the Law.
- 3 Subject to paragraph 4, Project Co shall have access to the Facilities during the hours of operation to the areas described in the Part 8 Section 3 Sub-section D and E (Specific Clinical and Non-Clinical Requirements) ("Hours of Operation") to carry out Programmed Maintenance.
- 4 Where Project Co requires access to an area of the Facilities during the Hours of Operation, Project Co will consult with and obtain the consent of the member of personnel (of the Board or GPs, as appropriate) in charge of an area concerning dates, times and periods during which Programmed Maintenance is to be undertaken in those areas so as to minimise disruption in those areas.
- 5 The Board may request Project Co to carry out Programmed Maintenance outside the Board's Normal Working Hours in the event that the carrying out of such Programmed Maintenance during Normal Working Hours would adversely affect the clinical and operational function of the department or area provided that the Board may only issue such a request to Project Co if the time for carrying out the relevant Programmed Maintenance has not already been agreed with the Board under Clause 28 and specified in an agreed Schedule of Programmed Maintenance. For the avoidance of doubt, Clause 28.7 shall apply to any request by the Board for Project Co to defer Programmed Maintenance in relation to an agreed Schedule of Programmed Maintenance.

PART 11 OF THE SCHEDULE

(1) FORTH VALLEY HEALTH BOARD

and

(2) THE CO-OPERATIVE BANK P.L.C

and

(3) ROBERTSON FACILITIES MANAGEMENT LIMITED

and

(4) ROBERTSON HEALTH (CLACKMANNANSHIRE) LIMITED

SERVICE PROVIDER'S COLLATERAL AGREEMENT

SERVICE PROVIDER'S COLLATERAL AGREEMENT

BETWEEN:

- (1) **FORTH VALLEY HEALTH BOARD** of Carseview House, Castle Business Park, Stirling, FK9 4SW (the "Board ");
- (2) **THE CO-OPERATIVE BANK P.L.C**, acting through its office at PO Box 101, 1 Balloon Street, Manchester M60 4EP (the "Senior Funder");
- (3) **ROBERTSON FACILITIES MANAGEMENT LIMITED** a company incorporated under the Companies Acts with registered number SC185956 and having its registered office at 10 Perimeter Road, Pinefield Industrial Estate, Elgin, Moray, IV30 6AE (the "Service Provider"); and
- (4) **ROBERTSON HEALTH (CLACKMANNANSHIRE) LIMITED**, a company incorporated under the Companies Acts with registered number SC312130 and having its registered office at 10 Perimeter Road, Pinefield Industrial Estate, Elgin, Moray, IV30 6AE ("Project Co"). ("Project Co").

WHEREAS:

- (A) The Board and Project Co have agreed the terms on which Project Co will design, develop and construct and provide certain services in connection with the development of new Clackmannanshire community health facilities (the "Development") at the Site (as that expression is defined in the Project Agreement) and, accordingly, have entered into the Project Agreement and the Project Documents.
- (B) The Service Provider and Project Co have entered into an agreement of even date herewith relating to the provision of certain of the Services (as defined in the Project Agreement) by the Service Provider to enable Project Co to discharge its obligations to the Board regarding such Services under the Project Agreement and the Project Documents (the "Service Contract").
- (C) This Service Provider's Collateral Agreement (the "Agreement") is one of the Service Providers' Collateral Agreements contemplated by the Project Agreement.

NOW IT IS HEREBY AGREED as follows:

1 Definitions and Interpretation

1.1 Definitions

In this Agreement, the following terms shall, unless the context otherwise requires, have the following meanings:

"Ancillary Documents"	has the meaning given in the Project Agreement
"Business Day"	has the meaning given in the Project Agreement
"Event of Project Co Default"	has the meaning given in the Service Contract
"Funders' Direct Agreement"	is the agreement of even date herewith between, amongst others, Project Co, the Service Provider and the Senior Funder
"Novation Agreement"	has the meaning given in Clause 4.5.2(b) (<i>Project Documents</i>)
"Novation Effective Date"	means the date of performance of the obligations set out in Clause 4.5.2 (<i>Project Documents</i>)
"Parent Company Guarantee"	has the meaning given in the Service Contract
"Project Agreement"	means the Project Agreement of even date herewith

	between (1) the Board and (2) Project Co
"Proposed Novation Date"	has the meaning given in Clause 4.1 (<i>Project Documents</i>)
"Proposed Novation Notice"	has the meaning given in Clause 4.1 (<i>Project Documents</i>)
"Proposed Step-in Date"	has the meaning given in Clause 3.1 (<i>Commencement and Duration</i>)
"Proposed Substitute"	has the meaning given in Clause 4.1 (<i>Project Documents</i>)
"Security Documents"	has the meaning given in the Funders' Direct Agreement
"Service Contract"	has the meaning given in the Project Agreement
"Step-in Date"	means the date of issue of the Step-in Undertaking
"Step-in Notice"	has the meaning given in Clause 3.1 (<i>Commencement and Duration</i>)
"Step-in Period"	means the period commencing on the Step-in Date and ending on the earliest of: <ul style="list-style-type: none"> (a) the date of the first anniversary of the Step-in Date (but subject always to Clause 4.7 (<i>Project Documents</i>)); (b) the Step-out Date; (c) the Novation Effective Date; and (d) termination of the Service Contract under Clause 3.3 (<i>Commencement and Duration</i>)
"Step-in Undertaking"	has the meaning given in Clause 3.2.4 (<i>Commencement and Duration</i>)
"Step-out Date"	has the meaning given in Clause 3.4.1 (<i>Commencement and Duration</i>)
"Termination Notice"	has the meaning given in Clause 2.4 (<i>Execution and Delivery of Documents</i>)

1.2 Interpretation

Save to the extent that the context or the express provisions of this Agreement otherwise require:

- 1.2.1 headings and sub-headings are for ease of reference only and shall not be taken into consideration in the interpretation or construction of this Agreement;
- 1.2.2 all references to Clauses are references to Clauses of this Agreement;
- 1.2.3 all references to agreements, documents or other instruments include (subject to all relevant approvals) a reference to that agreement, document or instrument as amended, supplemented, substituted, novated or assigned from time to time;

- 1.2.4 all references to any statute or statutory provision shall include references to any statute or statutory provision which amends, extends, consolidates or replaces the same or which has been amended, extended, consolidated or replaced by the same and shall include any orders, regulations, codes of practice, instruments or other subordinate legislation made under the relevant statute or statutory provision;
- 1.2.5 any reference to time of day shall be a reference to Edinburgh time;
- 1.2.6 the words "herein", "hereto" and "hereunder" refer to this Agreement as a whole and not to the particular Clause in which such word may be used;
- 1.2.7 words importing the singular include the plural and vice versa;
- 1.2.8 words importing a particular gender include all genders;
- 1.2.9 "person" includes any individual, partnership, firm, trust, body corporate, government, governmental body, authority, agency, unincorporated body of persons or association;
- 1.2.10 any reference to a public organisation shall be deemed to include a reference to any successor to such public organisation or any organisation or entity which has taken over the functions or responsibilities of such public organisation;
- 1.2.11 references to "Party" means a party to this Agreement and references to "Parties" shall be construed accordingly;
- 1.2.12 all monetary amounts are expressed in pounds sterling;
- 1.2.13 references to the word "includes" or "including" are to be construed without limitation;
- 1.2.14 the obligations of any Party under this Agreement are to be performed at that Party's own cost and expense;
- 1.2.15 terms used in this Agreement that are defined in the Project Agreement or the Ancillary Documents shall have the meanings given to them in the Project Agreement or the Ancillary Documents, as appropriate.

2 Termination Notice and Board Termination

2.1 Service Provider's Warranties and Undertakings

The Service Provider warrants and undertakes to the Board that it has complied with and fulfilled and shall continue to comply with and fulfil its duties and obligations arising under or by virtue of the Service Contract, provided that the Board shall only be entitled to make a claim against the Service Provider under this Clause 2.1 if the Project Agreement has terminated and shall not be entitled to do so during the Step-in Period or after the Service Contract has been novated under Clause 4.

2.2 Liability of Service Provider

Any liability arising from any claim for breach of the warranty under or pursuant to Clause 2.1 shall be in addition to and without prejudice to any other present or future liability of the Service Provider to the Board (including, without prejudice to the generality of the foregoing, any liability in negligence) and shall not be released, diminished or in any other way be affected by any independent enquiry into any relevant matter which may be made or carried out by or on behalf of the Board by any person nor by any action or omission of any person whether or not such action or omission might give rise to an independent liability of such person to the Board provided always that the Service Provider shall owe no greater duties or obligations to the Board under this Agreement than it owes or would have owed to Project Co under the Service Contract.

2.3 Termination Notice

- 2.3.1 The Service Provider undertakes not to terminate the Service Contract on account of an Event of Project Co Default without first giving the Board not less than fifteen (15) Business Days' prior written notice specifying the grounds for that termination. Subject to Clause 2.4.2 below any such notice, other than one given in circumstances where there is no default under the Service Contract by Project Co or the Service Provider, shall be a "Termination Notice".
- 2.3.2 Where the Service Provider's right to terminate is subject to the terms of the Funders' Direct Agreement then the Service Provider shall notify the Board of the same as soon as reasonably practicable upon becoming aware of the provisions of the Funders' Direct Agreement applying. Thereafter as soon as the Service Provider becomes entitled to terminate the Service Contract free from the constraints contained in the Funders' Direct Agreement, whether upon the expiry of the Step-in Period (as such term is defined in the Funders' Direct Agreement) or otherwise, then the Service Provider undertakes to the Board not to terminate the Service Contract on account of an Event of Project Co Default (whether occurring before or after the Service Provider's right to terminate the Service Contract was free from the constraints of the Funders' Direct Agreement) without first giving the Board not less than fifteen (15) Business Days' prior notice specifying the grounds for that termination and noting that the Service Provider's right of termination is not subject to the Funders' Direct Agreement. Any such notice, other than one given in circumstances where there is no default under the Service Contract by Project Co or the Service Provider, shall for the purposes of this Agreement also be a Termination Notice and the provisions of this Agreement shall apply accordingly.
- 2.3.3 Notwithstanding any provision of the Service Contract to the contrary, on termination of the Project Agreement by the Board, the Parties agree that the Service Contract shall not come to an end except in accordance with the terms of this Agreement.
- 2.3.4 The Board acknowledges that it shall not be entitled to exercise its rights under Clauses 3 (*Step-in and Step-out*) and 4 (*Novation*):
- (a) until the Senior Funder has released its security over the Service Contract; or
 - (b) until the Senior Funder has confirmed to the Board in writing that it has no further claims or interest in the claims of Project Co or any Suitable Substitute Contractor (as such term is defined in the Funders' Direct Agreement) against the Service Provider whether pursuant to the Security Documents, the Service Contract or the enforcement of any rights under the Security Documents or the Funders' Direct Agreement.

3 Step-In and Step-Out

3.1 Step-In Notice

- 3.1.1 If the Board has terminated the Project Agreement in accordance with the terms of the Project Agreement or if the Board has received a Termination Notice, then subject to the provisions of this Agreement, the Board may give written notice to the Service Provider (a "Step-in Notice") of the intention of the Board to issue a Step-in Undertaking on a specified date (the "Proposed Step-in Date") provided that such Proposed Step-in Date shall be:
- (a) no later than five (5) Business Days after termination of the Project Agreement where this has been terminated by the Board; and
 - (b) no earlier than the date falling five (5) Business Days prior to the date of expiry of the Termination Notice and no later than the date of expiry of the Termination Notice where a Termination Notice has been given by the Service Provider. The Board shall provide a copy of any Step-in Notice to the Senior Funder at the same time as the Step-in Notice is given to the Service Provider.

- (c) Unless the Service Provider otherwise consents, only one Step-in Notice may be given during the period of this Agreement. Subject to Clause 5.1 below, the Service Provider shall not be entitled to terminate the Service Contract until after the Proposed Step-in Date.

3.2 Notice Of Obligations and Step-In Undertaking

- 3.2.1 Within three (3) Business Days of receipt of any Step-in Notice, the Service Provider shall give written notice to the Board of any sums of which the Service Provider has actual knowledge which are due and payable but unpaid by Project Co and of any other material obligations or liabilities, of which the Service Provider has actual knowledge, which should have been performed or discharged by Project Co under the Service Contract, in each case, as at the date of the Step-in Notice.
- 3.2.2 The Service Provider shall inform the Board in writing as soon as reasonably practicable of:
 - (a) any change in such sums, obligations or liabilities referred to in Clause 3.2.1; and
 - (b) any further sums, obligations or liabilities thereafter falling due and payable but unpaid or falling due for performance or discharge and unperformed or undischarged (as the case may be);

in each case of which the Service Provider has actual knowledge, before the Step-in Date.
- 3.2.3 The Service Provider shall give the Board the information referred to in Clauses 3.2.1 and 3.2.2 in good faith and may not give any further notifications pursuant to Clause 3.2.2 less than two (2) Business Days prior to the Proposed Step-in Date. The Board shall not be required to assume any liability under a Step-in Undertaking for any outstanding obligations and/or liabilities of Project Co to the Service Provider which are not notified to the Board pursuant to Clauses 3.2.1 or 3.2.2.
- 3.2.4 Not later than the Proposed Step-in Date the Board shall decide if it is prepared to issue a Step-in Undertaking. If it does so decide, the Board shall promptly give the Service Provider written notification of such decision and, at the same time, provide a copy of such notification to the Senior Funder. Subject to the prior performance by the Senior Funder of its obligations under Clause 3.2.5, the Board shall deliver to the Service Provider on the Proposed Step-in Date, a written undertaking in form and substance agreed with the Service Provider (both the Board and the Service Provider acting reasonably) (the "Step-in Undertaking"), incorporating a clause in terms similar to Clause 11 (but only to the extent that there will not be double counting of default interest accruing under the Service Contract and this Agreement), and undertaking to the Service Provider:
 - (a) to pay or procure the payment to the Service Provider, within fifteen (15) Business Days of demand by the Service Provider, of any sum due and payable but unpaid by Project Co to the Service Provider under the Service Contract before the Step-in Date and which has been notified by the Service Provider to the Board in accordance with Clause 3.2.1 or 3.2.2;
 - (b) to perform or discharge or procure the performance or discharge of any unperformed or undischarged obligations of Project Co under the Service Contract which shall have fallen due for performance or discharge before the Step-in Date and which have been notified by the Service Provider to the Board in accordance with Clause 3.2.1 or 3.2.2 within such period as the Service Provider may reasonably require;
 - (c) to pay or procure the payment of any sum due and payable by Project Co under the Service Contract which arises during the Step-In Period or arises as a result of any act or omission occurring during the Step-in Period [which shall arise from any act or omission occurring after the Step-in Date] (but subject to

Clauses 3.4 and 4.5.3(b)) but not, to avoid doubt, any sum due in respect of any Services provided before the Step-in Date; and

- (d) to perform or discharge or procure the performance or discharge of any obligations of Project Co under the Service Contract which arises during the Step-In Period or arises as a result of any act or omission occurring during the Step-in Period which shall arise from any act or omission occurring after the Step-in Date (but subject to Clauses 3.4 and 4.5.3(b)) but not, to avoid doubt, to perform or discharge or to procure the performance or discharge of any obligations in respect of any Services provided before the Step-in Date.
- 3.2.5 Following notification of the Board's decision pursuant to Clause 3.2.4, the Senior Funder shall, on or before the Proposed Step-in Date, take any action which is necessary unconditionally and irrevocably to release the Service Contract and the Parent Company Guarantee from the security constituted by the Security Documents.
 - 3.2.6 Upon release of the Parent Company Guarantee in accordance with Clause 3.2.5, Project Co shall immediately assign all its rights and powers under the Parent Company Guarantee to the Board in accordance with Clause 7 of the same.
 - 3.2.7 If the Board shall not have issued the Step-in Undertaking on or before the Proposed Step-in Date the Step-in Notice shall be deemed to have been withdrawn and the rights and obligations of the Parties shall be construed as if the Step-in Notice had not been given.

3.3 **Restriction of Right of Termination**

During or in respect of the Step-in Period, the Service Provider confirms to the Board that it shall continue to observe and perform its duties and obligations under the Service Contract and shall, without prejudice to Clause 5.1, only be entitled to exercise its rights of termination under the Service Contract:

- 3.3.1 by reference to an Event of Project Co Default arising during the Step-in Period provided that no event of default by Project Co under the Project Agreement (whether resulting in termination of the Project Agreement or otherwise, and notwithstanding that it has occurred during the Step-in Period) shall entitle the Service Provider to exercise such rights of termination during the Step-in Period; or
- 3.3.2 if the Board fails to pay when due any amount owed to the Service Provider or fails to perform or discharge when falling due for performance or discharge any obligation under the Step-in Undertaking or fails to procure such payment or performance or discharge; or
- 3.3.3 if such rights of termination arise in circumstances where there is no default under the Service Contract by the Board or the Service Provider.

3.4 **Step-Out**

- 3.4.1 the Board may, at any time, give the Service Provider at least thirty (30) days' prior written notice to terminate the Step-in Period on a date specified in the notice (the "Step-out Date");
- 3.4.2 the Board shall give the Service Provider at least sixty (60) days' prior written notice that (subject to Clause 4.4.2) the Step-in Period will end due to the occurrence (subject to Clause 4.7) of the first anniversary of the Step-in Date;

provided that

- (a) the Board has performed and discharged in full or procured the performance and discharge in full of any obligations of Project Co under the Service Contract in relation to the maintenance of records and the provision of reports during the Step-in Period so as to permit the Service Provider to monitor the performance of Project Co's other obligations under the Service Contract; and

- (b) all liability under the Step-in Undertaking pursuant to any claims made up to the date specified in either Clause 3.4.1 or Clause 3.4.2 (as the case may be) shall have been fully and unconditionally discharged,

the Board shall be released from the Step-in Undertaking on the expiry of the Step-in Period in accordance with Clauses 3.4.1 and 3.4.2. Such release shall not affect the continuation of Project Co's obligations towards the Service Provider under the Service Contract.

3.5 Senior Funder

The Senior Funder is a party to this Agreement solely for the purposes of taking the benefit of its rights under Clause 2.4.4 and Clause 3 and, subject to Clauses 3.2.5, 4.5.1, 7.2.1 and 12.1 shall have no rights or obligations or liabilities hereunder.

4 Novation

4.1 Proposed Substitute

At any time that the Board is entitled to give a Step-in Notice pursuant to Clause 3.1 or at any time during the Step-in Period the Board may give notice (a "Proposed Novation Notice") to the Service Provider that it wishes itself or another person (a "Proposed Substitute") to assume, by way of sale, transfer or other disposal, the rights and obligations of Project Co under the Service Contract and specifying a date (the "Proposed Novation Date"):

- 4.1.1 falling not later than fifteen (15) Business Days after termination of the Project Agreement where this has been terminated by the Board;
- 4.1.2 falling not later than the expiry of the Termination Notice where a Proposed Novation Notice is given by the Board at a time when it is entitled to give a Step-in Notice pursuant to Clause 3.1; and
- 4.1.3 falling not later than twenty-eight (28) Business Days after the date of the Proposed Novation Notice, where a Proposed Novation Notice is given during a Step-in Period,

The Board shall provide a copy of any Proposed Novation Notice to the Senior Funder at the same time as the Proposed Novation Notice is given to the Service Provider. Save as provided in Clause 4.4, only one Proposed Novation Notice may be given during the period of this Agreement. Without prejudice to Clauses 3.3 and 5.1, the Service Provider shall not be entitled to terminate the Service Contract during the notice period specified in a Proposed Novation Notice.

4.2 Information for Consent to Novation

If the Proposed Novation Notice specifies the Board as the Proposed Substitute, the Service Provider's consent to the novation shall be deemed to have been given automatically. Where the Proposed Substitute is not the Board, a novation in accordance with a Proposed Novation Notice shall only be effective if the Service Provider consents to that novation in writing in accordance with Clause 4.3 and the Board shall (as soon as practicable) supply the Service Provider with the following information:

- 4.2.1 the name and registered address of the Proposed Substitute;
- 4.2.2 the names of the shareholders in the Proposed Substitute and the share capital owned by each of them;
- 4.2.3 the names of the directors and the secretary of the Proposed Substitute;
- 4.2.4 details of the means by which it is proposed to finance the Proposed Substitute (including the extent to which such finance is committed and any conditions precedent as to its availability for drawing); and
- 4.2.5 the resources (including contractual arrangements) which are to be available to the Proposed Substitute to enable it to perform its obligations under the Service Contract.

4.3 **Grant of Consent**

The Service Provider may withhold or delay consent to a novation only where the Proposed Substitute is not the Board and the Board has failed to show to the Service Provider's satisfaction (acting reasonably) that:

- 4.3.1 the Proposed Substitute has the legal capacity, power and authorisation to become a party to and perform the obligations of Project Co under the Service Contract; and
- 4.3.2 the technical competence and financial standing of and the technical and financial resources available to the Proposed Substitute are sufficient to perform the obligations of Project Co under the Service Contract.

The Service Provider shall notify the Board in writing, within five (5) Business Days of the later of receipt of a Proposed Novation Notice and all information required under Clause 4.2, as to whether or not it has decided to grant such consent (together with an explanation of its reasons if it has decided to withhold its consent) and, at the same time, provide a copy of the same to the Senior Funder.

4.4 **Consent Withheld**

If, in accordance with Clause 4.3, the Service Provider withholds its consent to a Proposed Novation Notice, the Board shall be entitled to give one or more subsequent Proposed Novation Notices, pursuant to the provisions of Clause 4.1, containing changed particulars relating to the same Proposed Substitute or particulars relating to another Proposed Substitute which (where the replacement Proposed Substitute is not the Board) the Board has good cause to believe would fulfil the requirements of Clauses 4.3.1 and 4.3.2, provided that only one Proposed Novation Notice may be outstanding at any one time, and provided further that:

- 4.4.1 where a Step-in-Notice has not been issued, any revised Proposed Novation Date shall be a date falling no later than the date specified in Clause 4.1.1 or 4.1.2 as appropriate; and
- 4.4.2 if the Proposed Novation Notice was served during the Step-in Period, any revised Proposed Novation Date shall be a date falling not later than twenty-eight (28) Business Days after the date of the revised Proposed Novation Notice.

4.5 **Implementation of Novation**

4.5.1 If the Service Provider consents to a novation pursuant to a Proposed Novation Notice (whether automatically or otherwise), then on the Proposed Novation Date and without prejudice to Clause 5.1:

- (a) following such notification and in the absence of any prior release in accordance with Clause 3.2.5, the Senior Funder shall, on or before the Proposed Novation Date, take any action which is necessary unconditionally and irrevocably to release the Service Contract and the Parent Company Guarantee from the security constituted by the Security Documents; and
- (b) upon release of the Parent Company Guarantee in accordance with Clause 4.5.1(a), Project Co shall immediately assign all its rights and powers under the Parent Company Guarantee to the Board in accordance with Clause 7 of the same;

and on the Proposed Novation Date and without prejudice to Clause 5.1:

4.5.2

- (a) subject to the prior performance by the Senior Funder and Project Co of their respective obligations under Clause 4.5.1(a) and 4.5.1(b) the Proposed Substitute shall become a party to the Service Contract in place of Project Co

and, thereafter, shall be treated as if it was and had always been named as a party to the Service Contract in place of Project Co; and

- (b) the Service Provider, Project Co and the Proposed Substitute shall enter into a novation agreement (the "Novation Agreement") and any other requisite agreements, in form and substance satisfactory to the Service Provider (acting reasonably), pursuant to which:
 - (i) the Proposed Substitute shall be granted all of the rights of Project Co under the Service Contract (including those arising prior to the end of the Step-in Period);
 - (ii) subject to the Service Provider giving to the Proposed Substitute within three (3) Business Days of receipt of the Proposed Novation Notice such notice as is referred to in Clause 3.2.1 and to the provisions of Clauses 3.2.2 and 3.2.3, *mutatis mutandis*, the Proposed Substitute shall assume all of the obligations and liabilities of Project Co under the Service Contract (including those arising prior to the end of any Step-in Period and those arising during the period of the Proposed Novation Notice);

provided that the Service Provider will not be in breach of any of its obligations under this Agreement if the Proposed Substitute does not enter into one or other of such agreements.

4.5.3 On and after the Novation Effective Date:

- (a) the Service Provider shall owe its obligations under the Service Contract (whether arising before, on or after such date) to the Proposed Substitute and the receipt, acknowledgement or acquiescence of the Proposed Substitute shall be a good discharge; and
- (b) if the Board shall have entered into a Step-in Undertaking, the Board will be released from the Step-in Undertaking, provided that:
 - (i) all obligations of the Board under the Step-in Undertaking which have accrued up to the Novation Effective Date and are identifiable as at that date shall have been fully and unconditionally discharged; and
 - (ii) the Board has performed and discharged in full or procured the performance and discharge in full of the obligations of Project Co under the Service Contract in relation to the maintenance of records and the provision of reports during the Step-in Period up to the Novation Effective Date so as to permit the Service Provider to monitor the performance of Project Co's other obligations under the Service Contract.

4.5.4 The Board and the Service Provider shall use all reasonable endeavours to agree and the Board shall use reasonable endeavours to procure that the Proposed Substitute agrees any amendments to the Service Contract necessary to reflect Clause 3.2.2 and the fact that the Project Agreement may have terminated at the time of the Novation Effective Date.

4.6 Termination after Novation

After the Novation Effective Date the Service Provider shall only be entitled to exercise its rights of termination under the Service Contract:

- 4.6.1 in respect of any Event of Project Co Default arising after that date in accordance with the Service Contract; or

- 4.6.2 if the Proposed Substitute does not discharge the obligations and liabilities assumed by it under Clause 4.5.2(b) which relate to matters arising prior to the end of the Step-in Period within fifteen (15) Business Days following the Novation Effective Date.

4.7 **Extension of Step-In Period**

As at the date of the first anniversary of the Step-in Date, if the Step-in Period has not previously ended, and:

- 4.7.1 the Board is in the course of conducting discussions in good faith with a Proposed Substitute (the novation to whom has been approved by the Service Provider whether automatically or otherwise in accordance with Clause 4.3), the Step-in Period shall be extended and shall continue until such date as is proposed by the Board and agreed by the Service Provider; or
- 4.7.2 a contract has been entered into between the Board and a Proposed Substitute (which has been approved by the Service Provider and in accordance with Clause 4.3) as at such date,
- 4.7.3 the Step-in Period shall be extended and shall continue until the date such contract comes into force, provided that such date shall not be later than thirty (30) Business Days after the last date of execution of such contract.

5 **Rights and Obligations under the Service Contract**

5.1 **Rights of Termination**

If:

- 5.1.1 no Step-in Notice or Proposed Novation Notice is given before a Termination Notice expires or within fifteen (15) Business Days after termination of the Project Agreement by the Board; or
- 5.1.2 a Step-in Undertaking is not issued on the Proposed Step-in Date; or
- 5.1.3 the Step-in Notice is withdrawn or, pursuant to Clause 3.2.7, deemed to have been withdrawn; or
- 5.1.4 the Step-in Period ends before the occurrence of the Novation Effective Date; or
- 5.1.5 in the absence of a Step-in Undertaking, the Service Provider withholds its consent to a novation pursuant to a Proposed Novation Notice, in accordance with Clause 4.3, and does not subsequently grant consent to a novation in accordance with Clause 4.4 on or before the Proposed Novation Date; or
- 5.1.6 in the absence of a Step-in Undertaking, the obligations of the Proposed Substitute set out in Clause 4.5 are not performed on the Proposed Novation Date; or
- 5.1.7 the Service Provider is entitled to terminate the Service Contract under Clause 3.3 or 4.6; or
- 5.1.8 the Board exercises its right to Step-out under Clause 3.4.1;

the Service Provider shall be entitled to:

- 5.1.9 exercise all of its rights under the Service Contract and act upon any and all grounds for termination available to it in relation to the Service Contract whenever occurring; and/or
- 5.1.10 pursue any and all claims and exercise any and all rights and remedies against Project Co.

5.2 **Project Co's Obligations to Continue**

Until completion of a novation pursuant to Clause 4.5 (unless the terms of such novation expressly preserve an obligation or liability of Project Co), Project Co shall continue to be liable for all its obligations and liabilities, whenever occurring, under or arising from the Service Contract notwithstanding:

- 5.2.1 the service of a Step-in Notice or the issue of a Step-in Undertaking or the expiry of the Step-in Period or the release of a Step-in Undertaking; or
- 5.2.2 the service of a Proposed Novation Notice; or
- 5.2.3 any other provision of this Agreement.

6 **Revocation of Notices**

A Termination Notice and a Step-in Notice may each be revoked (in writing to the recipient) by the Party giving them before the expiry of their respective notice periods. Upon any such revocation, the rights and obligations of the Parties shall be construed as if the relevant notice had not been given.

7 **Assignment**

7.1 **Binding on Successors and Assignees**

This Agreement shall be binding on and shall enure to the benefit of the Parties and their respective successors and permitted assignees. In the case of the Board, its successors shall include any person to which the Scottish Ministers, in exercising their statutory powers to transfer property, rights and liabilities of the Board upon the Board ceasing to exist, transfers the rights and obligations of the Board under this Agreement.

7.2 **Restriction on Assignment**

No Party shall assign or transfer any part of its respective rights or obligations under this Agreement without the prior consent of the others (such consent not to be unreasonably withheld or delayed), provided that:

- 7.2.1 the Senior Funder may assign or transfer its rights and obligations to a successor trustee of the Funders under the Funding Agreements without the consent of any other Party and this Clause 7.2 shall not prevent any Funder assigning or transferring its rights under the Funding Agreements and the Security Documents in accordance with the terms of the Funding Agreements; and
- 7.2.2 Other than in respect of any of the Security Documents by the Senior Funder, ProjectCo shall not assign this Agreement to any party other than a party to whom ProjectCo's interest in the Project Agreement is assigned in accordance with the terms of the Project Agreement;
- 7.2.3 the Board shall be entitled, without the consent of any other Party, to transfer all its rights and obligations hereunder, to any person to whom it assigns or otherwise disposes of the benefit of the Project Agreement in accordance with Clause 50 (*Assignment, Sub-Contracting and Changes in Control*) of the Project Agreement and, otherwise, with Project Co's and the Service Provider's consent (not to be unreasonably withheld or delayed);
- 7.2.4 nothing in this sub-clause shall restrict the rights of the Secretary of State to effect a statutory transfer;
- 7.2.5 the Service Provider shall assign this Agreement to any party to whom it assigns the Service Contract (in accordance with the terms of that agreement).

8 **Confidentiality**

- 8.1 The parties shall be bound to observe, mutatis mutandis, the terms of Clause 52 of the Service Contract with respect to any information or document referred to in Clause 52 of the Service Contract which shall come into its possession pursuant to this Agreement.
- 8.2 The Service Provider agrees that the Board shall be entitled to disclose the terms of this Agreement to the Scottish Executive Health Department and HM Treasury and that the Board shall be free to use and disclose such information on such terms and in such manner as the Department of Health and/or HM Treasury see fit.

9 Notices

Any notice given under this Agreement shall be deemed to be duly given if it is delivered by hand or sent by registered post or recorded delivery to the party named therein at the address of such party shown in this Agreement or such other address as such party may by notice in writing nominate for the purpose of Service and if sent by recorded delivery shall be deemed (subject to proof to the contrary) to have been received forty eight (48) hours after being posted.

10 Payments and Taxes

10.1 Payments

All payments under this Agreement to any Party shall be made in pounds sterling by electronic transfer of funds for value on the day in question to the bank account of the recipient (located in the United Kingdom) specified to the other Parties from time to time.

10.2 VAT

10.2.1 All amounts stated to be payable by any Party under this Agreement shall be exclusive of any VAT properly payable in respect of the supplies to which they relate.

10.2.2 Each Party shall pay any VAT properly payable hereunder in respect of any supply made to it under this Agreement, provided that it shall first have received a valid tax invoice in respect of that supply which complies with the requirements of Part III VAT Regulations 1995.

10.3 Deductions from Payments

All sums payable by a Party to any other Party under this Agreement shall be paid free and clear of all deductions or withholdings whatsoever in respect of taxation, save as may be required by Law.

11 Default Interest

Each Party shall be entitled, without prejudice to any other right or remedy, to receive interest on any payment not made on the due date calculated from day to day at a rate per annum equal to the Default Interest Rate from the day after the date on which payment was due up to and including the date of payment.

12 Authority

12.1 Senior Funder's Warranty and Undertaking

The Senior Funder represents and warrants to and undertakes to each of the Board, the Service Provider and Project Co that the Senior Funder is duly authorised by each of the Funders to assume the obligations expressed to be assumed by them under this Agreement and to undertake on behalf of each Funder in the terms of this Agreement so as to bind each Funder as if it were a Party.

12.2 **Board**

The Board shall not be obliged to make any enquiry as to the authority of the Senior Funder in doing any act or entering into any document or making any agreement under or in connection with this Agreement.

13 **Expiry**

The rights of the Senior Funder under this Agreement shall be extinguished upon the repayment by Project Co of all sums due and owing to the Funders by Project Co under the Funding Agreements or where the Service Contract is terminated.

14 **Aggregate liability**

Notwithstanding any other provision of this Agreement, the Service Provider's aggregate liability from time to time under this Agreement and the Service Contract shall not at any time exceed its maximum liability as stated in the Service Contract (as amended or varied).

15 **Third Party Rights**

It is agreed that this Agreement is not intended to, and does not, give to any person who is not a party to this Agreement any rights to enforce any provisions contained herein except for any person to whom the benefit of this Agreement is assigned or transferred in accordance with Clause 7.

16 **Agency**

16.1 **No Delegation**

No provision of this Agreement shall be construed as a delegation by the Board of any of its statutory authority to any other Party.

16.2 **No Agency**

Save as otherwise provided in this Agreement, no other Party shall be or be deemed to be an agent of the other Parties nor shall any party hold itself out as having authority or power to bind the other parties in any way.

16.3 **Independent Contractor**

The Parties shall, at all times, be independent contractors and nothing in this Agreement shall be construed as creating any partnership between the Parties or any relationship of employer and employee between the Parties.

17 **Whole Agreement**

17.1 This Agreement (when read together with the Project Agreement, the Service Contract, the Parent Company Guarantee and the Funders' Direct Agreement) contains or expressly refers to the entire agreement between the Parties with respect to the specific subject matter of this Agreement and expressly excludes any warranty, condition or other undertaking implied at Law or by custom and supersedes all previous agreements and understandings between the Parties with respect thereto and each of the Parties acknowledges and confirms that it does not enter into this Agreement in reliance on any representation, warranty or other undertaking not fully reflected in the terms of this Agreement.

17.2 Nothing in this Agreement is intended to or shall operate so as to exclude or limit any liability for fraud or fraudulent misrepresentation.

18 **Waiver**

Failure by any Party at any time to enforce any provision of this Agreement or to require performance by the other Parties of any provision of this Agreement shall not be construed as a

waiver of such provision and shall not affect the validity of this Agreement or any part of it or the right of the relevant Party to enforce any provision in accordance with its terms.

19 Execution in Duplicate

Not used.

20 Severability

If any condition, Clause or provision of this Agreement not being of a fundamental nature, is held to be illegal or unenforceable, the validity or enforceability of the remainder of this Agreement shall not be affected thereby.

21 Costs and Expenses

Each Party shall be responsible for paying its own costs and expenses incurred in connection with the negotiation, preparation and execution of this Agreement.

22 Amendments

No amendment to this Agreement shall be binding unless in writing and signed by the duly authorised representatives of the Parties.

23 Governing Law and Jurisdiction

23.1 Law

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

23.2 **Jurisdiction**

The Parties each submit to the jurisdiction of the Scottish Courts as regards any claim or matter arising in relation to this Agreement.

IN WITNESS WHEREOF these presents consisting of this and the 15 preceding pages are executed as follows:-

Subscribed for and on behalf of **Forth Valley Health Board**:

.....
Signature of Authorised Signatory Full name of Authorised Signatory
Date when signed:
Town where signed:

In the presence of this witness:
Signature of witness
Full name of witness:
Address of witness:

Subscribed for and on behalf of **Co-operative Bank plc**

.....
Signature of Power of Attorney Full name of Power of Attorney
Date when signed:
Town where signed:

in the presence of this witness:
Signature of witness
Full name of witness:
Address of witness:

Subscribed for and on behalf of **Robertson Facilities Management Limited**

.....
Signature of Director Full name of Director
Date when signed:

Town where signed:
In the presence of this witness:
Signature of witness
Full name of witness:

Address of witness:
Subscribed for and on behalf of **Robertson Health (Clackmannanshire) Limited:**

.....
Signature of Director Full name of Director
Date when signed:

Town where signed:
In the presence of this witness:
Signature of witness
Full name of witness:
Address of witness:

(1) FORTH VALLEY HEALTH BOARD

and

(2) THE CO-OPERATIVE BANK P.L.C

and

(3) ROBERTSON CONSTRUCTION CENTRAL LIMITED,

and

(4) ROBERTSON HEALTH (CLACKMANNANSHIRE) LIMITED

CONTRACTOR'S COLLATERAL AGREEMENT

CONTRACTOR'S COLLATERAL AGREEMENT

BETWEEN:

- (1) **FORTH VALLEY HEALTH BOARD** of Carseview House, Castle Business Park, Stirling, FK9 4SW (the "Board ");
- (2) **THE CO-OPERATIVE BANK P.L.C**, acting through its office at PO Box 101, 1 Balloon Street, Manchester M60 4EP (the "Senior Funder");
- (3) **ROBERTSON CONSTRUCTION CENTRAL LIMITED**, incorporated under the Companies Acts (Company No. SC 249933) and having its Registered Office at 10 Perimeter Road, Pinefield Industrial Estate, Elgin, Moray, IV30 6AW (the "Contractor");.and
- (4) **ROBERTSON HEALTH (CLACKMANNANSHIRE) LIMITED**, a company incorporated under the Companies Acts with registered number SC312130 and having its registered office at 10 Perimeter Road, Pinefield Industrial Estate, Elgin, Moray, IV30 6AE ("Project Co").

WHEREAS:

- (A) The Board and Project Co have agreed the terms on which Project Co will design, develop and construct and provide certain services in connection with the development of new Clackmannanshire community health facilities (the "Development") at the Site and, accordingly, have entered into the Project Agreement and the Project Documents.
- (B) The Contractor and Project Co have entered into an agreement of even date herewith relating to the Works (as defined in the Project Agreement) by the Contractor to enable Project Co to discharge its obligations to the Board regarding the Works under the Project Agreement and the Project Documents (the " Construction Contract").
- (C) This Contractor's Collateral Agreement (the "Agreement") is one of the Contractors' Collateral Agreements contemplated by the Project Agreement.

NOW IT IS HEREBY AGREED as follows:

1 Definitions and Interpretation

1.1 Definitions

In this Agreement, the following terms shall, unless the context otherwise requires, have the following meanings:

"Ancillary Documents"	has the meaning given in the Project Agreement
"Business Day"	has the meaning given in the Project Agreement
"Construction Contract"	has the meaning given in the Project Agreement
"Event of Project Co Default"	has the meaning given in the Construction Contract
"Funders' Direct Agreement"	is the agreement of even date herewith between, amongst others, Project Co, the Service Provider and the Senior Funder
"Novation Agreement"	has the meaning given in Clause 4.5.2(b) (<i>Project Documents</i>)
"Novation Effective Date"	means the date of performance of the obligations set out in Clause 4.5.2 (<i>Project Documents</i>)
"Parent Company Guarantee"	has the meaning given in the Construction Contract

"Project Agreement"	means the Project Agreement of even date herewith between (1) the Board and (2) Project Co
"Proposed Novation Date"	has the meaning given in Clause 4.1 (<i>Project Documents</i>)
"Proposed Novation Notice"	has the meaning given in Clause 4.1 (<i>Project Documents</i>)
"Proposed Step-in Date"	has the meaning given in Clause 3.1 (<i>Commencement and Duration</i>)
"Proposed Substitute"	has the meaning given in Clause 4.1 (<i>Project Documents</i>)
"Security Documents"	has the meaning given in the Funders' Direct Agreement
"Step-in Date"	means the date of issue of the Step-in Undertaking
"Step-in Notice"	has the meaning given in Clause 3.1 (<i>Commencement and Duration</i>)
"Step-in Period"	means the period commencing on the Step-in Date and ending on the earliest of: <ul style="list-style-type: none"> (e) the date of the first anniversary of the Step-in Date (but subject always to Clause 4.7 (<i>Project Documents</i>)); (f) the Step-out Date; (g) the Novation Effective Date; and (h) termination of the Construction Contract under Clause 3.3 (<i>Commencement and Duration</i>)
"Step-in Undertaking"	has the meaning given in Clause 3.2.4 (<i>Commencement and Duration</i>)
"Step-out Date"	has the meaning given in Clause 3.4.1 (<i>Commencement and Duration</i>)
"Termination Notice"	has the meaning given in Clause 2.4 (<i>Execution and Delivery of Documents</i>)

1.2 Interpretation

Save to the extent that the context or the express provisions of this Agreement otherwise require:

- 1.2.1 headings and sub-headings are for ease of reference only and shall not be taken into consideration in the interpretation or construction of this Agreement;
- 1.2.2 all references to Clauses are references to Clauses of this Agreement;
- 1.2.3 all references to agreements, documents or other instruments include (subject to all relevant approvals) a reference to that agreement, document or instrument as amended, supplemented, substituted, novated or assigned from time to time;
- 1.2.4 all references to any statute or statutory provision shall include references to any statute or statutory provision which amends, extends, consolidates or replaces the same or which

has been amended, extended, consolidated or replaced by the same and shall include any orders, regulations, codes of practice, instruments or other subordinate legislation made under the relevant statute or statutory provision;

- 1.2.5 any reference to time of day shall be a reference to Edinburgh time;
- 1.2.6 the words "herein", "hereto" and "hereunder" refer to this Agreement as a whole and not to the particular Clause in which such word may be used;
- 1.2.7 words importing the singular include the plural and vice versa;
- 1.2.8 words importing a particular gender include all genders;
- 1.2.9 "person" includes any individual, partnership, firm, trust, body corporate, government, governmental body, authority, agency, unincorporated body of persons or association;
- 1.2.10 any reference to a public organisation shall be deemed to include a reference to any successor to such public organisation or any organisation or entity which has taken over the functions or responsibilities of such public organisation;
- 1.2.11 references to "Party" means a party to this Agreement and references to "Parties" shall be construed accordingly;
- 1.2.12 all monetary amounts are expressed in pounds sterling;
- 1.2.13 references to the word "includes" or "including" are to be construed without limitation;
- 1.2.14 the obligations of any Party under this Agreement are to be performed at that Party's own cost and expense;
- 1.2.15 terms used in this Agreement that are defined in the Project Agreement or the Ancillary Documents shall have the meanings given to them in the Project Agreement or the Ancillary Documents, as appropriate.

2 Termination Notice and Board Termination

2.1 Contractor's Warranties and Undertakings

The Contractor warrants and undertakes to the Board that it has complied with and fulfilled and shall continue to comply with and fulfil its duties and obligations arising under or by virtue of the Construction Contract, provided that the Board shall only be entitled to make a claim against the Contractor under this Clause 2.1 if the Project Agreement has terminated and shall not be entitled to do so during the Step-in Period or after the Construction Contract has been novated under Clause 4.

2.2 Liability of Contractor

Any liability arising from any claim for breach of the warranty under or pursuant to Clause 2.1 shall be in addition to and without prejudice to any other present or future liability of the Contractor to the Board (including, without prejudice to the generality of the foregoing, any liability in negligence) and shall not be released, diminished or in any other way be affected by any independent enquiry into any relevant matter which may be made or carried out by or on behalf of the Board by any person nor by any action or omission of any person whether or not such action or omission might give rise to an independent liability of such person to the Board provided always that the Contractor shall owe no greater duties or obligations to the Board under this Agreement than it owes or would have owed to Project Co under the Construction Contract.

2.3 Termination Notice

- 2.3.1 The Contractor undertakes not to terminate the Construction Contract on account of an Event of Project Co Default without first giving the Board not less than fifteen (15) Business Days' prior written notice specifying the grounds for that termination. Subject to Clause 2.4.2 below any such notice, other than one given in circumstances where there is no default under the Construction Contract by Project Co or the Contractor, shall be a "Termination Notice".
- 2.3.2 Where the Contractor's right to terminate is subject to the terms of the Funders' Direct Agreement then the Contractor shall notify the Board of the same as soon as reasonably practicable upon becoming aware of the provisions of the Funders' Direct Agreement applying. Thereafter as soon as the Contractor becomes entitled to terminate the Construction Contract free from the constraints contained in the Funders' Direct Agreement, whether upon the expiry of the Step-in Period (as such term is defined in the Funders' Direct Agreement) or otherwise, then the Contractor undertakes to the Board not to terminate the Construction Contract on account of an Event of Project Co Default (whether occurring before or after the Contractor's right to terminate the Construction Contract was free from the constraints of the Funders' Direct Agreement) without first giving the Board not less than fifteen (15) Business Days' prior notice specifying the grounds for that termination and noting that the Contractor's right of termination is not subject to the Funders' Direct Agreement. Any such notice, other than one given in circumstances where there is no default under the Construction Contract by Project Co or the Contractor, shall for the purposes of this Agreement also be a Termination Notice and the provisions of this Agreement shall apply accordingly.
- 2.3.3 Notwithstanding any provision of the Construction Contract to the contrary, on termination of the Project Agreement by the Board, the Parties agree that the Construction Contract shall not come to an end except in accordance with the terms of this Agreement.
- 2.3.4 The Board acknowledges that it shall not be entitled to exercise its rights under Clauses 3 (*Step-in and Step-out*) and 4 (*Novation*):
- (a) until the Senior Funder has released its security over the Construction Contract; or
 - (b) until the Senior Funder has confirmed to the Board in writing that it has no further claims or interest in the claims of Project Co or any Suitable Substitute Contractor (as such term is defined in the Funders' Direct Agreement) against the Contractor whether pursuant to the Security Documents, the Construction Contract or the enforcement of any rights under the Security Documents or the Funders' Direct Agreement.

3 Step-In and Step-Out

3.1 Step-In Notice

- 3.1.1 If the Board has terminated the Project Agreement in accordance with the terms of the Project Agreement or if the Board has received a Termination Notice, then subject to the provisions of this Agreement, the Board may give written notice to the Contractor (a "Step-in Notice") of the intention of the Board to issue a Step-in Undertaking on a specified date (the "Proposed Step-in Date") provided that such Proposed Step-in Date shall be:
- (a) no later than five (5) Business Days after termination of the Project Agreement where this has been terminated by the Board; and
 - (b) no earlier than the date falling five (5) Business Days prior to the date of expiry of the Termination Notice and no later than the date of expiry of the Termination Notice where a Termination Notice has been given by the Contractor. The Board shall provide a copy of any Step-in Notice to the Senior Funder at the same time as the Step-in Notice is given to the Contractor.

- (c) Unless the Contractor otherwise consents, only one Step-in Notice may be given during the period of this Agreement. Subject to Clause 5.1 below, the Contractor shall not be entitled to terminate the Construction Contract until after the Proposed Step-in Date.

3.2 Notice Of Obligations and Step-In Undertaking

3.2.1 Within three (3) Business Days of receipt of any Step-in Notice, the Contractor shall give written notice to the Board of any sums of which the Contractor has actual knowledge which are due and payable but unpaid by Project Co and of any other material obligations or liabilities, of which the Contractor has actual knowledge, which should have been performed or discharged by Project Co under the Construction Contract, in each case, as at the date of the Step-in Notice.

3.2.2 The Contractor shall inform the Board in writing as soon as reasonably practicable of:

- (a) any change in such sums, obligations or liabilities referred to in Clause 3.2.1; and
- (b) any further sums, obligations or liabilities thereafter falling due and payable but unpaid or falling due for performance or discharge and unperformed or undischarged (as the case may be);

in each case of which the Contractor has actual knowledge, before the Step-in Date.

3.2.3 The Contractor shall give the Board the information referred to in Clauses 3.2.1 and 3.2.2 in good faith and may not give any further notifications pursuant to Clause 3.2.2 less than two (2) Business Days prior to the Proposed Step-in Date. The Board shall not be required to assume any liability under a Step-in Undertaking for any outstanding obligations and/or liabilities of Project Co to the Contractor which are not notified to the Board pursuant to Clauses 3.2.1 or 3.2.2.

3.2.4 Not later than the Proposed Step-in Date the Board shall decide if it is prepared to issue a Step-in Undertaking. If it does so decide, the Board shall promptly give the Contractor written notification of such decision and, at the same time, provide a copy of such notification to the Senior Funder. Subject to the prior performance by the Senior Funder of its obligations under Clause 3.2.5, the Board shall deliver to the Contractor on the Proposed Step-in Date, a written undertaking in form and substance agreed with the Contractor (both the Board and the Contractor acting reasonably) (the "Step-in Undertaking"), incorporating a clause in terms similar to Clause 11 (but only to the extent that there will not be double counting of default interest accruing under the Construction Contract and this Agreement), and undertaking to the Contractor:

- (a) to pay or procure the payment to the Contractor, within fifteen (15) Business Days of demand by the Contractor, of any sum due and payable but unpaid by Project Co to the Contractor under the Construction Contract before the Step-in Date and which has been notified by the Contractor to the Board in accordance with Clause 3.2.1 or 3.2.2;
- (b) to perform or discharge or procure the performance or discharge of any unperformed or undischarged obligations of Project Co under the Construction Contract which shall have fallen due for performance or discharge before the Step-in Date and which have been notified by the Contractor to the Board in accordance with Clause 3.2.1 or 3.2.2 within such period as the Contractor may reasonably require;
- (c) to pay or procure the payment of any sum due and payable by Project Co under the Construction Contract which arises during the Step-In Period or arises as a result of any act or omission occurring during the Step-in Period [which shall arise from any act or omission occurring after the Step-in Date] (but subject to Clauses 3.4 and 4.5.3(b)) but not, to avoid doubt, any sum due in respect of any Services provided before the Step-in Date; and

- (d) to perform or discharge or procure the performance or discharge of any obligations of Project Co under the Construction Contract which arises during the Step-In Period or arises, as a result of any act or omission occurring during the Step-in Period which shall arise from any act or omission occurring after the Step-in Date (but subject to Clauses 3.4 and 4.5.3(b)) but not, to avoid doubt, to perform or discharge or to procure the performance or discharge of any obligations in respect of any Services provided before the Step-in Date.
- 3.2.5 Following notification of the Board's decision pursuant to Clause 3.2.4, the Senior Funder shall, on or before the Proposed Step-in Date, take any action which is necessary unconditionally and irrevocably to release the Construction Contract and the Parent Company Guarantee from the security constituted by the Security Documents.
- 3.2.6 Upon release of the Parent Company Guarantee in accordance with Clause 3.2.5, Project Co shall immediately assign all its rights and powers under the Parent Company Guarantee to the Board in accordance with Clause 7 of the same.
- 3.2.7 If the Board shall not have issued the Step-in Undertaking on or before the Proposed Step-in Date the Step-in Notice shall be deemed to have been withdrawn and the rights and obligations of the Parties shall be construed as if the Step-in Notice had not been given.

3.3 **Restriction of Right of Termination**

During or in respect of the Step-in Period, the Contractor confirms to the Board that it shall continue to observe and perform its duties and obligations under the Construction Contract and shall, without prejudice to Clause 5.1, only be entitled to exercise its rights of termination under the Construction Contract:

- 3.3.1 by reference to an Event of Project Co Default arising during the Step-in Period provided that no event of default by Project Co under the Project Agreement (whether resulting in termination of the Project Agreement or otherwise, and notwithstanding that it has occurred during the Step-in Period) shall entitle the Contractor to exercise such rights of termination during the Step-in Period; or
- 3.3.2 if the Board fails to pay when due any amount owed to the Contractor or fails to perform or discharge when falling due for performance or discharge any obligation under the Step-in Undertaking or fails to procure such payment or performance or discharge; or
- 3.3.3 if such rights of termination arise in circumstances where there is no default under the Construction Contract by the Board or the Contractor.

3.4 **Step-Out**

- 3.4.1 the Board may, at any time, give the Contractor at least thirty (30) days' prior written notice to terminate the Step-in Period on a date specified in the notice (the "Step-out Date");
- 3.4.2 the Board shall give the Contractor at least sixty (60) days' prior written notice that (subject to Clause 4.4.2) the Step-in Period will end due to the occurrence (subject to Clause 4.7) of the first anniversary of the Step-in Date;

provided that

- (a) the Board has performed and discharged in full or procured the performance and discharge in full of any obligations of Project Co under the Construction Contract in relation to the maintenance of records and the provision of reports during the Step-in Period so as to permit the Contractor to monitor the performance of Project Co's other obligations under the Construction Contract; and

- (b) all liability under the Step-in Undertaking pursuant to any claims made up to the date specified in either Clause 3.4.1 or Clause 3.4.2 (as the case may be) shall have been fully and unconditionally discharged,

the Board shall be released from the Step-in Undertaking on the expiry of the Step-in Period in accordance with Clauses 3.4.1 and 3.4.2. Such release shall not affect the continuation of Project Co's obligations towards the Contractor under the Construction Contract.

3.5 Senior Funder

The Senior Funder is a party to this Agreement solely for the purposes of taking the benefit of its rights under Clause 2.4.4 and Clause 3 and, subject to Clauses 3.2.5, 4.5.1, 7.2.1 and 12.1 shall have no rights or obligations or liabilities hereunder.

4 Novation

4.1 Proposed Substitute

At any time that the Board is entitled to give a Step-in Notice pursuant to Clause 3.1 or at any time during the Step-in Period the Board may give notice (a "Proposed Novation Notice") to the Contractor that it wishes itself or another person (a "Proposed Substitute") to assume, by way of sale, transfer or other disposal, the rights and obligations of Project Co under the Construction Contract and specifying a date (the "Proposed Novation Date"):

- 4.1.1 falling not later than fifteen (15) Business Days after termination of the Project Agreement where this has been terminated by the Board;
- 4.1.2 falling not later than the expiry of the Termination Notice where a Proposed Novation Notice is given by the Board at a time when it is entitled to give a Step-in Notice pursuant to Clause 3.1; and
- 4.1.3 falling not later than twenty-eight (28) Business Days after the date of the Proposed Novation Notice, where a Proposed Novation Notice is given during a Step-in Period,

The Board shall provide a copy of any Proposed Novation Notice to the Senior Funder at the same time as the Proposed Novation Notice is given to the Contractor. Save as provided in Clause 4.4, only one Proposed Novation Notice may be given during the period of this Agreement. Without prejudice to Clauses 3.3 and 5.1, the Contractor shall not be entitled to terminate the Construction Contract during the notice period specified in a Proposed Novation Notice.

4.2 Information for Consent to Novation

If the Proposed Novation Notice specifies the Board as the Proposed Substitute, the Contractor's consent to the novation shall be deemed to have been given automatically. Where the Proposed Substitute is not the Board, a novation in accordance with a Proposed Novation Notice shall only be effective if the Contractor consents to that novation in writing in accordance with Clause 4.3 and the Board shall (as soon as practicable) supply the Contractor with the following information:

- 4.2.1 the name and registered address of the Proposed Substitute;
- 4.2.2 the names of the shareholders in the Proposed Substitute and the share capital owned by each of them;
- 4.2.3 the names of the directors and the secretary of the Proposed Substitute;
- 4.2.4 details of the means by which it is proposed to finance the Proposed Substitute (including the extent to which such finance is committed and any conditions precedent as to its availability for drawing); and
- 4.2.5 the resources (including contractual arrangements) which are to be available to the Proposed Substitute to enable it to perform its obligations under the Construction Contract.

4.3 Grant of Consent

The Contractor may withhold or delay consent to a novation only where the Proposed Substitute is not the Board and the Board has failed to show to the Contractor's satisfaction (acting reasonably) that:

- 4.3.1 the Proposed Substitute has the legal capacity, power and authorisation to become a party to and perform the obligations of Project Co under the Construction Contract; and
- 4.3.2 the technical competence and financial standing of and the technical and financial resources available to the Proposed Substitute are sufficient to perform the obligations of Project Co under the Construction Contract.

The Contractor shall notify the Board in writing, within five (5) Business Days of the later of receipt of a Proposed Novation Notice and all information required under Clause 4.2, as to whether or not it has decided to grant such consent (together with an explanation of its reasons if it has decided to withhold its consent) and, at the same time, provide a copy of the same to the Senior Funder.

4.4 Consent Withheld

If, in accordance with Clause 4.3, the Contractor withholds its consent to a Proposed Novation Notice, the Board shall be entitled to give one or more subsequent Proposed Novation Notices, pursuant to the provisions of Clause 4.1, containing changed particulars relating to the same Proposed Substitute or particulars relating to another Proposed Substitute which (where the replacement Proposed Substitute is not the Board) the Board has good cause to believe would fulfil the requirements of Clauses 4.3.1 and 4.3.2, provided that only one Proposed Novation Notice may be outstanding at any one time, and provided further that:

- 4.4.1 where a Step-in-Notice has not been issued, any revised Proposed Novation Date shall be a date falling no later than the date specified in Clause 4.1.1 or 4.1.2 as appropriate; and
- 4.4.2 if the Proposed Novation Notice was served during the Step-in Period, any revised Proposed Novation Date shall be a date falling not later than twenty-eight (28) Business Days after the date of the revised Proposed Novation Notice.

4.5 Implementation of Novation

4.5.1 If the Contractor consents to a novation pursuant to a Proposed Novation Notice (whether automatically or otherwise), then on the Proposed Novation Date and without prejudice to Clause 5.1:

- (a) following such notification and in the absence of any prior release in accordance with Clause 3.2.5, the Senior Funder shall, on or before the Proposed Novation Date, take any action which is necessary unconditionally and irrevocably to release the Construction Contract and the Parent Company Guarantee from the security constituted by the Security Documents; and
- (b) upon release of the Parent Company Guarantee in accordance with Clause 4.5.1(a), Project Co shall immediately assign all its rights and powers under the Parent Company Guarantee to the Board in accordance with Clause 7 of the same;

and on the Proposed Novation Date and without prejudice to Clause 5.1:

4.5.2

- (a) subject to the prior performance by the Senior Funder and Project Co of their respective obligations under Clause 4.5.1(a) and 4.5.1(b) the Proposed Substitute shall become a party to the Construction Contract in place of Project Co and, thereafter, shall be treated as if it was and had always been named as a party to the Construction Contract in place of Project Co; and

- (b) the Contractor, Project Co and the Proposed Substitute shall enter into a novation agreement (the "Novation Agreement") and any other requisite agreements, in form and substance satisfactory to the Contractor (acting reasonably), pursuant to which:
 - (i) the Proposed Substitute shall be granted all of the rights of Project Co under the Construction Contract (including those arising prior to the end of the Step-in Period);
 - (ii) subject to the Contractor giving to the Proposed Substitute within [three (3)] Business Days of receipt of the Proposed Novation Notice such notice as is referred to in Clause 3.2.1 and to the provisions of Clauses 3.2.2 and 3.2.3, *mutatis mutandis*, the Proposed Substitute shall assume all of the obligations and liabilities of Project Co under the Construction Contract (including those arising prior to the end of any Step-in Period and those arising during the period of the Proposed Novation Notice);

provided that the Contractor will not be in breach of any of its obligations under this Agreement if the Proposed Substitute does not enter into one or other of such agreements.

4.5.3 On and after the Novation Effective Date:

- (a) the Contractor shall owe its obligations under the Construction Contract (whether arising before, on or after such date) to the Proposed Substitute and the receipt, acknowledgement or acquiescence of the Proposed Substitute shall be a good discharge; and
- (b) if the Board shall have entered into a Step-in Undertaking, the Board will be released from the Step-in Undertaking, provided that:
 - (i) all obligations of the Board under the Step-in Undertaking which have accrued up to the Novation Effective Date and are identifiable as at that date shall have been fully and unconditionally discharged; and
 - (ii) the Board has performed and discharged in full or procured the performance and discharge in full of the obligations of Project Co under the Construction Contract in relation to the maintenance of records and the provision of reports during the Step-in Period up to the Novation Effective Date so as to permit the Contractor to monitor the performance of Project Co's other obligations under the Construction Contract.

4.5.4 The Board and the Contractor shall use all reasonable endeavours to agree and the Board shall use reasonable endeavours to procure that the Proposed Substitute agrees any amendments to the Construction Contract necessary to reflect Clause 3.2.2 and the fact that the Project Agreement may have terminated at the time of the Novation Effective Date.

4.6 Termination after Novation

After the Novation Effective Date the Contractor shall only be entitled to exercise its rights of termination under the Construction Contract:

- 4.6.1 in respect of any Event of Project Co Default arising after that date in accordance with the Construction Contract; or
- 4.6.2 if the Proposed Substitute does not discharge the obligations and liabilities assumed by it under Clause 4.5.2(b) which relate to matters arising prior to the end of the Step-in Period within fifteen (15) Business Days following the Novation Effective Date.

4.7 **Extension of Step-In Period**

As at the date of the first anniversary of the Step-in Date, if the Step-in Period has not previously ended, and:

- 4.7.1 the Board is in the course of conducting discussions in good faith with a Proposed Substitute (the novation to whom has been approved by the Contractor whether automatically or otherwise in accordance with Clause 4.3), the Step-in Period shall be extended and shall continue until such date as is proposed by the Board and agreed by the Contractor; or
- 4.7.2 a contract has been entered into between the Board and a Proposed Substitute (which has been approved by the Contractor and in accordance with Clause 4.3) as at such date,
- 4.7.3 the Step-in Period shall be extended and shall continue until the date such contract comes into force, provided that such date shall not be later than thirty (30) Business Days after the last date of execution of such contract.

5 **Rights and Obligations under the Construction Contract**

5.1 **Rights of Termination**

If:

- 5.1.1 no Step-in Notice or Proposed Novation Notice is given before a Termination Notice expires or within fifteen (15) Business Days after termination of the Project Agreement by the Board; or
- 5.1.2 a Step-in Undertaking is not issued on the Proposed Step-in Date; or
- 5.1.3 the Step-in Notice is withdrawn or, pursuant to Clause 3.2.7, deemed to have been withdrawn; or
- 5.1.4 the Step-in Period ends before the occurrence of the Novation Effective Date; or
- 5.1.5 in the absence of a Step-in Undertaking, the Contractor withholds its consent to a novation pursuant to a Proposed Novation Notice, in accordance with Clause 4.3, and does not subsequently grant consent to a novation in accordance with Clause 4.4 on or before the Proposed Novation Date; or
- 5.1.6 in the absence of a Step-in Undertaking, the obligations of the Proposed Substitute set out in Clause 4.5 are not performed on the Proposed Novation Date; or
- 5.1.7 the Contractor is entitled to terminate the Construction Contract under Clause 3.3 or 4.6; or
- 5.1.8 the Board exercises its right to Step-out under Clause 3.4.1;

the Contractor shall be entitled to:

- 5.1.9 exercise all of its rights under the Construction Contract and act upon any and all grounds for termination available to it in relation to the Construction Contract whenever occurring; and/or
- 5.1.10 pursue any and all claims and exercise any and all rights and remedies against Project Co.

5.2 **Project Co's Obligations to Continue**

Until completion of a novation pursuant to Clause 4.5 (unless the terms of such novation expressly preserve an obligation or liability of Project Co), Project Co shall continue to be liable for all its

obligations and liabilities, whenever occurring, under or arising from the Construction Contract notwithstanding:

- 5.2.1 the service of a Step-in Notice or the issue of a Step-in Undertaking or the expiry of the Step-in Period or the release of a Step-in Undertaking; or
- 5.2.2 the service of a Proposed Novation Notice; or
- 5.2.3 any other provision of this Agreement.

6 Revocation of Notices

A Termination Notice and a Step-in Notice may each be revoked (in writing to the recipient) by the Party giving them before the expiry of their respective notice periods. Upon any such revocation, the rights and obligations of the Parties shall be construed as if the relevant notice had not been given.

7 Assignment

7.1 Binding on Successors and Assignees

This Agreement shall be binding on and shall enure to the benefit of the Parties and their respective successors and permitted assignees. In the case of the Board, its successors shall include any person to which the Scottish Ministers, in exercising their statutory powers to transfer property, rights and liabilities of the Board upon the Board ceasing to exist, transfers the rights and obligations of the Board under this Agreement.

7.2 Restriction on Assignment

No Party shall assign or transfer any part of its respective rights or obligations under this Agreement without the prior consent of the others (such consent not to be unreasonably withheld or delayed), provided that:

- 7.2.1 the Senior Funder may assign or transfer its rights and obligations to a successor trustee of the Funders under the Funding Agreements without the consent of any other Party and this Clause 7.2 shall not prevent any Funder assigning or transferring its rights under the Funding Agreements and the Security Documents in accordance with the terms of the Funding Agreements; and
- 7.2.2 Other than in respect of any of the Security Documents by the Senior Funder, ProjectCo shall not assign this Agreement to any party other than a party to whom ProjectCo's interest in the Project Agreement is assigned in accordance with the terms of the Project Agreement;
- 7.2.3 the Board shall be entitled, without the consent of any other Party, to transfer all its rights and obligations hereunder, to any person to whom it assigns or otherwise disposes of the benefit of the Project Agreement in accordance with Clause 50 (*Assignment, Sub-Contracting and Changes in Control*) of the Project Agreement and, otherwise, with Project Co's and the Contractor's consent (not to be unreasonably withheld or delayed);
- 7.2.4 nothing in this sub-clause shall restrict the rights of the Secretary of State to effect a statutory transfer;
- 7.2.5 the Contractor shall assign this Agreement to any party to whom it assigns the Construction Contract (in accordance with the terms of that agreement).

8 Confidentiality

- 8.1 The parties shall be bound to observe, mutatis mutandis, the terms of Clause 52 of the Construction Contract with respect to any information or document referred to in Clause 52 of the Construction Contract which shall come into its possession pursuant to this Agreement.

- 8.2 The Contractor agrees that the Board shall be entitled to disclose the terms of this Agreement to the Scottish Executive Health Department and HM Treasury and that the Board shall be free to use and disclose such information on such terms and in such manner as the Department of Health and/or HM Treasury see fit.

9 Notices

Any notice given under this Agreement shall be deemed to be duly given if it is delivered by hand or sent by registered post or recorded delivery to the party named therein at the address of such party shown in this Agreement or such other address as such party may by notice in writing nominate for the purpose of Service and if sent by recorded delivery shall be deemed (subject to proof to the contrary) to have been received forty eight (48) hours after being posted.

10 Payments and Taxes

10.1 Payments

All payments under this Agreement to any Party shall be made in pounds sterling by electronic transfer of funds for value on the day in question to the bank account of the recipient (located in the United Kingdom) specified to the other Parties from time to time.

10.2 VAT

10.2.1 All amounts stated to be payable by any Party under this Agreement shall be exclusive of any VAT properly payable in respect of the supplies to which they relate.

10.2.2 Each Party shall pay any VAT properly payable hereunder in respect of any supply made to it under this Agreement, provided that it shall first have received a valid tax invoice in respect of that supply which complies with the requirements of Part III VAT Regulations 1995.

10.3 Deductions from Payments

All sums payable by a Party to any other Party under this Agreement shall be paid free and clear of all deductions or withholdings whatsoever in respect of taxation, save as may be required by Law.

11 Default Interest

Each Party shall be entitled, without prejudice to any other right or remedy, to receive interest on any payment not made on the due date calculated from day to day at a rate per annum equal to the Default Interest Rate from the day after the date on which payment was due up to and including the date of payment.

12 Authority

12.1 Senior Funder's Warranty and Undertaking

The Senior Funder represents and warrants to and undertakes to each of the Board, the Contractor and Project Co that the Senior Funder is duly authorised by each of the Funders to assume the obligations expressed to be assumed by them under this Agreement and to undertake on behalf of each Funder in the terms of this Agreement so as to bind each Funder as if it were a Party.

12.2 Board

The Board shall not be obliged to make any enquiry as to the authority of the Senior Funder in doing any act or entering into any document or making any agreement under or in connection with this Agreement.

13 Expiry

The rights of the Senior Funder under this Agreement shall be extinguished upon the repayment by Project Co of all sums due and owing to the Funders by Project Co under the Funding Agreements or where the Construction Contract is terminated.

14 Aggregate liability

Notwithstanding any other provision of this Agreement, the Contractor's aggregate liability from time to time under this Agreement and the Construction Contract shall not at any time exceed its maximum liability as stated in the Construction Contract (as amended or varied).

15 Third Party Rights

It is agreed that this Agreement is not intended to, and does not, give to any person who is not a party to this Agreement any rights to enforce any provisions contained herein except for any person to whom the benefit of this Agreement is assigned or transferred in accordance with Clause 7.

16 Agency

16.1 No Delegation

No provision of this Agreement shall be construed as a delegation by the Board of any of its statutory authority to any other Party.

16.2 No Agency

Save as otherwise provided in this Agreement, no other Party shall be or be deemed to be an agent of the other Parties nor shall any party hold itself out as having authority or power to bind the other parties in any way.

16.3 Independent Contractor

The Parties shall, at all times, be independent contractors and nothing in this Agreement shall be construed as creating any partnership between the Parties or any relationship of employer and employee between the Parties.

17 Whole Agreement

17.1 This Agreement (when read together with the Project Agreement, the Construction Contract, the Parent Company Guarantee and the Funders' Direct Agreement) contains or expressly refers to the entire agreement between the Parties with respect to the specific subject matter of this Agreement and expressly excludes any warranty, condition or other undertaking implied at Law or by custom and supersedes all previous agreements and understandings between the Parties with respect thereto and each of the Parties acknowledges and confirms that it does not enter into this Agreement in reliance on any representation, warranty or other undertaking not fully reflected in the terms of this Agreement.

17.2 Nothing in this Agreement is intended to or shall operate so as to exclude or limit any liability for fraud or fraudulent misrepresentation.

18 Waiver

Failure by any Party at any time to enforce any provision of this Agreement or to require performance by the other Parties of any provision of this Agreement shall not be construed as a waiver of such provision and shall not affect the validity of this Agreement or any part of it or the right of the relevant Party to enforce any provision in accordance with its terms.

19 Execution in Duplicate

Not used.

20 Severability

If any condition, Clause or provision of this Agreement not being of a fundamental nature, is held to be illegal or unenforceable, the validity or enforceability of the remainder of this Agreement shall not be affected thereby.

21 Costs and Expenses

Each Party shall be responsible for paying its own costs and expenses incurred in connection with the negotiation, preparation and execution of this Agreement.

22 Amendments

No amendment to this Agreement shall be binding unless in writing and signed by the duly authorised representatives of the Parties.

23 Governing Law and Jurisdiction

23.1 Law

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

23.2 **Jurisdiction**

The Parties each submit to the jurisdiction of the Scottish Courts as regards any claim or matter arising in relation to this Agreement.

IN WITNESS WHEREOF these presents consisting of this and the [16] preceding pages are executed as follows:-

Subscribed for and on behalf of **Forth Valley Health Board**:

.....
Signature of Authorised Signatory Full name of Authorised Signatory

Date when signed:

Town where signed:

In the presence of this witness:
Signature of witness

Full name of witness:

Address of witness:

Subscribed for and on behalf of **Co-operative Bank plc**

.....
Signature of Power of Attorney Full name of Power of Attorney

Date when signed:

Town where signed:

in the presence of this witness:
Signature of witness

Full name of witness:

Address of witness:

Subscribed for and on behalf of **Robertson Construction Central Limited**

.....
Signature of Director Full name of Director

Date when signed:

Town where signed:

In the presence of this witness:
Signature of witness

Full name of witness:

Address of witness:

Subscribed for and on behalf of **Robertson Health (Clackmannanshire) Limited:**

.....
Signature of Director Full name of Director

Date when signed:

Town where signed:

In the presence of this witness:
Signature of witness

Full name of witness:

Address of witness:

PART 12 OF THE SCHEDULE: OUTLINE COMMISSIONING PROGRAMME

PART 13 OF THE SCHEDULE: EQUIPMENT

Equipment is set out in the Agreed Form document comprising one volume labelled "Equipment", which shall have effect as if expressly set out in this Part 13 of the Schedule.

PART 14 OF THE SCHEDULE: SERVICE REQUIREMENTS

Section 1: Service Level Specifications

Service Level Specifications are set out in the Agreed Form document comprising one volume labelled "Service Level Specifications", which shall have effect as if expressly set out in this Section 1 of Part 14 of the Schedule.

PART 14 OF THE SCHEDULE

Section 2: Method Statements

The Method Statements are set out in the Agreed Form document comprising one volume labelled "Method Statements", which shall have effect as if expressly set out in this Section 2 of Part 14 of the Schedule.

PART 14 OF THE SCHEDULE

Section 3: Services Quality Plan

Services Quality Plan are set out in the Agreed Form document comprising one volume labelled "Services Quality Plan", which shall have effect as if expressly set out in this Section 3 of Part 14 of the Schedule.

PART 15 OF THE SCHEDULE: INDEPENDENT TESTER CONTRACT

- (1) **FORTH VALLEY HEALTH BOARD**
- (2) **ROBERTSON HEALTH (CLACKMANNANSHIRE) LIMITED**
- (3) **FAITHFUL + GOULD LIMITED**

INDEPENDENT TESTER CONTRACT

INDEPENDENT TESTER CONTRACT**BETWEEN:**

- (1) **FORTH VALLEY HEALTH BOARD** whose headquarters are at Carseview House, Castle Business Park, Stirling, FK9 4SW (the "Board");
- (2) **ROBERTSON HEALTH (CLACKMANNANSHIRE) LIMITED** (Company Number SC312130) whose registered office is at 10 Perimeter Road, Pinefield Industrial Estate, Elgin, Moray, IV30 6AE ("Project Co"); and
- (3) **FAITHFUL + GOULD LIMITED** (Company Number 02236832) whose registered office is Woodcote Grove at Ashley Road Epsom Surrey KT18 5BW (the "Independent Tester").

WHEREAS:

- (A) Project Co and the Board have entered into an agreement for the financing, design and construction of and the provision of certain services in connection with the development of new Clackmannanshire community health facilities at the Site (the "Project") pursuant to the Government's private finance initiative (the "Project Agreement") under the terms of which they have jointly agreed to appoint an independent tester.
- (B) Project Co has entered into an agreement ("the Construction Contract") with Robertson Construction Central Limited ("the Contractor") for the development of new Clackmannanshire community health facilities at the Site.
- (C) Project Co has entered into the Funding Agreements with the Co-Operative Bank plc ("the Senior Funders").
- (D) The Independent Tester is an independent adviser willing to provide services to Project Co, and the Board.
- (E) The Independent Tester shall on execution of this Agreement execute collateral warranty agreements in favour of the Senior Funders and in favour of the Contractor in the forms annexed hereto at Appendix 3 and Appendix 4 respectively.
- (F) Project Co and the Board have jointly agreed to engage the Independent Tester to carry out the duties and obligations ascribed to the Independent Tester in the Project Agreement upon the terms of this Agreement.

IT IS AGREED as follows:**1 Interpretation**

- 1.1 Unless the context otherwise requires, words and expressions defined in the Project Agreement have the same meanings in this Agreement as in the Project Agreement.
- 1.2 The headings in this Agreement do not affect its interpretation.
- 1.3 Unless the context otherwise requires, all references to Clauses and Schedules are references to clauses of and schedules to this Agreement.

2 Appointment

- 2.1 Project Co and the Board jointly engage the Independent Tester to perform the obligations and tasks which are ascribed to the Independent Tester under the Project Agreement and the Construction Contract and which are summarised in Appendix 1 upon the terms and conditions set out below.

- 2.2 The Independent Tester shall provide the services under Clause 2.1 above (the "Services") independently, fairly and impartially to and as between Project Co and the Board in relation to the Project Agreement at such times and at such locations as the parties shall agree from time to time. Whilst the Independent Tester may take account of any representations made by Project Co and the Board the Independent Tester shall not be bound to comply with any representations made by any of them in connection with any matter on which the Independent Tester is required to exercise his professional judgement.
- 2.3 **Varied Services**
- 2.3.1 The Independent Tester shall carry out and perform any varied services (the "Varied Services") required for the implementation of the Project reasonably required by the Board and Project Co which are not included in, or which are omitted from, those Services which are set out in Appendix 1, subject to prior agreement by the Board and Project Co to the costs thereof.
- 2.3.2 If the Independent Tester shall at any time be required to perform Varied Services, it shall give to the Board and Project Co a written estimate of the cost thereof (taking into account any reduction in work or other expense which might also occur as a result of the circumstances giving rise to the Varied Services). In the event that the Parties are unable to reach agreement in relation to the costs the issue shall be referred to dispute resolution pursuant to Clause 16.1 or the requirement pursuant to Clause 2.3.1 may be withdrawn.
- 2.4 The Independent Tester shall provide the Services and the Varied Services:
- 2.4.1 with the reasonable care, skill and diligence to be expected of a properly qualified and competent professional adviser who has held itself out as competent and experienced in rendering such services for projects of a similar size, nature, scope and complexity to the Project; and
- 2.4.2 in accordance with Good Industry Practice, all applicable Law and NHS Requirements.
- For the purposes of this Clause 2.4 "Good Industry Practice" shall mean the exercise of that degree of skill, diligence, prudence, foresight and operating practice that would reasonably and ordinarily be expected from skilled and experienced operators with appropriately qualified personnel engaged in the same type of undertaking as the Independent Tester in compliance with Law.
- 2.5 All instructions to the Independent Tester must be given signed and given jointly by the Board's Representative and the Project Co's Representative or such other person appointed pursuant to Clause 11 of the Project Agreement (*Representatives*).
- 2.6 The Independent Tester shall comply with all reasonable instructions given to it by Project Co and the Board except and to the extent that the Independent Tester reasonably considers that any such instructions vary or might vary the Services or its authority or responsibilities under this Agreement or prejudices or might prejudice the exercise by the Independent Tester of its professional judgement in accordance with Clauses 2.2 and 2.4 above. The Independent Tester shall promptly confirm in writing to Project Co and the Board whether or not it shall comply with any such instruction setting out the grounds upon which the decision is made.
- 2.7 The Board and Project Co agree to co-operate with and provide reasonable assistance to the Independent Tester to familiarise the Independent Tester with all necessary aspects of the Project to enable the Independent Tester to carry out its obligations under this Agreement.
- 2.8 The Independent Tester shall be deemed to have full knowledge of the provisions of the Project Agreement, the Construction Contract, the Service Contracts and the Interface Agreement and shall be deemed to be aware of and to have taken full account of all the undertakings and warranties, both expressed and implied, on the part of Project Co and the Board which are set out in the Project Agreement.

- 2.9 The Independent Tester shall promptly and efficiently perform the Services as soon as reasonably practicable but consistent with the standards specified in Clauses 2.2 and 2.4 above.
- 2.9.1 Subject to Clause 2.9.2, the Independent Tester shall use the following partners, directors or employees: Campbell Gray (Director), Andrew Tipper (Associate Director), Ian Millar (Building Services Engineer) and Alan Cook (Architect) in connection with the performance of the Services and such persons' services shall be available when necessary and for so long as may be necessary to ensure the proper performance by the Independent Tester of the Services. Such persons shall have full authority to act on behalf of the Independent Tester for all purposes in connection with this Agreement.
- 2.9.2 None of the persons mentioned in Clause 2.9.1 shall be removed or replaced unless he/she ceases to work as a partner in or director or employee of the Independent Tester or he/she is unable to work because of death or ill-health or by mutual agreement between Project Co and the Board. The Independent Tester shall notify (giving a minimum of ten (10) Business Days notice) Project Co and the Board of any such circumstances and shall be responsible for finding a replacement whose appointment shall be subject to approval in writing by Project Co and the Board.

3 Duration

- 3.1 The Services shall commence on the last date of execution of this Agreement.
- 3.2 The Parties shall hereby agree that this Agreement governs all of the Services and any Varied Services provided by the Independent Tester in relation to the Project whether before or after the date hereof.

4 Fee

- 4.1 Project Co shall pay to the Independent Tester a fee of £89,180.00 for the Services provided in relation to the Project Agreement. The fee is exclusive of value added tax and inclusive of disbursements. The Independent Tester shall issue an invoice to Project Co on a monthly basis in accordance with Appendix 2 Part 1. The date on which the invoice is received by Project Co shall constitute the due date. The final date for payment by Project Co shall be thirty (30) days after receipt of the Independent Tester's invoice. If Varied Services are provided then they shall be paid for equally by (1) the Board and (2) Project Co or as otherwise agreed.
- 4.2 Not later than five (5) Business Days after the due date ascertained in accordance with Clause 4.1, Project Co may give written notice to the Independent Tester stating the amount which Project Co proposes to pay and the basis on which the amount is calculated.
- 4.3 Where Project Co intends to withhold payment of any amount stated in the invoice, Project Co and the Board shall give written notice to the Independent Tester not later than five (5) Business Days before the final date for payment pursuant to Clause 4.1. The notice shall state the amount to be withheld and the ground or grounds for withholding the payment and if there is more than one ground, the notice shall identify the amount attributable to each ground.
- 4.4 If Project Co fails to pay the Independent Tester any sum payable under this Agreement by the final date for payment, Project Co shall pay the Independent Tester simple interest on that sum from the final date for payment until the actual date of payment at the Default Interest Rate.
- 4.5 If Project Co fails to pay the amounts properly due pursuant to these provisions and no notice to withhold the payment has been given pursuant to Clause 4.3, the Independent Tester may suspend performance of any or all of the Services. This right is subject to the Independent Tester first giving Project Co and the Board not less than seven (7) Business Days' notice in writing of such intention stating the grounds for suspension. The right to suspend performance shall cease when Project Co pays the amount properly due.
- 4.6 Neither the Board nor Project Co shall issue instructions or do anything which does or is reasonably likely materially to increase the fees payable to the Independent Tester without the prior approval of the other (such approval not to be unreasonably withheld or delayed).

- 4.7 As soon as the Independent Tester becomes aware of the same and before acting on the same the Independent Tester shall inform the Board and Project Co of any instructions which either party has given him which will or could reasonably be expected to increase the fees payable to the Independent Tester under the terms of this Agreement. The Independent Tester shall if requested by either Project Co or the Board provide both the Board and Project Co with as detailed an estimate as is reasonably practicable of the increase to the fees payable to it if it carries out such instructions. The estimate of increased fees shall be based upon the rates contained in Appendix 2, Part 2.
- 4.8 The obligations of Project Co and the Board to pay the Independent Tester for any Varied Services shall be several and not joint.

5 Limitations on Authority

The Independent Tester shall not:

- 5.1 make or purport to make any alteration or addition to or omission from the design of the Facilities (including, without limitation, the setting of performance standards) or issue any instruction or direction to any contractor or professional consultant employed or engaged in connection with the Project; or
- 5.2 (unless both Project Co and the Board consent in writing) consent or agree to any waiver or release of any obligation of Project Co or the Board under the Project Agreement or professional consultant employed or engaged in connection with the Project.

For the avoidance of doubt, the Independent Tester shall not express an opinion on and shall not interfere with or give any advice, opinion or make any representation in relation to any matters which are beyond its role and responsibilities under this Agreement.

6 Termination

- 6.1 Project Co and the Board may by joint notice in writing (a "Joint Notice") immediately terminate this Agreement if the Independent Tester:
- 6.1.1 is in breach of any of the terms of this Agreement which, in the case of a breach capable of remedy, shall not have been remedied by the Independent Tester within 21 days of receipt by the Independent Tester of a Joint Notice specifying the breach and requiring its remedy;
- 6.1.2 is incompetent, guilty of gross misconduct and/or any material failure, negligence or delay in the provision of the Services and/or its other duties under this Agreement;
- 6.1.3 fails to comply with Clause 2.9;
- 6.1.4 fails or refuses after written warning to provide the Services and/or its other duties under this Agreement reasonably and as properly required of him; or
- 6.1.5 is subject to an event analogous to any of the events set out in Clause 4.1(a) (*Project Co Events of Default – Insolvency*) of the Project Agreement.
- 6.2 If the Project Agreement is rescinded, terminated or repudiated for any reason and, notwithstanding that the validity of such rescission, termination or repudiation may be disputed, this Agreement may be terminated by Joint Notice and with immediate effect.
- 6.3 Following any termination of this Agreement, but subject to any set-off or deductions which Project Co or the Board may be entitled properly to make as a result of any breach of this Agreement by the Independent Tester, the Independent Tester shall be entitled to be paid in full and final settlement of any valid claim which the Independent Tester may have in consequence thereof, any fees due under Clause 4 above in respect of the Services carried out in accordance with this Agreement prior to the date of termination.

- 6.4 Termination of this Agreement shall be without prejudice to any accrued rights and obligations under this Agreement as at the date of termination (including the right of Project Co and the Board to recover damages from the Independent Tester).
- 6.5 If this Agreement is terminated in accordance with this Clause 6, Project Co and the Board shall use reasonable endeavours to engage an alternative Independent Tester within 30 days, subject to Law and public procurement rules. If within such period Project Co and the Board are unable to procure the appointment of an alternative Independent Tester on reasonable commercial terms, the Independent Tester shall pay to Project Co and/or the Board, as the case may be, any reasonable incremental loss, damage or extra costs suffered by each of them.
- 6.6 Termination of this Agreement shall not affect the continuing rights and obligations of Project Co, the Board and the Independent Tester under Clauses 7 (*Confidential Information and Copyright*), 8 (*Professional Indemnity Insurance*), 5 (*Limitations on Authority*), 16 (*Dispute Resolution Procedure*) and this Clause or under any other Clause which is expressed to survive termination or which is required to give effect to such termination or the consequences of such termination.

7 Confidential Information and Copyright

- 7.1 The Independent Tester shall treat as secret and confidential and shall not at any time for any reason disclose or permit to be disclosed to any person or otherwise make use of or permit to be made use of any unpublished information relating to Project Co's or the Board's or the Contractor's (if appropriate) technology or other know-how business plans or finances or any such information relating to a subsidiary, supplier, customer or client of Project Co or the Board where the information was received during the period of this Agreement. Upon termination of this Agreement for whatever reasons the Independent Tester shall deliver up to Project Co or the Board or the Contractor (as appropriate) all working papers, computer disks and tapes or other material and copies provided to or prepared by him pursuant either to this Agreement or to any previous obligation owed to Project Co or the Board .
- 7.2 The copyright in all reports, calculations and other similar documents provided by the Independent Tester in connection with the Project shall remain vested in the Independent Tester but the Independent Tester grants to Project Co and Board and their nominees with full title guarantee a non-exclusive irrevocable royalty free licence to copy and use such drawings and other documents and to reproduce the designs contained in them for any purpose related to the Project including (but without limitation) the construction, completion, maintenance, letting, promotion, advertisement, reinstatement, extension and repair of the Project. Such licence shall include a licence to grant sub-licences and to transfer the same to third parties.

8 Professional Indemnity Insurance

- 8.1 Without prejudice to its obligations under this Agreement, or otherwise at law, the Independent Tester shall maintain professional indemnity insurance with a limit of indemnity of five million pounds (£5,000,000) in aggregate in respect of any neglect, error or omission on the Independent Tester's part in the performance of its obligations under this Agreement for the period commencing on the date of this Agreement and expiring 12 years after:
- 8.1.1 the date of final certification of the Works; or
- 8.1.2 the termination of this Agreement,
- whichever is the earlier, provided that such insurance is available in the market place at commercially reasonable rates.
- 8.2 The Independent Tester shall maintain such insurance with reputable insurers carrying on business in the United Kingdom who are acceptable to Project Co and the Board, such acceptance not to be unreasonably withheld or delayed.
- 8.3 Any increased or additional premium required by insurers by reason of the Independent Tester's own claims record or other acts, omissions, matters or things particular to the Independent Tester shall be deemed to be within commercially reasonable rates.

- 8.4 The Independent Tester shall immediately inform Project Co and the Board if such insurance ceases to be available at commercially reasonable rates in order that the Independent Tester and Project Co and the Board can discuss means of best protecting the respective positions of Project Co and the Board and the Independent Tester in respect of the Project in the absence of such insurance.
- 8.5 The Independent Tester shall fully co-operate with any measures reasonably required by Project Co and the Board including (without limitation) completing any proposals for insurance and associated documents, maintaining such insurance at rates above commercially reasonable rates if Project Co and the Board undertake in writing to reimburse the Independent Tester in respect of the net cost of such insurance to the Independent Tester above commercially reasonable rates or, if Project Co and the Board effect such insurance at rates at or above commercially reasonable rates, reimbursing Project Co and the Board in respect of what the net cost of such insurance to Project Co and the Board would have been at commercially reasonable rates.
- 8.6 The Independent Tester shall, prior to commencing the provision of the Services and no less than thirty (30) days prior to renewal dates, produce for inspection by Project Co and the Board documentary evidence that such insurance is being properly maintained.
- 8.7 The above obligations in respect of professional indemnity insurance shall continue notwithstanding termination of this Agreement for any reason whatsoever, including (without limitation) breach by Project Co and the Board.

9 Notices

- 9.1 All notices or other communications required in connection with this Agreement shall be in writing and sent by hand, by first class pre-paid post or by facsimile transmission to the relevant address or facsimile number set out in the Project Agreement or to such other address or facsimile number as a party to this Agreement may notify to another party to this Agreement in writing.

10 Assignment

- 10.1 The Independent Tester shall not assign or transfer any of its rights or obligations under this Agreement or sub-contract the whole or any part of the Services.
- 10.2 Neither Project Co nor the Board shall be entitled to assign or transfer any of their respective rights or obligations under this Agreement save that such parties hereby consent to any such assignment or transfer which is contemporaneous to the assignment or transfer of the Project Agreement and is made to the same assignee or transferee. In the event that the Project Agreement is novated to a third party, the term "Project Agreement" shall include any replacement contract arising from such novation.
- 10.3 The Independent Tester shall not be entitled to contend that any person to whom this Agreement is assigned in accordance with Clause 10.2 is precluded from recovering under this Agreement any loss incurred by such assignee resulting from any breach of this Agreement (whenever happening) by reason that such person is an assignee and not a named party to this Agreement.
- 10.4 This Agreement or the benefit hereof and/or the rights arising hereunder (whether or not accrued) may without the consent of the Independent Tester but on notice to the Independent Tester be assigned to the Senior Funders and/or to any bank(s) or financial institution(s) providing finance for the Works. The Senior Funders and/or the bank(s) or financial institution(s) has/have the right to further assign the benefit of this Agreement to any company or other person nominated by or on behalf of the Senior Funders and/or bank(s) or financial institution(s), taking an assignment of the Project Agreement. No further or other assignment is permitted.

11 Cumulative Rights and Enforcement

- 11.1 Any rights and remedies provided for in this Agreement whether in favour of Project Co or the Board or the Independent Tester are cumulative and in addition to any further rights or remedies which may otherwise be available to the parties.

- 11.2 The duties and obligations of the Independent Tester arising under or in connection with this Agreement are owed to Project Co and the Board both jointly and severally and Project Co and the Board may accordingly enforce the provisions hereof and pursue their respective rights hereunder in their own name, whether separately or with each other.
- 11.3 Project Co and the Board covenant with each other that they shall not waive any rights, remedies or entitlements or take any other action under this Agreement which would or might reasonably be expected to adversely affect the rights, remedies or entitlements of the other without the other's prior written consent, such consent not to be unreasonably withheld or delayed.

12 Waiver

- 12.1 The failure of any party at any one time to enforce any provision of this Agreement shall in no way affect its right thereafter to require complete performance by any other party, nor shall the waiver of any breach or any provision be taken or held to be a waiver of any subsequent breach of any provision or be a waiver of the provision itself.

13 Severability

- 13.1 In the event that any term, condition or provision contained in this Agreement shall be held to be invalid, unlawful or unenforceable to any extent, such term, clause or provision shall, to that extent, be omitted from this Agreement and the rest of this Agreement shall stand, without affecting the remaining clauses.

14 Execution in Duplicate

- 14.1 Not used

15 Variation

- 15.1 A variation of this Agreement is valid only if it is in writing and signed by or on behalf of each party.

16 Dispute Resolution Procedure

- 16.1 All disputes shall be resolved in accordance with terms equivalent (*mutatis mutandis*) to the Dispute Resolution Procedure as set out in the Project Agreement (excluding for the avoidance of doubt the Liaison Committee).
- 16.2 Project Co, the Board and the Independent Tester shall co-operate to facilitate the proper, just, economical and expeditious resolution of any and all such disputes which arise under this Agreement.

17 Governing Law and Jurisdiction

- 17.1 Subject to Clause 16 above, this Agreement shall be governed by and construed in accordance with the laws of Scotland, and (subject as aforesaid) the parties hereby submit to the non-exclusive jurisdiction of the courts of Scotland.
- 17.2 No action or proceedings may be commenced against the Independent Tester for any breach of this Agreement after the expiry of 12 years following the date of completion of the Services or the termination of this Agreement, whichever is the earlier.

18 Not used

19 Third Party Rights

- 19.1 Save as expressly set out herein, no provision of this Agreement is intended to or does confer upon any third party any benefit or right enforceable at the option of that third party against any party to this Agreement.

IN WITNESS WHEREOF these presents consisting of this and the 8 preceding pages and the Appendix annexed hereto are executed as follows:-

Appendix 1

Scope of Services - Independent Tester Contract

The Independent Tester shall perform the role of Independent Tester as referred to in Clauses 17 20 (*Independent Tester*), 22 (*Pre-Completion Commissioning and Completion*) and 23 (*Post Completion Commissioning*) and the relevant Schedules of the Project Agreement and Clause 17,20, and 22 of the Construction Contract (including complying with any time limits specified in such Clauses), including but not limited to the following scope of Services:

1 Monthly Report and Completion Certification

The Independent Tester shall:

- 1.2 During the construction period, provide the Board and Project Co with a monthly report on the activities carried out by the Independent Tester. Undertake inspections, as necessary, in accordance with the Project Agreement. Report on the completion status of the Project, identifying any work that is not complete or is non-compliant with the Project Agreement.
- 1.3 Certify the date that completion has occurred and issue a Certificate of Practical Completion in accordance with the Project Agreement and the Construction Contract, provided that the Independent Tester has the right to withhold certifying that completion has occurred and the issue of the Certificate of Practical Completion where Project Co has failed to rectify incomplete or non-compliant work in accordance with paragraph 1.1 above and shall withhold certifying that completion has occurred and the issue of the Certificate of Practical Completion unless the Independent Tester reasonably considers that such incomplete or non-compliant work can be specified as a Snagging Matter capable of being rectified in accordance with the Project Agreement.
- 1.4 Within two (2) Business Days of issue of the Certificate of Practical Completion, prepare and issue a Snagging Notice. The Snagging Notice shall specify all Snagging Matters arising out the Independent Tester's own inspection and incorporate Snagging Matters identified by the Board and Project Co which the Independent Tester considers to be Snagging Matters. Issue an estimate of the rectification cost of the Snagging Matters at the same time. Monitor and review rectification of such Snagging Matters in accordance with the Project Agreement.
- 1.5 Review the programme for the rectification of all Snagging Matters to be carried out and advise Project Co and the Board as appropriate.

And in order to enable the Independent Tester to discharge these primary functions which are to be performed independently, fairly and impartially to and as between Project Co and the Board and having regard to the interests of the Senior Funders, the Independent Tester shall discharge at least the further duties described below.

2 General

The Independent Tester shall:

- 2.1 Familiarise itself with the Project Agreement (including the Design Data, the Design Quality Plan, the Construction Quality Plan and any Variations issued from time to time and any other relevant documentation or information referred to in the Project Agreement, relevant Service Level Specifications and Method Statements) and the Construction Contract to the extent necessary to be in a position to carry out the Services in accordance with the terms of the Project Agreement, the Construction Contract and this Agreement.
- 2.2 Following notification by Project Co, pursuant to Clauses 22.8 and 22.10 (*Pre-Completion Commissioning and Completion*) of the Project Agreement, inspect and comment as required on the Works as required by the Completion Process.

3 Design Compliance Check

The Independent Tester shall:

- 3.1 Monitor the construction, structural and services design for the Project to establish that the design is generally in accordance with the Project Agreement.
- 3.2 Monitor the detailed working drawings and specifications for a sample number and type of rooms which in his professional judgment is appropriate to be selected by the Independent Tester to verify that they comply with the approved outline design as described in the Project Agreement. The Independent Tester has indicated that in normal circumstances twenty-five percent (25%) of rooms should be sampled. If in the professional judgment of the Independent Tester, because of the results of its sample or other circumstances a different sampling percentage is appropriate, he shall provide a detailed report in respect of that and, if so agreed (or determined as between Project Co and the Board by the Dispute Resolution Procedure) any change in the percentage sampling resulting in a change in fees will be borne by Project Co, the Board or the Contractor as they shall agree or as determined by the Dispute Resolution Procedure.
- 3.3 Review the detailed design information for any approved design or specification variations for compliance with the performance and quality standards of the Project Agreement, and the Contractor's Quality Plan.
- 3.4 Determine if the Facilities have been designed so as to achieve a theoretical energy consumption of 42 Giga Joules per 100m³ of heated volume and, if not, the appropriate remedies if any in accordance with CI 17.4A of the Project Agreement.

4 Procedure review

The Independent Tester shall:

- 4.1 Monitor the operation of the quality assurance procedures of the Contractor at regular intervals (maximum three (3) months) during the execution of the Works.
- 4.2 Review the proposed procedures and programmes for the testing, commissioning and Board's occupation.
- 4.3 Monitor the procedures for the identification, approval and recording of agreed Variations to the Works in accordance with the Project Agreement.

5 Construction Review

The Independent Tester shall:

- 5.1 Visit the Site and monitor the Works for their compliance with the Project Agreement. The frequency and timing of the Independent Tester's visits are dependent on the progress of construction on Site. The Contractor shall agree a programme with the Independent Tester for the inspection of key construction processes and the completed Project and shall give the Independent Tester advance notice of these Works being carried out on Site. The Independent Tester shall identify any aspect of the Works which need to be inspected before being covered over by subsequent activity so that he may satisfy himself that these have been constructed in accordance with the Contractor's Quality Plan without the need for opening up.
- 5.2 Randomly check that the Works are being undertaken in accordance with any health and safety plan that has been agreed by the Board and Project Co and in a workmanlike manner.
- 5.3 Review any samples as required by the Project Agreement and check that they have been approved in accordance with that agreement.
- 5.4 Review any extensions to the time for completion of the Works granted or to be granted in accordance with the Project Agreement.
- 5.5 Witness a sample proportion of the testing and commissioning procedures at random. The Independent Tester has indicated that these proportions should amount to approximately fifty percent (50%). The Independent Tester shall review one hundred percent (100%) of all test results. If in the professional judgment of the Independent Tester, because of the results of witnessing (or because of other circumstances) a different sampling percentage is appropriate he

shall provide a detailed report in respect of that and any change in the percentage sampling resulting in a change of fees will be borne by Project Co, and or the Board as they shall agree, failing such agreement, as determined by the Dispute Resolution Procedure.

- 5.6 Determine if the Facilities have been built so as to achieve a theoretical energy consumption of 42 Giga Joules per 100m³ of heated volume.
- 5.7 Inspect rectification works which have previously prevented the Independent Tester from certifying the Project as complete. Following the issue of the Certificate of Practical Completion, agree a list of Snagging Matters with Project Co together with its programme for implementation.
- 5.8 Check the production of the relevant operating manuals, relevant approvals, test results, inspection records and as built drawings and monitor the timely handover of this documentation.

6 Participation in Dispute Resolution

- 6.1 As and when required by the Board or Project Co, the Independent Tester shall participate in the Dispute Resolution Procedure of the Project Agreement (as such term is defined in the Project Agreement) to the extent that issues under the Project Agreement which have been referred to the said Dispute Resolution Procedure relate to the Independent Tester's other obligations and tasks as set out in this Appendix 1 and this Agreement.

Appendix 2**Part 1****Schedule of Drawdown of Fees**

		Labour	Expenses	Total
Month	1	3,640	430	4,070
Month	2	3,120	430	3,550
Month	3	3,640	430	4,070
Month	4	2,600	430	3,030
Month	5	3,120	430	3,550
Month	6	2,600	430	3,030
Month	7	3,120	430	3,550
Month	8	3,120	430	3,550
Month	9	3,380	150	3,530
Month	10	5,200	150	5,350
Month	11	5,200	150	5,350
Month	12	5,200	150	5,350
Month	13	5,590	150	5,740
Month	14	5,590	150	5,740
Month	15	6,500	150	6,650
Month	16	7,540	150	7,690
Month	17	7,540	150	7,690
Month	18	7,540	150	7,690
		84,240	4,940	89,180

The Consultant confirms that should there be a delay for a period of 4 weeks beyond the anticipated Completion Date, the Fee of £89,180 remains fixed for such 4 weeks delay period.

Any additional work that may result after a period of 4 weeks delay will be agreed by Project Co, the Board and the Consultant on the basis of the agreed hourly rates as set out in Appendix 2 Part 2.

Appendix 2**Part 2****Schedule of Hourly Rates**

Project Director	£120 / hr
Project Manager	£75 / hr
Architect	£70 / hr
Building Services Engineer	£70 / hr
Structural Engineer	£65 / hr
Technical Support	£60 / hr

Appendix 3

Style Collateral Warranty to Funder

INDEPENDENT TESTERS COLLATERAL WARRANTY AGREEMENT

Among

THE CO-OPERATIVE BANK plc

and

FAITHFUL + GOULD LIMITED

and

FORTH VALLEY HEALTH BOARD

and

ROBERTSON HEALTH (CLACKMANNANSHIRE) LIMITED

**Re: The Development of the Clackmannanshire Community Hospital
and related provision of services**

AGREEMENT

among

FAITHFUL +GOULD LIMITED (Company Number 02236832) whose registered office is Woodcote Grove at Ashley Road Epsom Surrey KT18 5BW (hereinafter referred to as “the Consultant”);

and

THE CO-OPERATIVE BANK PLC, acting through its office at PO Box 101, 1 Balloon Street, Manchester M60 4EP in its own right and as agent, account bank and security trustee as (hereinafter referred to as “the Beneficiary” which expression shall include its successors and permitted assignees);

and

FORTH VALLEY HEALTH BOARD whose headquarters are at Carseview House, Castle Business Park, Stirling, FK9 4SW (hereinafter referred to as “the Board”);

and

ROBERTSON HEALTH (CLACKMANNANSHIRE) LIMITED (registered under number SC312130) whose registered office is at 10 Perimeter Road, Pinefield Industrial Estate, Elgin, Moray, IV30 6AE (hereinafter referred to as “ProjectCo”).

WHEREAS:

- A The Board has entered or intends to enter into an agreement (hereinafter referred to as “the Project Agreement”) with ProjectCo for *inter alia* the design, construction, testing, commissioning and completion of a community hospital at Clackmannanshire (hereinafter referred to as “the Project”).
- B The Beneficiary has entered or intends to enter into an agreement to provide finance to ProjectCo for the carrying out of the Project
- C The Board and ProjectCo (together hereinafter referred to as “the Employer”) have entered into an agreement (hereinafter referred to as “the Appointment”) with the Consultant to perform the services of an Independent Tester in connection with the Project and the Project Agreement as set out in the Appointment (hereinafter referred to as “the Services”).
- D It is a condition of the Appointment that the Consultant enters into this Agreement with the Beneficiary.

NOW IT IS AGREED:

1. Definitions and Interpretation

- 1.1 Capitalised terms in this Agreement shall have the same meanings as those given in the Appointment and the provisions of Clause 1 of the Appointment (Definitions and Interpretation) shall be repeated herein.

2. Consultant’s Obligations

- 2.1 The Consultant warrants and undertakes to the Beneficiary that it has complied and shall comply with the terms of the Appointment and that in performing the Services it has exercised and shall exercise all the reasonable skill, care and attention to be expected of a competent and fully qualified member of the Consultant’s profession experienced in performing services of a similar nature and complexity to the Services.

- 2.2 The Consultant further warrants and undertakes to the Beneficiary that it has exercised and shall exercise such reasonable skill, care and attention all to the same effect as if the Consultant had been appointed by the Beneficiary.
- 2.3 The Consultant shall have no greater responsibility to the Beneficiary than it would have had if the Beneficiary had been named as the employer under the Appointment. The Consultant shall be entitled in any action or proceedings by the Beneficiary to rely on any limitation in the Appointment and to raise the equivalent rights in defence of liability as it would have against the Employer under the Appointment (other than counterclaim, set-off or to state a defence of no loss or a different loss has been suffered by the Employer).
- 2.4 The Beneficiary has relied and will continue to rely upon the Consultant's reasonable skill, care and attention in respect of all matters covered by this Agreement in so far as they relate to the Services provided by the Consultant under the Appointment.

3. Inspection

- 3.1 The obligations and liabilities of the Consultant under this Agreement shall not be limited or excluded or in any other way affected by any enquiry or inspection into any matter which may be made or carried out by or for the Beneficiary nor by any failure or omission to carry out such enquiry or inspection by the Beneficiary (or failure to so appoint) and whether or not any independent liability of any such person, firm or other entity to the Beneficiary arises in connection therewith.

4. Copyright

- 4.1 The copyright in all, reports, and other similar documents provided by the Consultant in connection with the Services shall remain vested in the Consultant but the Consultant grants to the Beneficiary and its respective nominees with full title guarantee a non-exclusive irrevocable royalty free licence to copy and use such drawings and other documents and to reproduce the designs contained in them for any purpose related to the Project including (but without limitation) the installation, completion, maintenance, and/or repair carried out under and/or associated with the Project Agreement. Such licence shall include a licence to grant sub-licences and to transfer the same to third parties, but only with the prior approval of the Consultant (such approval not to be unreasonably withheld or delayed).
- 4.2 The Consultant shall not be liable for any such use by the Beneficiary or its nominees of any drawings and other documents for any purposes other than those for which they were originally prepared by the Consultant.
- 4.3 The Beneficiary shall, on written request and upon paying a reasonable copying charge therefor, be entitled to be supplied by the Consultant with copies of the drawings and other items referred to in Clause 4.1.

5. Professional Indemnity Insurance

- 5.1 The Consultant shall maintain professional indemnity insurance covering (inter alia) all liability hereunder upon customary and usual terms and conditions prevailing for the time being in the insurance market, and with reputable insurers lawfully carrying on such insurance business in the United Kingdom, in an amount of £5,000,000 (Five Million Pounds) in aggregate (save that in respect of claims relating to contamination and/or pollution the level of insurance shall be in the aggregate) arising out of any one event for a period beginning now and ending 12 years after the Actual Completion Date (as defined in the Project Agreement), provided always that such insurance is available at commercially reasonable rates. The said terms and conditions shall not include any term or condition to the effect that the Consultant must discharge any liability before being entitled to recover from the insurers, or any other term or condition which might adversely

affect the rights of any person to recover from the insurers pursuant to the Third Parties (Rights Against Insurers) Act 1930, or any amendment or re-enactment thereof. The Consultant shall not, without the prior approval in writing of the Beneficiary, settle or compromise with the insurers any claim which the Consultant may have against the insurers and which relates to a claim by the Beneficiary against the Consultant, or by any act or omission lose or prejudice the Consultant's right to make or proceed with such a claim against the insurers.

- 5.2 Any increased or additional premium required by insurers by reason of the Consultant's own claims record or other acts, omissions, matters or things particular to the Consultant shall be deemed to be within commercially reasonable rates.
- 5.3 The Consultant shall immediately inform the Beneficiary if such insurance ceases to be available at commercially reasonable rates in order that the Consultant and the Beneficiary can discuss means of best protecting the respective positions of the Consultant and the Beneficiary in respect of the Services in the absence of such insurance.
- 5.4 The Consultant shall fully co-operate with any measures reasonably required by the Beneficiary, including (without limitation) completing any proposals for insurance and associated documents and maintaining such insurance at rates above commercially reasonable rates, if the Beneficiary undertakes in writing to reimburse the Consultant in respect of the net cost of such insurance to the Consultant above commercially reasonable rates or, if the Beneficiary effects such insurance at rates at or above commercially reasonable rates, reimbursing the Beneficiary in respect of what the net cost of such insurance to the Beneficiary would have been at commercially reasonable rates.
- 5.5 On or before the date of this Agreement and thereafter as and when reasonably requested to do so by the Beneficiary, the Consultant shall produce for inspection an insurance brokers' letter confirming that the Consultant's professional indemnity insurance is being maintained in accordance with this Agreement.

6. Assignment AND TRANSFER of Agreement

- 6.1 This Agreement may be assigned on two occasions only by the Beneficiary at any time to any other party acquiring the whole or any part of the Beneficiary's interest in the Project without the consent of the Consultant or the Employer being required and such Assignment shall be effective upon written notice thereof being given to the Consultant and the Employer. The Consultant or the Employer may not assign this Agreement.
- 6.2 The Consultant agrees that it shall not at any time assert that any permitted assignee in terms of this Agreement is precluded from recovering any loss resulting from any breach of this Agreement by reason that such assignee is not an original party to this Agreement or that no loss or a different loss has been suffered by the original party.

7 Extraneous Rights

- 7.1 The parties acknowledge and accept that the provisions of this Agreement shall not in any way whatsoever and notwithstanding any rule of law to the contrary prejudice the rights and remedies which may be available to the parties against each other in delict at common law.

8 Third Party Rights

- 8.1 Save where expressly stated otherwise in this Agreement, nothing in this Agreement shall confer or purport to confer on any third party any benefit or right to enforce any term of this Agreement.

9 Notices

- 9.1 Any notice to be given hereunder shall only be validly served if in writing and delivered personally or sent by pre-paid first class recorded delivery post or sent by fax to the Beneficiary or the Consultant or the Employer at the address specified in the preamble to this Agreement or to such amended address as the relevant party may specify.
- 9.2 In proving service it shall be sufficient to prove that the envelope containing the notice was properly addressed and either delivered personally or posted as a pre-paid first class recorded delivery letter, or that the notice was faxed to the correct fax number (as demonstrated by the transmission slip).
- 9.3 The Consultant undertakes to the Beneficiary that it will copy to the Beneficiary, at the time of issue to the Employer, any notices issued pursuant to the Appointment.

10 Consultant's Remuneration

- 10.1 THE CONSULTANT ACKNOWLEDGES THAT THE EMPLOYER HAS PAID ALL FEES AND EXPENSES PROPERLY DUE AND OWING TO IT UNDER OR ARISING OUT OF THE APPOINTMENT UP TO THE DATE OF THIS AGREEMENT. THE BENEFICIARY HAS NO LIABILITY TO THE CONSULTANT IN RESPECT OF FEES AND EXPENSES UNDER THE APPOINTMENT UNLESS THE BENEFICIARY HAS GIVEN NOTICE UNDER CLAUSES 11.1 OR 11.2.

11 Step-In Rights

- 11.1 The Consultant agrees that it shall, if so required by notice in writing given by the Beneficiary and subject to Clause 11.4, accept the instructions of the Beneficiary or its appointee (which, for the avoidance of doubt, and without limitation may include a third party appointed by the Beneficiary) on a commercial arms length basis to carry out the role of Project Co under the Appointment to the exclusion of Project Co in respect of the Project upon the terms and conditions of the Appointment.
- 11.2 The Consultant further agrees that it shall not without first giving the Beneficiary not less than 28 days' notice in writing specifying the grounds for so doing, exercise any right it may have to terminate the Appointment or to treat the same as having been repudiated by Project Co or to discontinue the performance of any Services to be performed by the Consultant pursuant thereto. Such right to terminate the Appointment or to treat the same as having been repudiated or to discontinue performance shall cease if, within such period of notice and subject to Clause 11.4, the Beneficiary shall give notice in writing to the Consultant requiring the Consultant to accept the instructions of the Beneficiary or its appointee (which, for the avoidance of doubt, and without limitation may include a third party appointed by the Beneficiary) on a commercial arms length basis to act as the employer under the Appointment to the exclusion of Project Co in respect of the Project upon the terms and conditions of the Appointment.
- 11.3 The Employer acknowledges that the Consultant shall be entitled to rely on a notice given to the Consultant by the Beneficiary under Clauses 11.1 or 11.2.
- 11.4 It shall be a condition of any notice given by the Beneficiary under Clauses 11.1 or 11.2 that the Beneficiary or its appointee accepts liability for payment of the fees and expenses payable to the Consultant under the Appointment and for performance of Project Co's obligations including payment of any fees and expenses properly incurred, due and payable and which are outstanding at the date of such notice.
- 11.5 Upon the issue of any notice by the Beneficiary under Clauses 11.1 or 11.2, the Appointment shall continue in full force and effect as if no right of termination on the part of the Consultant had arisen and the Consultant shall be liable to the Beneficiary and its appointee under the Appointment in lieu of its liability to Project Co. The Beneficiary guarantees to the Consultant the performance of the obligations of any appointee nominated under Clauses 11.1 or 11.2.

12 Governing Law

12.1 This Agreement shall be governed by and construed according to Scots law and the parties submit to the exclusive jurisdiction of the Scottish Courts: IN WITNESS WHEREOF this Agreement consisting of this and the preceding 7 pages has been executed as follows:-

Subscribed for and on behalf of **FAITHFUL + GOULD LIMITED**

.....
 Director Full name

Date when signed:

Town where signed:

In the presence of this witness:

Signature of witness

Full name of witness:

Address of witness:

Subscribed for and on behalf of **the Beneficiary**

.....
 Signature of Authorised Signatory Full name of Authorised Signatory

Date when signed:

Town where signed:

in the presence of this witness:

Signature of witness

Full name of witness:

Address of witness:

Subscribed for and on behalf of **Forth Valley Health Board:**

.....
 Signature of Authorised Signatory Full name of Authorised Signatory

Date when signed:

Town where signed:

in the presence of this witness:

Signature of witness

Full name of witness:

Address of witness:

Subscribed for and on behalf of **Robertson Health (Clackmannanshire) Limited:**

.....
 Signature of Director Full name of Director

Date when signed:

Town where signed:

In the presence of this witness:

Signature of witness

Full name of witness:

Address of witness:

Appendix 4

Style Collateral Warranty to Contractor

INDEPENDENT TESTERS COLLATERAL WARRANTY AGREEMENT

Among

ROBERTSON CONSTRUCTION CENTRAL LIMITED

and

FAITHFUL + GOULD LIMITED

**Re: The Development of the Clackmannanshire Community Hospital
and related provision of services**

AGREEMENT

among

FAITHFUL +GOULD LIMITED (Company Number 02236832) whose registered office is Woodcote Grove at Ashley Road Epsom Surrey KT18 5BW (hereinafter referred to as “the Consultant”);

and

ROBERTSON CONSTRUCTION CENTRAL LIMITED, incorporated under the Companies Acts (Company No. SC 249933) and having its Registered Office at 10 Perimeter Road, Pinefield Industrial Estate, Elgin, Moray, IV30 6AW (hereinafter referred to as “the Beneficiary” which expression shall include its successors and permitted assignees).

WHEREAS:

- A The Forth Valley Health Board (“the Board”) has entered or intends to enter into an agreement (hereinafter referred to as “the Project Agreement”) with Robertson Health (Clackmannanshire) Limited (“ProjectCo”) for *inter alia* the design, construction, testing, commissioning and completion of a community hospital at Clackmannanshire (hereinafter referred to as “the Project”).
- B The Beneficiary has entered or intends to enter into a construction contract with ProjectCo (“the Contract”) to carry out the design and construction of the Works (as more specifically defined in the Contract) for and on behalf of and for ProjectCo.
- C The Board and ProjectCo (together hereinafter referred to as “the Employer”) have entered into an agreement (hereinafter referred to as “the Appointment”) with the Consultant to perform the services of an Independent Tester in connection with the Project and the Project Agreement as set out in the Appointment (hereinafter referred to as “the Services”).
- D It is a condition of the Appointment that the Consultant enters into this Agreement with the Beneficiary.

NOW IT IS AGREED:

1. Definitions and Interpretation

- 1.1 Capitalised terms in this Agreement shall have the same meanings as those given in the Appointment and the provisions of Clause 1 of the Appointment (Definitions and Interpretation) shall be repeated herein.

2. Consultant’s Obligations

- 2.1 The Consultant warrants and undertakes to the Beneficiary that it has complied and shall comply with the terms of the Appointment and that in performing the Services it has exercised and shall exercise all the reasonable skill, care and attention to be expected of a competent and fully qualified member of the Consultant’s profession experienced in performing services of a similar nature and complexity to the Services.
- 2.2 The Consultant further warrants and undertakes to the Beneficiary that it has exercised and shall exercise such reasonable skill, care and attention all to the same effect as if the Consultant had been appointed by the Beneficiary.
- 2.3 The Consultant shall have no greater responsibility to the Beneficiary than it would have had if the Beneficiary had been named as the employer under the Appointment. The Consultant shall be entitled in any action or proceedings by the Beneficiary to rely on any limitation in the Appointment and to raise the equivalent rights in defence of liability as it would have against the Employer under

the Appointment (other than counterclaim, set-off or to state a defence of no loss or a different loss has been suffered by the Employer).

- 2.4 The Beneficiary has relied and will continue to rely upon the Consultant's reasonable skill, care and attention in respect of all matters covered by this Agreement in so far as they relate to the Services provided by the Consultant under the Appointment.

3. Inspection

- 3.1 The obligations and liabilities of the Consultant under this Agreement shall not be limited or excluded or in any other way affected by any enquiry or inspection into any matter which may be made or carried out by or for the Beneficiary nor by any failure or omission to carry out such enquiry or inspection by the Beneficiary (or failure to so appoint) and whether or not any independent liability of any such person, firm or other entity to the Beneficiary arises in connection therewith.

4. Copyright

- 4.1 The copyright in all, reports, and other similar documents provided by the Consultant in connection with the Services shall remain vested in the Consultant but the Consultant grants to the Beneficiary and its respective nominees with full title guarantee a non-exclusive irrevocable royalty free licence to copy and use such drawings and other documents and to reproduce the designs contained in them for any purpose related to the Project including (but without limitation) the installation, completion, maintenance, and/or repair carried out under and/or associated with the Project Agreement. Such licence shall include a licence to grant sub-licences and to transfer the same to third parties, but only with the prior approval of the Consultant (such approval not to be unreasonably withheld or delayed).
- 4.2 The Consultant shall not be liable for any such use by the Beneficiary or its nominees of any drawings and other documents for any purposes other than those for which they were originally prepared by the Consultant.
- 4.3 The Beneficiary shall, on written request and upon paying a reasonable copying charge therefor, be entitled to be supplied by the Consultant with copies of the drawings and other items referred to in Clause 4.1.

5. Professional Indemnity Insurance

- 5.1 The Consultant shall maintain professional indemnity insurance covering (inter alia) all liability hereunder upon customary and usual terms and conditions prevailing for the time being in the insurance market, and with reputable insurers lawfully carrying on such insurance business in the United Kingdom, in an amount of £5,000,000 (Five Million Pounds) in aggregate (save that in respect of claims relating to contamination and/or pollution the level of insurance shall be in the aggregate) arising out of any one event for a period beginning now and ending 12 years after the Actual Completion Date (as defined in the Project Agreement), provided always that such insurance is available at commercially reasonable rates. The said terms and conditions shall not include any term or condition to the effect that the Consultant must discharge any liability before being entitled to recover from the insurers, or any other term or condition which might adversely affect the rights of any person to recover from the insurers pursuant to the Third Parties (Rights Against Insurers) Act 1930, or any amendment or re-enactment thereof. The Consultant shall not, without the prior approval in writing of the Beneficiary, settle or compromise with the insurers any claim which the Consultant may have against the insurers and which relates to a claim by the Beneficiary against the Consultant, or by any act or omission lose or prejudice the Consultant's right to make or proceed with such a claim against the insurers.

- 5.2 Any increased or additional premium required by insurers by reason of the Consultant's own claims record or other acts, omissions, matters or things particular to the Consultant shall be deemed to be within commercially reasonable rates.
- 5.3 The Consultant shall immediately inform the Beneficiary if such insurance ceases to be available at commercially reasonable rates in order that the Consultant and the Beneficiary can discuss means of best protecting the respective positions of the Consultant and the Beneficiary in respect of the Services in the absence of such insurance.
- 5.4 The Consultant shall fully co-operate with any measures reasonably required by the Beneficiary, including (without limitation) completing any proposals for insurance and associated documents and maintaining such insurance at rates above commercially reasonable rates, if the Beneficiary undertakes in writing to reimburse the Consultant in respect of the net cost of such insurance to the Consultant above commercially reasonable rates or, if the Beneficiary effects such insurance at rates at or above commercially reasonable rates, reimbursing the Beneficiary in respect of what the net cost of such insurance to the Beneficiary would have been at commercially reasonable rates.
- 5.5 On or before the date of this Agreement and thereafter as and when reasonably requested to do so by the Beneficiary, the Consultant shall produce for inspection an insurance brokers' letter confirming that the Consultant's professional indemnity insurance is being maintained in accordance with this Agreement.

6. Assignment AND TRANSFER of Agreement

- 6.1 This Agreement may be assigned on two occasions only by the Beneficiary at any time to any other party acquiring the whole or any part of the Beneficiary's interest in the Project without the consent of the Consultant or the Employer being required and such Assignment shall be effective upon written notice thereof being given to the Consultant and the Employer. The Consultant may not assign this Agreement.
- 6.2 The Consultant agrees that it shall not at any time assert that any permitted assignee in terms of this Agreement is precluded from recovering any loss resulting from any breach of this Agreement by reason that such assignee is not an original party to this Agreement or that no loss or a different loss has been suffered by the original party.

7 Extraneous Rights

- 7.1 The parties acknowledge and accept that the provisions of this Agreement shall not in any way whatsoever and notwithstanding any rule of law to the contrary prejudice the rights and remedies which may be available to the parties against each other in delict at common law.

8 Third Party Rights

- 8.1 Save where expressly stated otherwise in this Agreement, nothing in this Agreement shall confer or purport to confer on any third party any benefit or right to enforce any term of this Agreement.

9 Notices

- 9.1 Any notice to be given hereunder shall only be validly served if in writing and delivered personally or sent by pre-paid first class recorded delivery post or sent by fax to the Beneficiary or the Consultant at the address specified in the preamble to this Agreement or to such amended address as the relevant party may specify.
- 9.2 In proving service it shall be sufficient to prove that the envelope containing the notice was properly addressed and either delivered personally or posted as a pre-paid first class recorded

delivery letter, or that the notice was faxed to the correct fax number (as demonstrated by the transmission slip).

- 9.3 The Consultant undertakes to the Beneficiary that it will copy to the Beneficiary, at the time of issue to the Employer, any notices issued pursuant to the Appointment.

10 Consultant's Remuneration

- 10.1 THE CONSULTANT ACKNOWLEDGES THAT THE EMPLOYER HAS PAID ALL FEES AND EXPENSES PROPERLY DUE AND OWING TO IT UNDER OR ARISING OUT OF THE APPOINTMENT UP TO THE DATE OF THIS AGREEMENT. THE BENEFICIARY HAS NO LIABILITY TO THE CONSULTANT IN RESPECT OF FEES AND EXPENSES UNDER THE APPOINTMENT.

11 NOT USED

12 Governing Law

12.1 This Agreement shall be governed by and construed according to Scots law and the parties submit to the exclusive jurisdiction of the Scottish Courts: IN WITNESS WHEREOF this Agreement consisting of this and the preceding 7 pages has been executed as follows:-

Subscribed for and on behalf of **FAITHFUL + GOULD LIMITED**

.....
Director Full name

Date when signed:

Town where signed:

In the presence of this witness:

Signature of witness

Full name of witness:

Address of witness:

Subscribed for and on behalf of **ROBERTSON CONSTRUCTION CENTRAL LIMITED**

.....
Signature of Director Full name of Director

Date when signed:

Town where signed:

In the presence of this witness:

Signature of witness

Full name of witness:

Address of witness:

PART 16 OF THE SCHEDULE: NOT USED

PART 17 OF THE SCHEDULE: NOT USED

PART 18 OF THE SCHEDULE - PAYMENT MECHANISM

Payment Mechanism is set out in the Agreed Form document comprising one volume labelled "Payment Mechanism", which shall have effect as if expressly set out in this Part 18 of the Schedule.

PART 19 OF THE SCHEDULE: FINANCIAL MODEL

The Financial Model is set out in an Agreed Form document comprising a CD.

PART 20 OF THE SCHEDULE

NOT USED

PART 21 OF THE SCHEDULE: INSURANCE REQUIREMENTS

This is Part 21 of the Schedule comprising the minimum Insurance Requirements referred to in the Project Agreement for Clackmannanshire Community Health Services Project between:

Forth Valley Health Board

-and-

Robertson Health (Clackmannanshire) Limited

Section 1: Policies to be taken out by Project Co during the Design and Construct Phase

1 Contractors "all risks" insurance

Insured:

- (1) The Board and Scottish Ministers
- (2) Project Co
- (3) The Contractor
- (4) The Service Provider
- (5) The Funder
- (6) Sub-contractors of any tier
- (7) Consultants to all of the above for site risks only

each for their respective rights and interests in the Project.

Period of Insurance:

From the date of the Agreement until the Actual Completion Date and thereafter in respect of defects liability until expiry of the 12 months defects liability period.

Coverage:

"All risks" of physical loss or damage unless otherwise excluded.

Insured Property:

The permanent and temporary works (including but not limited to any demolition works), materials, goods, plant and equipment for incorporation in the works (other than constructional plant, tools, hutting and equipment belonging to or the responsibility of the Contractor or Contractor's Sub-Contractors) and other property used or for use in connection with the works.

Sums Insured:

At all times an amount not less than the full reinstatement or replacement value of the Insured Property, but not less than the value specified in the building contract plus provision to include Principal Extensions, as appropriate.

Deductible:

Not to exceed £150,000 each and every claim for defective design, materials and workmanship and £10,000 for all other claims.

Territorial Limits:

United Kingdom

Principal Extensions and Conditions:

- Professional fees clause inclusive within sum insured – Limit £1m any one occurrence
- Debris removal clause inclusive within sum insured – Limit £1,000,000 any one occurrence
- 72 hour clause
- Free issue materials clause
- 10% Escalation clause
- Additional costs of constructing incomplete or unbuilt portions - £1,000,000 any one occurrence in addition to the sum insured subject to the Insured bearing 20% contribution to the claim or a financial deductible of £100,000 (whichever is the greater for each and every occurrence)
- European local authorities reinstatement clause – 15% of sum insured subject to a maximum of £2,000,000 any one occurrence
- Automatic reinstatement of sum insured – additional premium payable if over £1,000,000
- Damage to the works during the testing and commissioning operations

- Plans and documents clause - limit £100,000 during the period of insurance in addition to the sum insured
- Munitions of war
- Loss minimisation - £250,000 any one occurrence in addition to the sum insured
- Expediting expenses – 25% of the amount of the loss excluding expediting expenses subject to a maximum of £250,000 any one occurrence
- Temporary repairs - 15% of the actual cost of permanent repair
- Payment on account
- Terrorism
- Basis of settlement – Reinstatement as new
- Subject to Joint Code of Fire Practice
- Temporary offsite storage - £500,000 limit
- Inland transit - £500,000 limit
- Senior Lender and Authority endorsements
- Cash settlement at reinstatement value if no reinstatement in accordance with documentation
- Property hired in/out (excluding Construction Equipment)
- Marine 50/50
- Non vitiation
- Subrogation waiver
- Computer data reinstatement – limit £50,000 any one occurrence inclusive of the sum insured
- Buildings due for demolition – limit £1,000,000
- Subsidence, ground heave, landslip

Principal Exclusions:

- LEG 3/06
- War and related perils (UK market agreed wording)
- Nuclear/radioactive risks (UK market agreed wording)
- Pressure waves caused by aircraft and other aerial devices travelling at sonic or supersonic speeds
- Wear, tear and corrosion
- Routine inventory losses
- Consequential losses
- Cyber risks
- Transit by sea or air
- Water-borne or aircraft
- Money or negotiable documents
- Deliberate acts or omissions of the insured
- Deductibles
- Breakdown being damage to that part of any item of construction equipment insured under Insured Property caused by its own electrical or mechanical breakdown but the exclusion shall not apply to fire, explosion, impact or other damage arising as a result of such breakdown
- Piling in accordance with Insurers Standard Policy Wording
- Acts of fraud or theft committed by employees
- Toxic mould

2 Public and Products Liability

Insured:

- (1) The Board and Scottish Ministers
- (2) Project Co
- (3) The Contractor
- (4) The Service Provider
- (5) The Funder
- (6) Sub-contractors of any tier
- (7) Consultants to all of the above for site risks only

each for their respective rights and interests in the Project.

Period of Insurance:

From the date of the Agreement until the Actual Completion Date and thereafter in respect of defects liability until expiry of the 12 months defects liability period.

Interest:

Third Party Legal Liability

All sums that the Insured shall become legally liable to pay in respect of:-

- (a) death of or bodily injury to, illness or disease suffered by any person
- (b) loss or damage to property
- (c) interference to property or any easement or quasi-easement, right of air, light, waterway or the enjoyment or use thereof by trespass, nuisance, stoppage of traffic, obstruction, loss of amenities or any like cause whatsoever

arising out of or in the course of or in connection with the Works happening within the Geographic Limits during the Period of Insurance

Limit of Indemnity:

Not less than £30,000,000 in respect of any one occurrence, the number of occurrences being unlimited but in the aggregate in respect of pollution and products liability.

Deductible:

Not to exceed £5,000 each occurrence other in respect of personal injury or fatality claims which will be nil.

Territorial Limits:

United Kingdom extended to European Union in respect of temporary non manual visits

Jurisdiction:

Worldwide excluding USA, Canada and Australia

Principal Extensions and Conditions:

- Liability assumed under contract
- Infringement of privacy and wrongful arrest
- Claimant's costs and Insured's own costs and expenses in addition
- Defence costs of any prosecution made under the Health and Safety at Work Act
- Defective Premises Act 1972
- Data Protection Act
- Cross liabilities
- Food and safety legislation

- Consumer Protection Act 1987
- Contingent motor liability
- Social functions and activities
- Munitions of war
- Disclosure of Information
- Libel and slander – Limit £500,000 in the aggregate during the period of insurance
- Senior Lender and Authority endorsements
- Leased or rented property not excluded and property owned by the Authority to be treated as third party property
- Including officers, directors and employees of the insured
- Non vitiation
- Subrogation waiver
- Terrorism

Principal Exclusions:

- Liability for death, illness, disease or bodily injury sustained by employees of the insured
- Liability arising out of the use of mechanically propelled vehicles whilst required to be compulsorily insured by legislation
- Liability in respect of predetermined penalties or liquidated damages imposed under any contract entered into by the insured
- Liability in respect of loss or damage to property in the care, custody and control of the Insured
- Liability arising out of technical or professional advice other than in respect of death or bodily injury to persons or damage to third party property
- Liability arising from ownership, possession or use of any aircraft or marine vessel.
- Liability arising from pollution unless caused by a sudden, identifiable, unintended and unexpected occurrence
- Asbestos
- Obstruction, interference (as per policy wording) which is inevitable
- Deliberate acts
- Deductible
- Date recognition
- Electronic data
- Cyber liability
- Other Board liabilities

3 Delay in Start Up Insurance

Insured:

- (1) Project Co
- (2) The Funders

each for their respective rights and interests in the Project.

Period of Insurance:

As per Contractors "All Risks" Insurance excluding the defects liability period.

Indemnity:

In respect of:

1. loss of unavoidable fixed costs and debt service costs of Project Co anticipated during the Indemnity Period arising from a delay in completion as a result of physical loss or damage covered under the Contractors "All Risks" Insurance effected in accordance with Item 1 of Section 1 of this Schedule, including physical loss or damage which would have been indemnifiable but for the application of any waiting period;
2. the additional expenditure necessarily and reasonably incurred for the purpose of avoiding or reducing the loss of fixed costs and debt service costs of Project Co which without such expenditure would have taken place during the Indemnity Period; and
3. The additional expenditure (beyond the amount otherwise payable under 2 above necessarily and reasonably incurred for the sole purpose of avoiding or diminishing the delay in completion which but for the expenditure would have taken place during the Indemnity Period in consequence of the damage. This cover shall only operate in the event that a loss occurs which would result in an indemnity being given by the Insurers under this section following application of the claims deductible to such loss.

Indemnity Period:

21 Months

Sums Insured:

- 1 and 2 An amount sufficient to cover the sums the subject of the Indemnity for the Indemnity Period
3. Additional increased costs of working – £3,000,000

Waiting Period:

45 days waiting period in the aggregate.

Territorial Limits:

Anywhere in the UK

Principal Extensions and Conditions:

- Fees for Verification and Investigation of Claims
- Prevention of access - £500,000 limit
- Payments on account
- Subrogation waiver extended to the Contractor, the Board and Service Provider
- Terrorism
- Utilities/Services extension – Limit £250,000
- Specified suppliers only – Limit £250,000 any one period
- Munitions of war
- Funders and Board Endorsements as provided in Part 5 of this Schedule 21
- Claims Settlement – Insurers not to deduct from any claims settlement any liquidated or non-liquidated damages provided by the Building Contractor to the Contractor following insured loss or damage on the undertaking that liquidated or non-liquidated damages are to be reimbursed by the Contractor to the Building Contractor upon receipt of the proceeds of this policy in proportion to any recovery under this policy
- Subsidence, ground heave, landslip

Principal Exclusions:

As per Contractors "All Risks" insurance (other than consequential losses) and including :-

- Deductible
- Public authority delay
- Rectification of defects
- Non availability of funds
- Modifications
- Loss of operational revenue (but this shall not exclude loss of anticipated operational revenue in consequence of loss or damage insured under the Contractors "All Risks" insurance specified in Section 1 of this Part 1 of Schedule 21
- Fines and penalties
- Date Recognition
- Electronic Data

4 Compulsory Insurances

“Any other insurances required by law”

Section 2: Policies to be taken out by the Project Co during the Operational Term

1 Property damage insurance

Insured:

- (1) The Board and Scottish Ministers
- (2) Project Co
- (3) The Service Provider
- (4) The Funder

each for their respective rights and interests in the Project.

Period of Insurance:

From the Actual Completion Date or as otherwise specified in the Agreement for the duration of the Project Agreement and renewable on an annual basis unless agreed otherwise.

Coverage:

"All Risks" of physical loss or damage unless otherwise excluded.

Insured Property:

Any property of whatsoever nature or description which is the property of Project Co or for which the Project Co may be responsible.

Sums Insured:

At all times an amount not less than the total reinstatement or replacement value of the Insured Property plus provision to include other Principal Extensions as appropriate.

Territorial Limits:

At the Sites and elsewhere in the United Kingdom as provided for by the extensions.

Maximum Deductible:

Not to exceed £10,000 (Index Linked in accordance with RPI) each and every claim.

Principal Extensions and Conditions:

- Automatic reinstatement of sum insured – Additional premium payable if loss exceeds £1,000,000
- Capital additions clause – 10% of sum insured subject to £5,000,000 limit in any one period
- 72 hour clause
- European Union local authorities reinstatement – 15% of sum insured subject to a maximum of £2,000,000
- Temporary repairs clause – 15% of actual cost of repair/replacement
- Computer data reinstatement – Limit £50,000 in any one period of insurance
- Munitions of war
- Escalation clause – 15%
- Plans and documents - £50,000 any one occurrence in addition to the sums insured
- Expediting Expenses – Limit 25% subject to a maximum of £250,000 any one occurrence in addition to the sums insured
- Professional fees
- Debris removal
- Terrorism
- Property hired in – Limit £25,000 in any one period of insurance

- Temporary loan - £10,000
- Trace and access - £50,000 any one period of insurance
- Loss of metered water and fire extinguishing media – Limit £50,000 any one period of insurance
- Replacement locks £50,000 any one period of insurance
- Clearance of drains - £50,000 any one period of insurance
- Damage to landscaped areas by emergency services - £50,000 any one period of insurance
- Temporary removal - £50,000 included in sum insured
- Loss minimisation - £250,000 any one period of insurance
- Payments on account
- Senior Lender and Authority endorsements
- Non vitiation
- Cash option in the event of contractual non-reinstatement
- Subrogation waiver
- Subsidence, ground heave, landslip

Principal Exclusions:

- War and related perils (UK market agreed wording)
- Nuclear/radioactive risks (UK market agreed wording)
- Pressure waves caused by aircraft and other aerial devices travelling at sonic or supersonic speeds
- Wear, tear and corrosion
- Inventory
- Consequential losses
- Cyber risks
- Latent defects
- Date recognition
- Electronic data
- Deductibles
- Excluded property eg Money, jewellery, works of art, sculptures, rare books etc as per policy wording
- Motor vehicle, waterborne craft, aircraft and hovercraft
- Changes in Water Table/Temperature (as per policy wording)
- Pollution/Contamination of Insured Property (as per policy wording)
- Acts of fraud or theft committed by Employees
- Theft unless following forcible or violent entry to any building
- Collapse and cracking of buildings
- Toxic mould
- River or marine piers and bridges
- Fences, gates or moveable property in the open caused by wind, rain, hail, sleet, snow or flood

2 Public and Products Liability Insurance

Insured:

- (1) The Board and Scottish Ministers
- (2) Project Co
- (3) The Service Provider
- (4) The Funder

each for their respective rights and interests in the Project.

Period of Insurance:

From the Actual Completion Date or as otherwise specified in the Agreement for the duration of the Project Agreement and renewable on an annual basis unless agreed otherwise.

Interest:

All sums which the insured shall become legally liable to pay as damages or compensation in respect of:

- a) death of or bodily injury, illness or disease suffered by any person
- b) loss or damage to property
- c) interference to property or any easement, quasi-easement, right of air, light, waterway or the enjoyment or use thereof by trespass, nuisance, obstruction, stoppage of traffic, loss of amenities or any like cause whatsoever

happening within the Geographical Territories during the Period of Insurance and arising out of or in the course of or in connection with the Project other than in relation to the provision of the Works as more specifically insured under Item 2 of Section 1 of this Schedule 21.

Limit of Indemnity:

Not less than £30,000,000 (Index Linked in accordance with RPI to the nearest £1,000,000) in respect of any one occurrence, the number of occurrences being unlimited, but in the aggregate in respect of pollution and products liability.

Territorial Limits:

United Kingdom extended to European Union in respect of temporary non manual visits.

Deductible:

Not to exceed £10,000 (Index Linked in accordance with RPI) each and every claim other in respect of personal injury or fatality claims which will be nil.

Principal Extensions and Conditions:

- Liability assumed under agreement
- Defence costs of any prosecution made under the Health and Safety at Work Act not necessarily where injury has been sustained
- Defective Premises Act 1972
- Data Protection Act
- Cross liability clause
- Contingent motor liability
- Consumer Protection Act 1987 – legal costs
- Food Safety Act (or similar)
- Disclosure of information

- Infringement of privacy or wrongful arrest
- Indemnity to other persons
- Munitions of war
- Libel and Slander – Limit £500,000 in any one period
- Claimant's costs and Insured's own costs and expenses in addition
- Social functions and activities
- Senior Lenders and Authority Endorsements
- Leased or rented property not excluded and property owned by The Board to be treated as third party property
- Worldwide Jurisdiction (excluding USA/Canada/Australia)
- Non vitiation
- Subrogation waiver
- Terrorism

Principal Exclusions:

- Liability for death, illness, disease or bodily injury sustained by employees of the insured
- Liability arising out of the use of mechanically propelled vehicles whilst required to be compulsorily insured by legislation
- Liability in respect of predetermined penalties or liquidated damages imposed under any contract entered into by the insured
- Liability in respect of loss or damage to property in the care, custody and control of the Insured, but this exclusion shall not apply to the property of the Board except to the extent said property is insured under the Contractors All Risks or Property Damage sections of this Schedule 21
- Liability arising out of technical or professional advice other than in respect of death or bodily injury to persons or damage to third party property
- Liability arising from ownership, possession or use of any aircraft or marine vessel
- Liability arising from pollution unless caused by a sudden, identifiable, unintended and unexpected occurrence.
- Asbestos
- Toxic mould
- Cyber liability
- Obstruction that is inevitable
- Deliberate acts
- Products Liability under contract
- Defective work and damage to products
- Medical malpractice
- Electronic Data
- Date Recognition

3 **Business interruption**

Insured:

- (1) Project Co
- (2) The Funders

each for their respective rights and interests in the Project.

Period of Insurance:

From the Actual Completion Date for the duration of the Project Agreement and renewable on an annual basis unless agreed otherwise.

Indemnity:

In respect of

1. loss of unavoidable fixed costs and debt service costs of Project Co anticipated during the Indemnity Period arising from physical loss or damage covered under the Property Damage insurance effected in accordance with Item 1 of Section 2 of this Schedule including physical loss or damage which would have been indemnifiable but for the application of the deductible or Waiting Period;
2. the additional expenditure necessarily and reasonably incurred for the purpose of avoiding or reducing the loss of unavoidable fixed costs and debt service costs of Project Co which without such expenditure would have taken place; and
3. The additional expenditure (beyond the amount otherwise payable under 2 above necessarily and reasonably incurred for the sole purpose of avoiding or diminishing the interruption to the business which but for that expenditure would have taken place during the indemnity period in consequence of the damage. This cover shall only operate in the event that a loss occurs which would result in an indemnity being given by the Insurers under this section following application of the claims deductible to such loss.

Sums Insured:

1 and 2. An amount sufficient to cover the sums the subject of the Indemnity for the Indemnity Period

3. Additional increased costs of working - £3,000,000

Indemnity Period:

21 Months

Territorial Limits:

At the Sites and elsewhere in the United Kingdom as provided for by the extensions

Deductible:

Not to exceed £10,000 (Index Linked in accordance with RPI) each and every loss

Principal Extensions and Conditions:

- Fees for Verification and Investigation of Claims
- One automatic reinstatement of sum insured – additional premium to be agreed
- Prevention of access
- Utilities extension
- Notifiable disease, murder, suicide and vermin - £250,000 limit subject to £25,000 deductible and 90 day indemnity period
- Terrorism
- Escalation clause – 10%
- Suppliers clause - £250,000 any one period
- Munitions of war
- Payments on account
- Subrogation waiver extended to Building Contractor, Service Provider and Board
- Senior Lenders and Authority Endorsements
- Subsidence, ground heave, landslip

Principal Exclusions:

As per Property Damage insurance specified in Item 1 of this Section 2 of Schedule 21 (other than Consequential losses) and including

- Deductible
- Public authority delay
- Rectification of defects
- Non availability of funds
- Fines and penalties

4. Compulsory Insurances

“Any other insurances required by law”

Section 3: Insurance Cost Sharing

Definitions

For the purposes of this Section 3 of Part 21 of the Schedule (*Insurance Requirements*), the following words and expressions shall bear the following meanings:

“Actual Relevant Insurance Cost”	means the aggregate of the annual insurance premiums reasonably incurred by Project Co to maintain the Relevant Insurance during the Insurance Review Period but excluding insurance premium tax and all brokers’ fees and commissions;
“Base Cost”	means £46,004 being the amount as agreed at the Base Date and set out in the Financial Model which represents the insurance costs (which excludes amounts in respect of insurance premium tax and all brokers’ fees and commissions) which are proposed to be incurred to maintain the Relevant Insurance in each year following the Actual Completion Date, expressed in real terms as at the Base Date;
“Base Date”	means the date of this Agreement;
“Base Relevant Insurance Cost”	means the aggregate of the Base Costs which were (at Base Date) projected to be incurred to maintain the Relevant Insurance during the Insurance Review Period indexed by actual RPI from the Base Date up to the dates on which the Relevant Insurance was placed or renewed either immediately before or during the Insurance Review Period (as applicable in respect of the year in question) less any Base Relevant Insurance Reduction;
“Base Relevant Insurance Reduction”	means the reduction to be made to the Base Relevant Insurance Cost in respect of a risk which has become Uninsurable or a term or condition which is no longer available and shall be an amount that is either: <ul style="list-style-type: none"> (a) the amount by which the Base Relevant Insurance Cost would have been a lesser amount had such a risk been Uninsurable or such a term or condition been unavailable at the Base Date (which amount, for the avoidance of doubt, can be £0); or (b) if it is impossible to determine an amount pursuant to paragraph (a) above, an amount that is reasonable to be deducted from the Base Relevant Insurance Cost having due regard to: <ul style="list-style-type: none"> (i) the amount by which the Actual Relevant Insurance Cost is less than it would have been as a result of the risk becoming Uninsurable, or the term or condition becoming unavailable (the “Actual Reduction”); (ii) the size of the Actual Reduction as a percentage of the Actual Relevant Insurance Cost immediately prior to the risk becoming Uninsurable, or the term or condition becoming unavailable;

	and (iii) the effects of the RPI since the Base Date;
“Business Interruption Cover”	means the insurance cover specified in paragraph 3 (<i>Business Interruption</i>) of Section 1a and paragraph 3 of Section 2 of this Part 21 of the Schedule (<i>Insurance Requirements</i>);
“Construction Period Insurance”	means the Required Insurances specified in Section 1 of this Part 21 of the Schedule (<i>Insurance Requirements</i>);
“Exceptional Cost”	means, for an Insurance Review Period, the extent to which there is an Insurance Cost Increase which exceeds in amount 30% of the Base Relevant Insurance Cost for that Insurance Review Period;
“Exceptional Saving”	means, for an Insurance Review Period, the extent to which there is an Insurance Cost Decrease which exceeds in amount 30% of the Base Relevant Insurance Cost for that Insurance Review Period;
“First Insurance Review Date”	means the first Business Day following the first anniversary of the Relevant Insurance Inception Date;
“Insurance Cost Decrease”	means the Insurance Cost Differential if the value thereof is less than zero, multiplied by minus one;
“Insurance Cost Differential”	shall, subject to the Insurance Review Procedure, be determined as follows: Insurance Cost Differential = (ARIC - BRIC) - (±PIC) where: ARIC is the Actual Relevant Insurance Cost; BRIC is the Base Relevant Insurance Cost; and PIC is any Project Insurance Change;
“Insurance Cost Increase”	means the Insurance Cost Differential if the value thereof is greater than zero;
“Insurance Cost Index”	means any index introduced by the United Kingdom Government or the Office of National Statistics after the Effective Date and which is anticipated to be published annually to provide an independent and objective measure of changes in prevailing market insurance costs;
“Insurance Review Date”	means the First Insurance Review Date and, thereafter, each date falling on the second anniversary of the previous Insurance Review Date, except where such date lies beyond the end of the Project Term, in which case the Insurance Review Date shall be the last renewal date of the Relevant Insurance prior to the end of the Project Term;
“Insurance Review Procedure”	means the procedure set out in paragraph 1 of this Section 3 of this Part 21 of the Schedule (<i>Insurance Requirements</i>);

“Insurance Review Period”	means the period from the Relevant Insurance Inception Date to the First Insurance Review Date and each subsequent period commencing on an Insurance Review Date and ending on the following Insurance Review Date except where the end of such period lies beyond the end of the Project Term, in which case the Insurance Review Period shall be the period from the end of the penultimate Insurance Review Period to the last day of the Project Term;
“Joint Insurance Cost Report”	shall bear the meaning ascribed to it in paragraph 2.2 of this Section 3 of this Part 21 of the Schedule (<i>Insurance Requirements</i>);
“Portfolio Cost Saving”	means any insurance cost saving which arises from Project Co changing the placement of the Required Insurances from being on a stand-alone project-specific basis assumed at Financial Close and reflected in the Base Cost, to being on the basis of a policy (or policies) also covering risks on other projects or other matters which are outside the scope of the Project so as to benefit from portfolio savings. A Portfolio Cost Saving is defined to be a positive sum and cannot be less than zero;
“Project Insurance Change”	<p>means any net increase or net decrease in the Actual Relevant Insurance Cost relative to the Base Relevant Insurance Cost, arising from:</p> <ul style="list-style-type: none"> (a) the claims history or re-rating of Project Co or any Project Co Party; (b) the effect of any change in deductible unless the following applies: <ul style="list-style-type: none"> (i) such change is attributable to circumstances generally prevailing in the Relevant Insurance Market; and (ii) the deductible, further to such change, is either greater than or equal to the maximum in Sections 1 or 2 of this Part 21 of the Schedule (<i>Insurance Requirements</i>); (c) any other issue or factor other than circumstances generally prevailing in the Relevant Insurance Market, except for any Portfolio Cost Saving, <p>and for the purpose of determining the Insurance Cost Differential, in the event that there is a net increase, the Project Insurance Change shall have a positive value and in the event that there is a net decrease the Project Insurance Change shall have a negative value;</p>
“Relevant Insurance”	<p>means the Required Insurances and any other insurances as may be required by law other than:</p> <ul style="list-style-type: none"> (a) Construction Period Insurance; and (b) Business Interruption Cover except to the extent that it relates to loss of Revenue;

“Relevant Insurance Inception Date”	means the date on which the Relevant Insurance is first providing active insurance cover to Project Co, being a date no earlier than the Actual Completion Date;
“Relevant Insurance Market”	means the insurance market which insures the majority of all PFI projects across all of the PFI sectors (as determined by the number of PFI projects) (and as at the Effective Date, the Relevant Insurance Market is in the United Kingdom); and
“Required Insurances”	means all Insurances.

Insurance Review Procedure

- 1.1 This procedure shall be used to determine whether the Board shall bear any increase or benefit from any decrease in Relevant Insurance costs.
- 1.2 Project Co’s insurance broker shall prepare a report on behalf of both Project Co and the Board (the Joint Insurance Cost Report). The report is to be prepared at Project Co’s expense and should, as a minimum, contain the following information for the relevant Insurance Review Period:
 - 1.2.1 A full breakdown of the Actual Relevant Insurance Cost;
 - 1.2.2 A full breakdown of the Base Relevant Insurance Cost;
 - 1.2.3 A spreadsheet (the Insurance Summary Sheet) detailing separately:
 - 1.2.3.1 the sum(s) insured / limit of indemnity (ie rateable factor) for each of the Relevant Insurances;
 - 1.2.3.2 the premium rate for each of the Relevant insurances;
 - 1.2.3.3 the net premium paid (or to be paid) for each of the Relevant Insurances (ie excluding both insurance premium tax and brokers fees and commissions);
 - 1.2.3.4 the deductible(s) for each Relevant Insurance;
 - 1.2.3.5 details of any claims (paid or reserved) (including incident date, type and quantum) in excess of £100,000, being the amount stated in Clause 36.17 (Risk Management);
 - 1.2.4 An assessment and quantification of each Project Insurance Change together with the reasons therefor;
 - 1.2.5 Full details of any Portfolio Cost Saving;
 - 1.2.6 Any other reasons that Project Co believes may have caused a change (by way of increase or decrease relative to the Base Relevant Insurance Costs) in the Actual Relevant Insurance Cost;
 - 1.2.7 The opinion of the Project Co’s insurance broker as to the reasons why the Actual Relevant Insurance Cost has varied from the Base Relevant Insurance Cost, specifying the impact of each of the factors and quantifying the amount attributable to each factor specified above;
 - 1.2.8 The calculation of the Insurance Cost Differential and any Exceptional Cost or Exceptional Saving arising from this calculation;
 - 1.2.9 Evidence satisfactory to the Board (acting reasonably) of any changes to circumstances generally prevailing in the Relevant Insurance Market that are claimed to account for the Insurance Cost Differential; and
 - 1.2.10 Details of movements in the CBS Private Capital non marine index plus, if available from other appropriate sources, details of changes in insurance cost across the PFI market as a whole.

- 1.3 Project Co shall procure that its insurance broker, no later than the date which is ten (10) Business Days after the Insurance Review Date, delivers to the Board, at the same time as it delivers to Project Co, at least two copies of the Joint Insurance Cost Report. Following receipt of the Joint Insurance Cost Report, the Board shall notify Project Co in writing within fifteen (15) Business Days whether or not it accepts the Joint Insurance Cost Report including full details of any disagreement. If the Board does not provide such notification and/or details of any disagreement to Project Co within fifteen (15) Business Days, the Board shall be deemed to have accepted the Joint Insurance Cost Report. If the Board disagrees with any item in the Joint Insurance Cost Report, the Parties shall use their respective reasonable endeavours acting in good faith to agree the contents of the Joint Insurance Cost Report. If the Parties fail to agree the contents of the Joint Insurance Cost Report within thirty five (35) Business Days from the date it was delivered to the Board, the matter shall be resolved pursuant to Schedule Part 26 (Dispute Resolution Procedure), provided always that references in that Schedule to an expert shall be construed as references to an independent insurance expert agreed by the Parties or, in the absence of agreement, appointed by the President for the time being of the Chartered Institute of Arbitrators.
- 1.4 The Board may make the Joint Insurance Cost Report available to any of its agents or advisers.

2 Sharing of Exceptional Cost and Exceptional Saving

- 2.1 If, following the completion of the Insurance Review Procedure, it is agreed or determined that there is an Exceptional Cost, the Board shall within thirty (30) days of completion of the Insurance Review Procedure make a one-off lump-sum payment to Project Co equal to 85% of the Exceptional Cost.
- 2.2 If, following the completion of the Insurance Review Procedure, it is agreed or determined that there is an Exceptional Saving, Project Co shall within thirty (30) days of completion of the Insurance Review Procedure make a one-off lump-sum payment to the Authority equal to 85% of the Exceptional Saving.
- 2.3 Following the completion of the Insurance Review Procedure, if it is agreed or determined that there is neither an Exceptional Cost nor an Exceptional Saving, any Insurance Cost Differential shall be borne by or benefit Project Co.

3 Insurance Cost Index

If at any time an Insurance Cost Index is published and intended for use in PFI contracts of a similar nature to this Agreement, the Parties shall meet with a view to agreeing (a) its application to the Project, and (b) how a Portfolio Cost Saving may be accounted for when the index is in use.

Section 4: Base Insurance Premiums

FORM OF BROKER'S LETTER OF UNDERTAKING

To: Forth Valley Health Board
 Carseview House
 Castle Business Park
 Stirling FK9 4SW

Dear Sirs,

Clackmannanshire Community Health Service Project (the "Project")

We confirm in our capacity as insurance brokers to Project Co that the insurances specified in Parts 1 and 2 to Part 21 of the Schedule (the "Insurances") of the Project Agreement (the "Project Agreement") dated between the Board and Robertson Health (Clackmannanshire) Limited ("Project Co") are, as at today's date, in effect on and in respect of the risks as set out in the attached [***draft policies/cover notes***] and, that any premiums due as at the date of this letter, in respect of the Insurances, have been paid in full.

We also confirm that, as at the date of this letter, the relevant endorsements set out in the appendix to this letter are in full force and effect in respect of the Insurances.

Pursuant to instructions received from Project Co and in consideration of your approving our appointment or continuing appointment as brokers in connection with the Insurances, we hereby undertake the following:

1. to use our reasonable endeavours to endorse, on each and every policy evidencing the Insurances when the same is issued, endorsements substantially in the form set out in the appendix to this letter;
2. to pay all proceeds from the Insurances received by us in accordance with the relevant loss payable clauses set out in endorsement no. 3 of the appendix of this letter;
3. to notify the Board prior to the expiry of any of the Insurances if we have not received instructions from Project Co to negotiate renewal;
4. to notify the Board promptly if any insurer cancels or gives notice of cancellation of any of the Insurances to us;
5. to advise the Board (where reasonably possible in advance) of any material change to the terms of the Insurances;
6. promptly upon request, to supply to you and/or your insurance advisers (or your or their authorised representatives) copies of all placing slips relating to the Insurances;
7. promptly upon request to make available to you the original certificates of insurance, cover notes, renewal receipts and confirmations of renewal and payment of premiums and all policy documents, or certified true copies thereof, in respect of the Insurances and/or all such documents held by us on behalf of the Project Co;
8. subject to the prior written consent of the Project Co (and we undertake to notify you as soon as reasonably practicable if such consent is withheld) to disclose to insurers all information provided to those of our employees directly involved with the placement of the Insurances in our capacity as insurance broker to the Project Co, including any fact, change of circumstance or occurrence notified to such employees, which in our reasonable opinion is material to the risks insured against under the Insurances and which properly should be disclosed to insurers, or in accordance with the policy terms and conditions of the relevant Insurances, as soon as reasonably practicable after we are in receipt of such information, fact, change of circumstance or occurrence whether prior to inception or renewal or otherwise;

9. to treat as confidential all information so marked or otherwise stated to be confidential and supplied to us by or on behalf of the Project Co or the Board and not to disclose such information, without the prior written consent of the supplier, to any third party other than those persons who, in our reasonable opinion have a need to have access to such information from time to time, and for the purpose of disclosure to the insurers or their agents in respect of the Insurances. Our obligations of confidentiality shall not conflict with our duties owed to the Project Co and shall not apply to disclosure required by an order of a court of competent jurisdiction, or pursuant to any applicable law, governmental or regulatory authority having the force of law or to information which is in the public domain.

10. to notify the Board at least 30 Business Days prior to our ceasing to act as brokers to Project Co, unless impracticable because of circumstances beyond our control, in which case we shall notify the Board promptly upon becoming aware that we shall cease, or have ceased, so to act.

The above undertakings are given:

- (a) subject to any insurer's right of cancellation following default, in excess of 30 Business Days, in payment of premiums due and owing in respect of the Insurances, but we undertake to seek insurers' agreement to allow you a reasonable opportunity of paying such premiums before such cancellation becomes effective; and

- (b) subject to our continuing appointment for the time being as insurance brokers to Project Co; and

- (c) in respect of paragraph 2 above only, subject to any lien in respect of unpaid premium due by Project Co in respect of the Insurances.

Our aggregate liability to any persons, companies or organisations who act in reliance on this letter for any and all matters arising from it, shall in any and all events be limited to the sum of £2,000,000, even if we are negligent. We do not limit our liability for our fraud, or in respect of any liabilities which cannot lawfully be limited or excluded.

This letter is given by us on the instructions of Project Co and with their full knowledge and consent as to its terms.

This letter shall be governed by and construed in accordance with the laws of Scotland.

Yours faithfully

For and on behalf of Marsh Limited

We consent to the giving by our insurance brokers of this letter of undertaking on the terms set out above.

For and on behalf of Robertson Health (Clackmannanshire) Limited

Endorsement 1

Multiple Insured/Non-Vitiation Clause

Each of the parties comprising the insured shall for the purpose of this policy be considered a separate co-insured entity, insured on a composite basis, with the words "the insured" applying to each as if they were separately and individually insured provided that the total liability of the insurers under each section of this policy to the insured collectively shall not (unless the policy specifically permits otherwise) exceed the limit of indemnity or amount stated to be insured under that section of the policy. Accordingly, the liability of the insurers under this policy to any one insured shall not be conditional upon the due observance and fulfilment by any other insured party of the terms and conditions of this policy or of any duties imposed upon that insured party relating thereto, and shall not be affected by any failure in such observance or fulfilment by any such other insured party.

It is understood and agreed that any payment or payments by insurers to any one or more of the insureds shall reduce, to the extent of that payment, insurers' liability to all such parties arising from any one event giving rise to a claim under this policy and (if applicable) in the aggregate.

Insurers shall be entitled to avoid liability to or (as may be appropriate) claim damages from any insured party in circumstances of fraud misrepresentation non-disclosure or material breach of warranty or condition of this policy (each referred to in this clause as a "Vitiating Act") committed by that insured party save where such misrepresentation non-disclosure or material breach of warranty or condition was committed innocently and in good faith.

For the avoidance of doubt it is however agreed that a Vitiating Act committed by one insured party shall not prejudice the right to indemnity of any other insured who has an insurable interest and who has not committed the Vitiating Act.

Insurers hereby agree to waive all rights of subrogation and/or recourse which they may have or acquire against any insured party (together with their employees and agents) except where the rights of subrogation or recourse are acquired in consequence of a Vitiating Act in which circumstances insurers may enforce such rights against the insured responsible for the Vitiating Act notwithstanding the continuing or former status of the vitiating party as an insured.

Notwithstanding any other provisions of this policy or any other document or any act and/or omission by any insured party insurers agree that:

- (1) no party other than the Trust has any authority to make any warranty, disclosure or representation in connection with this policy on behalf of the Trust;
- (2) where any warranty, disclosure or representation is required from the Trust in connection with this policy insurers will contact the Trust in writing (in accordance with Endorsement 2 to the Agreement) and set out expressly the warranty, disclosure and/or representation required within a reasonable period of time from the Trust (regarding itself); and
- (3) save as set out in a request from insurers to the Trust in accordance with (2) above, the Trust shall have no duty to disclose any fact or matter to insurers in connection with this policy save to the extent that for the Trust not to disclose a fact or matter would constitute fraudulent misrepresentation and/or fraudulent non-disclosure.

Endorsement 2

Communications

All notices or other communications under or in connection with this policy shall be given to each insured (and the Trust) in writing or by facsimile. Any such notice will be deemed to be given as follows:

- (a) if in writing, when delivered
- (b) if by facsimile, when transmitted but only if, immediately after transmission, the sender's facsimile machine records a successful transmission has occurred.

The address and facsimile number of the Trust for all notices under or in connection with this policy are those notified from time to time by the Trust for this purpose to the Project Co's insurance broker at the relevant time. The initial address and facsimile number of the trust are as follows:

1. The Trust: NHS Forth Valley

Address:

Facsimile Number:

Attention: The Chief Executive from time to time of the Trust

It is further agreed that a notice of claim given by the Trust or any other insured shall in the absence of any manifest error be accepted by the insurer as a valid notification of a claim on behalf of all insureds.

Endorsement 3

Loss Payee (applicable only to the Physical damage Policies)

All proceeds of this policy shall be payable without deduction or set-off to the Joint Insurance Account.

Endorsement 4

Primary Insurance

It is expressly understood and agreed that this policy provides primary cover for the insured parties and that in the event of loss destruction damage or liability covered by this policy which is covered either in whole or in part under any other policy or policies of insurance effected by or on behalf of any of the insured parties the insurers will indemnify the insured parties as if such other policy or policies of insurance were not in force and the insurers waive their rights of recourse if any against the insurers of such other policy or policies of insurance.

Endorsement 5

Claims Negotiation Rights

Notwithstanding any claim conditions contained herein insurers agree that the Trust has the right to settle and negotiate any claims received from third parties subject to prior consent of insurers. If the trust takes or fails to take any action as a direct result of which insurers' liability is increased then the liability of insurers to provide an indemnity is reduced to such an extent.

Endorsement 6

Ringfencing

The level of any indemnity available to an insured party under this policy in relation to any claim(s) concerning the Project shall not be affected and/or reduced by any claim(s) unrelated to the Project.

PART 22 OF THE SCHEDULE: VARIATION PROCEDURE

Section 1A: Interpretation

For the purposes of this Agreement, and in particular this Part 22 of the Schedule (*Variation Procedure*), unless the context requires otherwise:

"Board Additional Works Confirmation"	means a Confirmation pursuant to paragraph 8 of Section 1 of Part 22 of the Schedule (<i>Variation Procedure</i>) in respect of a Board Works Confirmation
"Board Additional Works Enquiry"	means a Variation Enquiry issued by the Board's Representative pursuant to paragraph 2.1(c)(ii) of Section 1 of Schedule 22 (<i>Variation Procedure</i>)
"Board Additional Works Item"	<p>means an item of works affecting the Facilities (being any work of alteration, addition, demolition or extension or any variation in the quality or function of the Facilities) which:</p> <p>is not Maintenance Works or Small Works or work otherwise required to ensure that Project Co complies with its duties under this Agreement; and</p> <p>is to be carried out after the Actual Completion Date,</p> <p>and which is required to comply with a Board Additional Works Variation</p>
"Board Additional Works Variation"	means additional Works initiated by the Board in accordance with Part 22 of the Schedule (<i>Variation Procedure</i>)
"Board Service Variation"	means a Service Variation initiated by the Board in accordance with Part 22 of the Schedule (<i>Variation Procedure</i>)
"Board Service Variation Enquiry"	has the meaning given in paragraph 2.1(c)(iii) of Section 1 of Part 22 of the Schedule (<i>Variation Procedure</i>)
"Board Works Variation"	means a variation to the Works initiated by the Board in accordance with Part 22 of the Schedule (<i>Variation Procedure</i>)
"Board Works Variation Confirmation"	means a Variation Confirmation pursuant to paragraph 4.3 of Section 1 of Part 22 of the Schedule (<i>Variation Procedure</i>) in respect of a Board Works Variation
"Board Works Variation Enquiry"	has the meaning given in paragraph 2.1(b) of Section 1 of Part 22 of the Schedule (<i>Variation Procedure</i>)
"Capital Expenditure"	means capital expenditure (as such term is interpreted in accordance with generally accepted accounting principles in the United Kingdom from time to time)
"Commencement Date"	means the date set out in the Certificate of Commencement
"Directive"	means the Acquired Rights Directive EC 2001/23/EC

"Executive"	has the meaning given to it in the Construction (Design and Management) Regulations 1994 as referred to at Section 2 of Part 8 of the Schedule (<i>Construction Matters</i>)
"Funding Shortfall"	has the meaning given in paragraph 2.1 of Section 2 of Part 22 of the Schedule (<i>Variation Procedure</i>)
"General Procedure"	has the meaning given in paragraph 1.1 of Section 3 of Part 22 of the Schedule (<i>Variation Procedure</i>)
"IRR"	means the real internal rate of return on Shareholders' equity and subordinated debt which shall be that rate of return calculated in accordance with the Financial Model at the Commencement Date
"Qualifying Variation"	means a Variation (other than any revision to or substitution for the Method Statements pursuant to Clause 27.3 (<i>Services</i>)) for which a Variation Confirmation has been issued and the supplementary agreement referred to in paragraph 4.5 of Section 1 of Part 22 of the Schedule (<i>Variation Procedure</i>) has become unconditional in all respects
"Room Data Sheets"	has the meaning described in Part 8 of the Schedule (<i>Construction Matters</i>)
"Schedule of Small Works Rates"	means the schedule of labour rates for Small Works, referred to in paragraph 1 of Section 4 of Part 22 of the Schedule (<i>Variation Procedure</i>), to be agreed or determined annually in accordance with paragraph 2 of that Section 4 of Part 22 of the Schedule (<i>Variation Procedure</i>)
"Service Variation"	means a variation to a Service in accordance with Part 22 of the Schedule (<i>Variation Procedure</i>)
"Small Works"	means works of a minor nature that are requested by the Board to be carried out having an individual cost not exceeding £5,000.00 (index linked), or as otherwise agreed from time to time, but excluding any operation or work which will increase the likelihood of the Facilities not complying with the requirements described in Section 5 of each of the Service Level Specifications, will increase the cost to Project Co of performing the Project Operations or will materially hinder Project Co in the performance of the Services
"Variation"	means a Board Works Variation, a Board Additional Works Item and/or a Board Service Variation (as the case may be)
"Variation Confirmation"	has the meaning given in paragraph 4.5 of Section 1 of Part 22 of the Schedule (<i>Variation Procedure</i>)
"Variation Enquiry"	has the meaning given in paragraph 2.1 of Section 1 of Part 22 of the Schedule (<i>Variation Procedure</i>)
"Works Variation Capital Limit"	means sum equal to 15% of the Capital Cost of the Facilities, index linked; and
"Works Variation Delay Limit"	means a period of twelve months

Section 1: Variations

1 General

Subject to receiving the Variation Confirmation issued in accordance with the terms of this Schedule and to any Consent which must be obtained or modified being so obtained or modified and subject to the other provisions of this Schedule, Project Co shall be under a duty to implement a Variation. Project Co will not be entitled to any payment or compensation for or in respect of a Variation save as provided in accordance with this Part 22 of the Schedule.

2 Variation enquiries

2.1 A Variation Enquiry shall be a document issued by the Board's Representative which:

- (a) states on its face that it is a Variation Enquiry;
- (b) states, in the case of a Board Works Variation or a Board Additional Works Item, whether it is the intention of the Board that the Board will pay a capital sum in respect of the Variation in accordance with paragraph 3 of Section 2 of this Part 22 of the Schedule or whether it is the intention of the Board that Project Co should seek to obtain finance in accordance with Section 2 of this Part 22 of the Schedule; and
- (c) in the case of:
 - (i) a Board Works Variation, specifies the nature of the Board Works Variation and which of the provisions of the Board's Construction Requirements and/or Project Co's Proposals are required to be amended to accommodate the relevant Board Works Variation; or
 - (ii) a Board Additional Works Variation, specifies:
 - (aa) the nature and scope of the relevant Board Additional Works Item to the same level of detail as set out in Project Co's Proposals and/or the Board's Construction Requirements; and
 - (bb) the times at or by which the Board wishes the work at the Facilities to implement the relevant Board Additional Works Item to be commenced and completed; or
 - (iii) a Board Service Variation specifies, the nature of the Board Service Variation and is accompanied by a marked up or amended version of the relevant section(s) of the Method Statements and/or Service Level Specifications.

2.2 The Board's Representative may not issue a Variation Enquiry other than in accordance with the provisions of this Section 1.

3 Project Co Response to Variation Enquiry

Preliminary Indicative Information

3.1 Prior to giving a notice referred to in paragraph 3.2 of this Section 1:

- (a) Project Co may at its option within ten (10) Business Days of receipt of a Variation Enquiry:
 - (i) give to the Board in good faith a preliminary non-binding indication of the estimated cost of implementing the Variation and provide such other information about the Variation as is available to Project Co and which it believes is useful to the Board; and

- (ii) in the case of a Board Works Variation, such information shall include in particular Project Co's estimated effect on the date when the Actual Completion Date will occur;
- (b) if Project Co provides an indication referred to in paragraph (ii), the Board shall within a further five (5) Business Days of its receipt confirm whether or not it wishes Project Co to proceed to respond to the Variation Enquiry in accordance with provisions of paragraph 3.2; and
- (c) in the case of a Variation Enquiry for a Board Works Variation or a Board Additional Works Item where the Board has stated an intention that Project Co should obtain finance, Project Co will, if so required in the Variation Enquiry, use reasonable endeavours to obtain an initial non-binding response from the Funders as to availability of finance for the Variation in advance of performing its obligations under Section 2 of this Part 22 of the Schedule.

Project Co Response

- 3.2 Within one (1) month of receipt of a Variation Enquiry or (if the provisions of paragraph 3.10(b) apply) within one (1) month of the Board confirming that it wishes Project Co to proceed with responding to the Variation Enquiry or in either case such longer period as may be agreed by the parties or determined in accordance with Part 26 of the Schedule (*Dispute Resolution Procedure*) as reasonable given the nature of the Variation Enquiry and all other relevant considerations, Project Co shall either:
- (a) give notice to the Board's Representative that it objects to the Variation Enquiry stating the grounds of the objection. Project Co may only object to a Variation Enquiry on one or more of the following grounds:
 - (i) that implementation of the Variation would materially and adversely affect the health and safety of any person; or
 - (ii) that implementation of the Variation would:
 - (aa) infringe any Law; or
 - (bb) cause any existing Consent (which is not reasonably likely, on a balance of probabilities, to be capable of modification) to be revoked; or
 - (cc) require a new Consent which will not (using all reasonable endeavours) be obtainable; or
 - (dd) have a material and adverse effect on the performance of the Project Operations (except those Project Operations which have been specified as requiring to be amended in the Variation Enquiry) in a manner not compensated pursuant to this Schedule; or
 - (ee) be a departure from Good Industry Practice; or
 - (iii) that the Board does not have the legal power or capacity to require the Variation to be implemented or to do anything envisaged by this Schedule in respect of, or in connection with, the Variation; or
 - (iv) in the case of a Variation Enquiry where the Board has stated an intention that Project Co should obtain finance, either that Project Co has performed its obligations under paragraphs 1.1 and 1.2 of Section 2 of this Part 22 of the Schedule and that finance is not available at the date of such notice to Project Co to implement the Variation, or that Project Co has not yet performed such obligations in which case the provisions of paragraph 3.3 of Section 1 shall apply; or

- (v) that the Variation would, if implemented, result in a change in the essential nature of the Facilities; or
- (vi) that the Variation Enquiry does not comply with paragraph 2 of this Section 1; or
- (vii) in the case of:
 - (aa) a Board Works Variation, that the Capital Expenditure required in respect of the Board Works Variation, when taken together with the Capital Expenditure in respect of other Board Works Variations which are Qualifying Variations, exceeds the Works Variation Capital Limit; or
 - (bb) a Board Works Variation, that the delay to the date on which the Actual Completion Date will occur caused by the Board Works Variation, when taken together with the delays caused by other Board Works Variations which are Qualifying Variations, will exceed the Works Variation Delay Limit; or
 - (cc) a Board Additional Works Item, that the time specified for commencement and/or completion of the Board Additional Works Item cannot reasonably be achieved by Project Co; or
 - (dd) a Board Service Variation, that the time (if any) specified for implementation of the Board Service Variation cannot reasonably be achieved by Project Co; or
- (viii) that the information contained in the Variation Enquiry is inadequate to enable Project Co to respond in accordance with paragraph (b) below (on the assumption, whether or not the case, that it has no objection under paragraphs (i) to (vii));

or

- (b) give notice to the Board's Representative stating:
 - (i) the steps which Project Co proposes to take to implement the Variation giving such level of detail as is reasonable and appropriate in all the circumstances;
 - (ii) Project Co's estimated out of pocket expenditure or estimated savings in respect of the Variation having regard to all relevant facts and matters, including:
 - (aa) any costs (by line item) incurred or to be incurred under paragraph 5 of this Section 1 (*Consents*);
 - (bb) in the case of a Board Works Variation, the provisions governing the valuation of variations (however described) in the Construction Contract and any capitalised interest or other costs which may be incurred by Project Co as a result of any delay to the Actual Completion Date by reason of such Board Works Variation; and
 - (cc) in the case of a Board Service Variation, any Capital Expenditure or other lump sum expenditure likely to be incurred in the course of the implementation of the Board Service Variation;
 - (iii) in the case of a Board Works Variation, whether, in the view of Project Co, implementing the Board Works Variation Enquiry would be likely to prevent the Actual Completion Date from occurring at the Completion Date (prior to any adjustment being made to the Completion Date by reason of the implementation or proposed implementation of the Board Works Variation) and, if so, giving an estimate of the extension of time likely to be required (subject to any further time required to obtain or amend any Consent);

- (iv) any Consent which must be obtained or amended for the Variation to be implemented and the latest date by which Project Co must receive a Variation Confirmation and any such Consent must be obtained or modified for the matters set out in (i)-(iii) above to remain valid, such date being a reasonable period of time after service of the notice by Project Co under this paragraph 3.2 (b) to enable the Board's Representative to consider any matter under paragraph 4.14.1(c) below;
- (v) whether Project Co considers that a Service Variation, including, in the case of a Variation Enquiry for a Service Variation, another Service Variation (which for the purpose of this paragraph 3.2(b)(v), shall include a change in the cost to Project Co of performing periodic or life cycle maintenance) shall be required as a consequence of the Variation specified in the Variation Enquiry and, if so, stating the matters specified in this paragraph 3.2 in respect of such Service Variation;
- (vi) such amendments to the provisions of the Payment Mechanism and the Performance Monitoring System and other associated provisions of this Agreement which are necessary as a consequence of the Variation, the objective of such amendments being to ensure that (save for the obligation of the Board to make payments or altered payments in respect of the Variation or any other adverse consequences for the Board arising from the Variation itself) the parties are in no better and no worse position in relation to the Project than they would have been in if such Variation had not been implemented; and
- (vii) whether, in the view of Project Co, implementing the Service Variation or the Board Additional Works Item, would cause any Non-Availability to all or any part of the Facilities and/or cause the issue of any Service Failure Point, giving an estimate in each case of relief from any Service Failure Points required to put the parties in no better and no worse position in relation to the Project than they would have been in if such Variation had not been implemented.

Finance

If Project Co shall give notice pursuant to paragraph 3.2(a)(iv) and it has not performed its obligations under paragraphs 1.1 and 1.2 of Section 2 of this Part 22 of the Schedule then it shall, as soon as reasonably practicable, perform such obligations. In the case of a Board Works Variation, if Project Co cannot obtain finance from the sources referred to in paragraph 1 of Section 2 of this Part 22 of the Schedule, the timetable set out in this Part for implementation of the Variation shall be suspended until the Board either instructs Project Co to proceed with, or withdraws, the Variation as contemplated in paragraph 1.3 of Section 2 of this Part 22 of the Schedule (which the Board shall decide and notify Project Co within twenty (20) Business Days of the notification from Project Co to the Board in accordance with paragraph 1.3 of Section 2 (*Funding not available*)). If the operation of those provisions results in finance being available then, as soon as practical after such finance becomes available, Project Co shall, unless it has other objections falling within paragraph 3.2.(a)(i)-(iii) or (v)-(viii) (inclusive), give a notice pursuant to paragraph 3.2(b) of this Section 1 and the other provisions of this Section 1 shall come into operation accordingly.

4 Resolution of Disputes and Variation Confirmation

- 4.1 Within ten (10) Business Days of receipt of the notice referred to in paragraph 3.2 of this Section 1:
 - (a) if Project Co has served a notice under paragraph 3.2(a) but the Board's Representative does not accept that Project Co is entitled to object to the Variation Enquiry, the matter may be referred for resolution in accordance with Part 26 of the Schedule (*Dispute Resolution Procedure*) and if the Dispute is resolved in favour of the Board then Project Co shall forthwith give the notice referred to in paragraph 3.2(b);
 - (b) if the contents of the notice under paragraph 3.2(b) shall be to the satisfaction of the Board's Representative he shall so inform Project Co and the parties shall proceed to agree or determine all the matters referred to in paragraph 4.3 of this Section 1; or

- (c) if he wishes to consider further any matter, the Board's Representative may give notice to that effect to Project Co provided that if no response is given under paragraph (b) of this paragraph 4.1 prior to the date referred to in paragraph 3.2(b)(iv), (*Latest date for Variation Confirmation*) the Variation Enquiry shall be deemed to have been withdrawn; or
 - (d) if any aspect of a notice under paragraph 3.2(b) shall not be to the Board's Representative's satisfaction he shall so notify Project Co and shall specify the alterations to the notice which he would require in order to be so satisfied.
- 4.2 If the Board's Representative has given a notice referred to in paragraph 4.1(d) of this Section 1 then, unless agreement has been reached with Project Co within a further ten (10) Business Days from the date of issue of that notice (in which case the Board's Representative shall proceed pursuant to paragraph 4.1(b) of this Section 1) or the Board's Representative withdraws the Variation Enquiry, the outstanding Dispute shall be referred for resolution in accordance with Part 26 of the Schedule (*Dispute Resolution Procedure*) to be determined (if the Board's Representative so requires it) concurrently with any matter referred to in paragraph 4.3 of this Section 1. In seeking to reach agreement and/or in so determining a Dispute pursuant to this paragraph or to paragraph 4.3, the criterion to be applied to resolve any such dispute (except where another criterion or other criteria are expressly or by implication stated in this Part 22 of the Schedule) shall be that Project Co shall be in no worse position in relation to the Project and the Works after the Variation is implemented than it would have been in had the Variation not been implemented.
- 4.3 The parties shall meet and seek to agree the matters referred to in paragraphs 4.3(a) and 4.3(b) in relation to the Variation, failing which agreement being reached in a reasonable period of time, either party may refer any matter for resolution in accordance with Part 26 of the Schedule (*Dispute Resolution Procedure*). The matters to be agreed or determined are:
- (a) in relation to the terms of the Variation:
 - (i) any alteration to the Completion Date;
 - (ii) the Capital Expenditure required to implement the Variation or saved by such implementation and any costs or expenditure recoverable by Project Co and/or any out of pocket costs or expenditure to be met by the Board under this Part 22 of the Schedule in connection with or as a consequence of the Variation and the timing and method of payment thereof (including, where applicable, payment pursuant to paragraph 3 of Section 2 of this Part 22 of the Schedule);
 - (iii) the specification of any Service Variation (including any further Service Variation) required in connection with the Variation and whether Project Co has any right to object to such Service Variation under the provisions of this Part 22 of the Schedule;
 - (iv) any alteration to the Service Payment pursuant to the provisions of Section 3 of this Part 22 of the Schedule and the other results of the operation of Section 3 in accordance with the provisions of that Part;
 - (v) any amendment to the provisions of this Agreement which is referred to in paragraph 3.2(b)(v) (*Deductions Mechanisms*); and
 - (vi) any relief to be granted to Project Co in respect of any Non-Availability or Service Failure Points as referred to in paragraph 3.2(b)(vi) (*Relief*),

in each case occasioned by the Variation; and
 - (b) the terms of a supplementary agreement under which:
 - (i) as required to give effect to the Variation in each case, the Board's Construction Requirements and/or Project Co's Proposals are amended (in respect of any Board Works Variation or Board Additional Works Item); and/or provision is made for the amendment of the as-built drawings and specifications, including Room

Data Sheets and other records, drawings, operating and maintenance manuals, the asset register, the health and safety file (all on completion of a Board Additional Works Item); and/or the Method Statements or Service Level Specifications are amended in respect of any Service Variation; and

- (ii) the matters referred to in paragraph 4.3 of this Section 1 are fully recorded and given effect as amendments to and/or other variations to the provisions of this Agreement and/or such other documentation as is necessary.

Board Funding Information

- 4.4 The Board shall upon request from Project Co provide information to Project Co to show how the Service Payments (as altered in accordance with Section 3 of this Part 22 of the Schedule) and any capital sum payable in accordance with paragraph 3 of Section 2 of this Part 22 of the Schedule will be funded by the Board, including, to the extent that the Board is required to obtain the same, in accordance with the procedures applicable to the Board or the NHS (or any successor of it):
- (a) written approval to the proposed Variation (and the financial consequences for the Board) by each of the Scottish Executive Health Department Private Finance and Capital Unit and by the Scottish Ministers and giving satisfactory comfort to Project Co regarding affordability and the legal capacity of the Board to require and implement the variation, in the manner contemplated by the Variation Enquiry; and
 - (b) letters from the principal purchasers or commissioners of healthcare services from the Board (or their equivalent) confirming how the Variation is to be funded and, where required by such procedures, confirming their approval of the Variation,

and, where so requested, Project Co's satisfaction (acting reasonably and without delay) with the information referred to in this paragraph 4.4 shall be a condition of the Variation Confirmation becoming effective.

- 4.5 Upon the agreement or determination of all the matters referred to in paragraph 4.3, and upon any Consent having been modified or obtained, in accordance with paragraph 5 (*Consents*) in terms reasonably satisfactory to Project Co and the Board, and upon the provision by Project Co to the Board of evidence reasonably satisfactory to the Board of the availability of committed funding for the Variation (subject only to any condition relating to the issue of the Variation Confirmation pursuant to this paragraph), the Board's representative shall, by notice (a "Variation Confirmation") confirm the Variation. Upon the issue of the Variation Confirmation, the parties shall enter into the supplementary agreement referred to in paragraph 4.3, subject to and conditional upon any relevant funding procured by Project Co becoming unconditionally available for drawdown to Project Co.
- 4.6 Upon the Variation Confirmation being issued and the supplementary agreement referred to in paragraph 4.5 becoming unconditional in all respects:
- (a) the relevant Variation shall be a Qualifying Variation; and
 - (b) the rights and liabilities of the parties under this Agreement shall be construed accordingly.

5 Consent and Variations

- 5.1 If it shall be necessary to obtain or amend any Consent in respect of any Variation then Project Co shall use all reasonable endeavours to obtain and, where the co-operation and involvement of both parties is required, the Board shall use all reasonable endeavours to assist and co-operate in obtaining, such Consent. The provisions of Clause 16 (*Consents and Planning Approval*) shall apply in relation to Planning Permissions, save that the time taken to obtain such Consent shall be taken into account for the purposes of determining any extension of time and any other amounts payable by the Board to Project Co under this Part 22 of the Schedule.

- 5.2 If it shall not be possible to obtain any such Consent as is referred to in paragraph 5.1 above by the latest date when a Variation Confirmation could be given with regard to the Variation in question in accordance with the notice by Project Co pursuant to paragraph 3.2(b) of this Section 1 of Part 22 of the Schedule, the Variation Enquiry shall be deemed to be withdrawn and the provisions of paragraph 7 of this Section 1 of Part 22 of the Schedule shall apply accordingly.

6 Valuation of Variations

Board Works Variations

- 6.1 The General Procedure shall be operated in respect of Board Works Variations so that, subject to the other provisions of this Agreement providing for the adjustment of any amount payable under this Agreement, the Capital Expenditure used to assess the effect of the Qualifying Variation in respect of the Board Works Variation shall be:
- (a) the proposed amount of Capital Expenditure in respect of the Board Works Variation specified in Project Co's notice under paragraph 3.2(b) of this Section 1 of Part 22 of the Schedule; or
 - (b) (if that sum was not agreed by the Board's Representative) the corresponding sum in respect of that Board Works Variation which was agreed by the Board's Representative and Project Co or determined in accordance with Part 26 of the Schedule (*Dispute Resolution Procedure*).

Board Additional Works Items

- 6.2 The General Procedure shall be operated in respect of Board Additional Works Items, subject to paragraph 8 of this Section 1 of Part 22 of the Schedule.

Board Service Variations

- 6.3 The General Procedure shall be operated in respect of Board Service Variations so that the variation in Project Co's costs used to assess the effect of the Qualifying Variation under the General Procedure shall be the actual variation in costs which Project Co and the relevant Service Provider will incur in order to implement the Service Variation (whilst preserving (but not increasing) any margin charged by Project Co and the Service Provider on their respective costs). Project Co shall obtain from the relevant Service Provider and disclose to the Board's Representative the costs of providing the Service to which the Board Service Variation relates for the period from and including the last preceding Market Testing Date (if any) or the Payment Commencement Date (as the case may be) together with the Service Provider's computation of the variation in its costs resulting from the Board Service Variation, taking into account:
- (a) existing labour rates applying to providers of services which correspond to the Service to which the Board Service Variation relates, in the open market;
 - (b) resulting changes in the Service Providers' workforce including costs and provisions associated with the Transfer Regulations and/or the Directive;
 - (c) the changes in the Method Statements and Service Level Specifications and any other Variations to this Agreement arising out of the Board Service Variation;
 - (d) any change in risk transfer; and
 - (e) changes in working methods including associated capital investment (and the costs of providing such capital) reasonably required to be made by Project Co or the relevant Service Provider other than Variations in the Facilities which fall to be dealt with under Sections 1 or 2 of this Part 22 of the Schedule.
- 6.4 If the Board Service Variation will result in any employees of Project Co and/or the relevant Service Provider becoming redundant, the costs of any redundancy payments which require to be paid to each such employee under the Employment Rights Act 1996 and the terms and conditions of their employment shall be paid by the Board to Project Co in the Contract Month in which

redundancy occurs save to the extent that such redundancy payments have been increased by reason of any failure by the relevant employer to act reasonably so as to minimise such payments (including any failure to take reasonable efforts to redeploy such employees within the business of Project Co and/or the relevant Service Provider).

7 Withdrawal

The Board's Representative may withdraw a Variation Enquiry at any time prior to the issue of a Variation Confirmation, or, in the case of a Variation which requires the obtaining of, or an amendment to any Consent, the date when the last such Consent is granted, whichever shall be later. In the case of a withdrawal or deemed withdrawal the Board shall pay Project Co all out of pocket expenses reasonably and properly incurred by Project Co in connection with the Variation.

8 Particular provisions in respect of the implementation of Board Additional Works Items

- 8.1 Where Project Co does not intend to use its own resources to execute any Board Additional Works Items it shall comply with Good Industry Practice with the objective of ensuring that it obtains good value for money (taking into account all relevant circumstances including, in particular, the requirement that Project Co should be no worse off as a result of the implementation of the Board Additional Works Enquiry) when procuring any work, services, supplies, materials or equipment required for the Board Additional Works Items. To avoid doubt, where the Capital Expenditure in respect of the Board Additional Works Item is expected to exceed a value of £10,000 (index linked) Project Co's obligations under this paragraph shall (unless otherwise agreed) include an obligation to seek and evaluate competitive tenders.
- 8.2 Where the implementation of any Board Additional Works Item by Project Co is subject to the CDM Regulations, the following provisions shall apply:
- (a) Project Co shall timeously serve on the Executive a declaration pursuant to CDM Regulation 4 in respect of the proposed Board Additional Works Item and shall act as "the client" in relation to the relevant Board Additional Works Item for all the purposes of the CDM Regulations;
 - (b) Project Co shall comply with all of the obligations incumbent on the client under the CDM Regulations in relation to the relevant Board Additional Works Item; and
 - (c) Project Co shall, as soon as reasonably practicable following the completion of the relevant Board Additional Works Item, issue to the Board three copies of either the health and safety file prepared in relation to the relevant Board Additional Works Item (where prior to the implementation of the relevant Board Additional Works Item no health and safety file existed in respect of the structure or structures affected by the relevant Board Additional Works Item) or the relevant page or pages to be added to (or substituted for existing pages in) any existing health and safety file affected by the implementation of such Board Additional Works Item.
- 8.3 Notwithstanding any other express provision of this Agreement, where the Board considers, in its sole discretion (acting reasonably and having taken appropriate legal and technical advice), that the procurement of any Board Additional Works Item would be governed by any element of the Procurement Legislation with the result that the Board itself is under a duty competitively to tender any contract in relation to such Board Additional Works Item in accordance with such Procurement Legislation, the Board shall not be obliged to issue a Variation Enquiry to Project Co in relation to such Board Additional Works Item and shall be free to procure such Board Additional Works Item by any means it sees fit (which, to avoid doubt, may include awarding a contract to a third party in relation to such work).
- 8.4 Where the Board exercises its right under paragraph 8.3, the parties shall (as soon as possible following the decision of the Board so to exercise) meet and seek to agree such course of action (which may include, where relevant, changes to the terms of the Agreement, granting relief from liability or the payment of compensation) as is necessary to leave Project Co (as far as is possible) in no better and no worse a position following the Board exercising such right than it would have been had the Board not exercised the right and had not sought to procure the Board Additional Works Item. If the parties shall fail to agree on the necessary course of action, not less than thirty

(30) Business Days prior to the award by the Board of any contract in relation to the Board Additional Works Item, the issue of what course of action is so necessary may be referred for determination in accordance with Part 26 of the Schedule (*Dispute Resolution Procedure*).

- 8.5 Notwithstanding any other express provision of this Agreement, as between the Board and Project Co, the taking of and the consequences of any action by the Board in accordance with paragraph 8.3 shall not give rise to any rights for Project Co or any liability for the Board (whether in contract, delict or otherwise) other than as may be agreed or determined in accordance with paragraph 8.4.

9 Deemed service variations

- 9.1 Where there is a change to the Board Policies (subject to Clause 32.7 (*Site Security and Personnel Issues*)) or a change of use or occupancy of, or operational hours or activities carried on within the whole or any part of the Facilities by the Board or any Board Party, either party shall be entitled to advise the other party by notice in writing that it considers that a Service Variation has arisen or will arise by operation of the change provided that it does so within three (3) months of the date when it became aware, or ought reasonably to have become aware, of the relevant change. Any notice so served shall describe in as much detail as practicable the nature of the Service Variation which is likely to be required as a result of the change and the date by which the relevant Service Variation must be implemented.
- 9.2 The Board (in the case of a notice under paragraph 9.1 from Project Co) or Project Co (in the case of a notice under paragraph 9.1 from the Board) shall within fifteen (15) Business Days of receipt of the notice under paragraph 9.1 set out its response to the matters set out in such notice. Any dispute as to the nature of the relevant change or as to its effect shall be referred for resolution in accordance with Part 26 of the Schedule (*Dispute Resolution Procedure*).
- 9.3 Within fifteen (15) Business Days of agreement or determination pursuant to paragraph 9.2 above that a relevant change has occurred which requires a Service Variation to be implemented, the provisions of this Section 1 shall apply to the definition and implementation of the Service Variation as if it were a Board Service Variation and as if the notice referred to in paragraph 9.1 of this Section 1 was a Board Service Variation Confirmation given at the end of such period of fifteen (15) Business Days.

Project Co Variations

- 10.1 Project Co shall be entitled, at any time during the Project Term, to propose to the Board a change to the Works or a change to the manner of carrying out the Services. The Board undertakes to discuss and agree or disagree to any such proposed change made by Project Co. For the avoidance of doubt, the Board will be entitled to agree or disagree at its absolute discretion to any such proposed change.

Section 2: Finance for Capital Expenditure in respect of Variations

1 General principle

- 1.1 Project Co shall use reasonable endeavours to obtain finance for any Capital Expenditure required in respect of a Qualifying Variation (which term, when used in this Section 2, shall include reference to a proposed Variation which will be a Qualifying Variation when all matters in respect of it have been agreed or determined pursuant to this Agreement) in accordance with the other Sections of this Part 22 of the Schedule from any funds specifically available to it for this purpose under the Funding Agreements in force from time to time.
- 1.2 In particular, Project Co shall use reasonable endeavours to utilise (subject to their terms) any available stand-by facility or "head room" in the loan facilities (however described) (so far as not committed or reserved to fund cost overruns on the Works or otherwise) which is or becomes available to finance Qualifying Variations during the period up to the Actual Completion Date.
- 1.3 In the case of a Board Works Variation, Project Co shall not be required to take any steps to obtain finance beyond those contemplated in paragraphs 1.1 and 1.2. If within fifteen (15) Business Days (or such longer period as Project Co may decide which shall not, in any event, exceed forty (40) Business Days) of Project Co initiating discussions with the Funders, confirmation has not been obtained from the Funders that they are prepared to enter into their respective credit processes with a view to obtaining credit approval to finance the Board Works Variation, Project Co shall notify the Board's Representative reporting on the response received from the Funders. Within twenty (20) Business Days after receiving such notice the Board shall:
- (a) subject to the provisions of Section 1 of this Part 22 of the Schedule, instruct Project Co to proceed with development of the Board Works Variation on the basis that the Board will make payment to Project Co in accordance with paragraph 3 of this Section 2 of Part 22 of the Schedule in respect of the expenditure incurred and any increased cost of funding due to any delay to the Completion Date agreed or determined pursuant to Section 1 of this Part 22 of the Schedule, on a current basis in accordance with the provisions of Section 1 of this Part 22 of the Schedule; or
 - (b) withdraw the requirement for Project Co to implement the Board Works Variation in accordance with the provisions of Section 1 of this Part 22 of the Schedule.

2 Funding shortfalls

- 2.1 If Project Co cannot obtain finance for all or any part of Capital Expenditure required in respect of a Qualifying Variation (other than a Board Works Variation in relation to which Project Co shall have no obligations pursuant to this paragraph 2) (the "Funding Shortfall") from the sources referred to in paragraph 1 and such Capital Expenditure exceeds £500,000 (index linked) then, at the Board's request, Project Co shall use all reasonable endeavours to procure such finance on such reasonable terms as are available to it. The use of reasonable endeavours shall include the preparation of an appropriate business plan in respect of the business of Project Co as affected by the Qualifying Variation to demonstrate the ability of Project Co successfully to implement the relevant financing strategy in respect of the Funding Shortfall.
- 2.2 If having used reasonable endeavours for a period of no less than sixty (60) Business Days (or such shorter period as may be reasonable in all the circumstances) after the determination of the amount of the Funding Shortfall, Project Co cannot obtain such finance on terms reasonably satisfactory to Project Co and the Board then it shall notify the Board's Representative reporting on the activities seeking finance. Within twenty (20) Business Days after receiving such notice the Board shall:
- (a) subject to the provisions of Sections 2 and 3 (as applicable) of this Part 22 of the Schedule instruct Project Co to proceed with development of the relevant Qualifying Variation on the basis that the Board will make payments to Project Co in respect of the Funding Shortfall in accordance with paragraph 3 of this Section 2 of Part 22 of the Schedule; or

- (b) where the Qualifying Variation is a Board Service Variation or Board Additional Works Item ordered by the Board, withdraw the requirement for Project Co to implement the relevant Qualifying Variation in accordance with the provisions of Section 1 of this Part 22 of the Schedule.

3 Payment of capital sum by the Board

3.1 Where pursuant to any provision of this Part 22 of the Schedule the Board is to pay a capital sum in respect of a Qualifying Variation:

- (a) the Board and Project Co shall agree:
 - (i) a payment schedule in respect of the payment of such sum reflecting the amount and timing of the costs to be incurred by Project Co in carrying out the Qualifying Variation to the extent borne by the Board; and
 - (ii) where payment for part of the Qualifying Variation reflects the carrying out of, or specific progress towards, an element within the Qualifying Variation, an objective means of providing evidence confirming that the part of the Qualifying Variation corresponding to each occasion when payment is due under the payment schedule appears to have been duly carried out,

(such payment schedule and evidence to be determined in accordance with Part 26 of the Schedule (*Dispute Resolution Procedure*) in the event of the Board and Project Co failing to agree as to its terms) provided that where all or any part of the Qualifying Variation is being carried out by a third party under a contract with Project Co, subject to the terms of any contract between Project Co and that third party in relation to the implementation of the Qualifying Variation having been approved by the Board (such approval not to be unreasonably withheld), the process under Part 26 of the Schedule (*Dispute Resolution Procedure*) shall not determine a payment schedule or evidence which would not enable Project Co to be funded by the Board in time to make payments to that third party in accordance with its contract with Project Co;

- (b) the Board shall make payment to Project Co within fifteen (15) Business Days of receipt by the Board of invoices presented to the Board (in all material respects) in accordance with the agreed payment schedule (as the case may be, varied by agreement from time to time) accompanied by the relevant evidence (where applicable) that the relevant part of the Qualifying Variation has been carried out; and
- (c) if payment is not made in accordance with sub-paragraph (b) above, the Board shall pay interest to Project Co on the amount unpaid from the date fifteen (15) Business Days after receipt of the relevant invoice until paid at the Default Interest Rate.

Section 3: General Procedure

1 General

The procedure described in this Section 3 of Part 22 of the Schedule ("the General Procedure") shall apply where required to determine the effect on payments of a Qualifying Variation.

2 Objective of the General Procedure

2.1 The objective of the General Procedure shall be to adjust the values of entries used in the calculation of the Service Payment in Part 18 of the Schedule (*Payment Mechanism*) after entering changes in costs shown in the Financial Model for the Project, taking into account all relevant matters including:

- (a) the effect of the Qualifying Variation (including, to avoid doubt, the method of financing the Qualifying Variation, the impact of the Qualifying Variation on the project economics as reflected in the Financial Model, taxation and the commercial income earned by Project Co through its participation in the Project);
- (b) any adjustments pursuant to paragraph 2.4 of this Section 3 of Part 22 of the Schedule;
- (c) the effect of indexation to date and forecast inflation as it would affect the Project; and
- (d) when any adjustment to the Service Payment takes effect,

so that comparison of the output from the Financial Model before such adjustments and changes in costs and after such adjustments and changes in costs shows that:

- (i) the nominal internal rate of return from the expected date of implementation of the Qualifying Variation to the expiry of the Project Term in respect of the equity and subordinated debt originally expected to be invested in the Project (as shown in the Financial Model) shall be unchanged before and after modelling the effects of the Qualifying Variation;
- (ii) the nominal internal rate of return from the expected date of implementation of the Qualifying Variation to the expiry of the Project Term in respect of any other equity and subordinated debt (which term when used in this Section 3 of Part 22 of the Schedule in connection with further subordinated debt supplied in connection with funding Qualifying Variations shall include other methods used by equity investors to provide capital to companies whether subordinated to senior lenders or not, other than subscribing for equity in those companies) (in addition to that referred to in (i) above) invested in the Project as a consequence of any other Qualifying Variation (as shown in the Financial Model as adjusted at the time for the investment of such other equity and subordinated debt) shall be unchanged before and after modelling the effects of the Qualifying Variation,

and so that the output from the Financial Model after such adjustments and changes in costs shows that:

- (aa) Project Co would not, by reason of the effect of the Qualifying Variation and the consequential variation in cashflow during the remainder of the Project Term as shown in the Financial Model after such adjustments have been made, be placed in breach of its obligations under the Funding Agreements and there would be no event of default, acceleration event, limitation on drawdown, deterioration in all cover ratios over the period of repayment of the amounts due under the Funding Agreements or other adverse effect (whatever called or however described) (compared to the position if such adjustments were not made) under the Funding Agreements; and

- (bb) the agreed IRR on any additional equity and subordinated debt to be invested in the Project as a consequence of the Qualifying Variation is achieved.
- 2.2 The output from the operation of the General Procedure shall be the prices and other terms referred to below and such other terms as may be required to give effect to the application of the General Procedure, having taken into account actual indexation as applied pursuant to this Agreement to determine the Service Payments in respect of the Contract Year following that in which the General Procedure was brought into operation by substituting new values for the terms designated [insert cross reference to the algebraic terms in the relevant formulae in Part 18 of the Schedule] for those values in force immediately prior to the operation of the General Procedure; in each such case for such period (not exceeding the remaining term of the Project Term) as shall be appropriate to give effect to the objective of the General Procedure.
- 2.3 Subject to the other Parts of the Schedule, adjustments shall be made to the Financial Model in accordance with this paragraph to achieve the objectives set out in paragraph 2.1 and produce outputs reflecting the results required by paragraph 2.2 by entering into the model the revised or additional costs incurred by Project Co as a result of the Qualifying Variation, and, where necessary, incorporating the consequences of any funding obtained or used by Project Co to implement the Qualifying Variation. The following guidelines shall be followed to the maximum extent possible when making the adjustment:
- (a) wherever possible, the adjustment shall be carried out without altering the logic and formulae incorporated in the Financial Model in any way whatsoever, and only data such as costs incurred by Project Co and the timing and amount of drawdowns of funding shall be changed;
 - (b) where it is necessary to amend any logic or formulae incorporated in the Financial Model to permit the adjustments to be made, this shall be done to the minimum extent necessary;
 - (c) where any amendment is made to the logic or formulae incorporated in the Financial Model, the Financial Model, as amended, shall first be run with the data included in the Financial Model prior to amendment to ensure that the outputs from the Financial Model as amended correspond to the outputs prior to amendment; and
 - (d) any amendments to the logic or formulae incorporated in the Financial Model shall be fully recorded and shall be such that the manner in which the revised prices are calculated can be readily verified.
- 2.4 In relation to Qualifying Variations, the adjustments to the Financial Model shall only take place as follows:
- (a) when the expenditure or savings in connection with one or more Qualifying Variations in respect of which no adjustment has been made to the Financial Model exceeds (in either case) £250,000 (index linked) in aggregate;
 - (b) on each anniversary of the date of this Agreement falling prior to the Actual Completion Date;
 - (c) on the Actual Completion Date; and
 - (d) at the end of a Contract Year.

3 Financing costs where lump sum payment

If payment is to be made pursuant to paragraph 3 of Section 2 of this Part 22 of the Schedule which fully finances the Qualifying Variation, then no account shall be taken of the need to finance any Capital Expenditure in connection with the Qualifying Variation save to the extent that such financing is actually required between implementation of the Qualifying Variation and the payment of the lump sum.

4 Updating the Financial Model

Following the adjustment to calculate the new prices following a Qualifying Variation the Financial Model as adjusted in accordance with paragraphs 2 or 5 of this Section 3 of Part 22 of the Schedule shall be the Financial Model for the purposes of this Agreement.

Section 4: Small Works

- 1 After the Actual Completion Date, Project Co shall carry out Small Works which have been requested by the Board. If there shall be any dispute as to whether an item of work requested by the Board constitutes Small Works either party may refer it for resolution in accordance with Part 26 of the Schedule (*Dispute Resolution Procedure*).
- 2 Not later than twenty (20) Business Days prior to the commencement of each Contract Year Project Co shall propose a Schedule of Small Works Rates for that Contract Year for the purposes of the same being agreed by the Liaison Committee pursuant to the provisions of Clause 12 (*Liaison*). The value of any such Small Works shall be calculated as follows:
 - (a) the labour element shall be calculated in accordance with the Schedule of Small Works Rates or, where such rates are not applicable, in accordance with analogous rates, failing which rates which are fair and reasonable; and
 - (b) the materials element shall be charged at the cost of the materials to Project Co or to the contractor carrying out the work (net of all discounts) plus 7.5%.
- 3 Project Co shall notify the Board's Representative of the estimated duration of any Small Works so that the Board's Representative and Project Co can agree a convenient time for carrying out the same (so as to minimise inconvenience to the Board). Project Co shall take all reasonable steps to minimise the duration of any Small Works.
- 4 Any dispute as to the cost of Small Works shall be referred for resolution in accordance with Part 26 of the Schedule (*Dispute Resolution Procedure*). In the event of failure on the part of the Liaison Committee to agree in advance of any Contract Year the Schedule of Small Works Rates, the said rates shall be determined in accordance with Part 26 of the Schedule (*Dispute Resolution Procedure*).

PART 23 OF THE SCHEDULE: COMPENSATION ON TERMINATION

SECTION A: COMPENSATION ON TERMINATION FOR BOARD DEFAULT AND VOLUNTARY TERMINATION

- 1 If Project Co terminates this Agreement pursuant to Clause 45 (*Board Events of Default*) or the Board terminates this Agreement pursuant to Clause 46.2 (*Voluntary Termination*) or the Board exercises its right under Clause 36.21 (*Board election not to reinstate*) the Board shall pay to Project Co the "Board Default Termination Sum" as set out in paragraph 2.
- 2 Subject to paragraphs 4 to 6 the Board Default Termination Sum shall be an amount equal to the aggregate of:
 - (a) the Base Senior Debt Termination Amount;
 - (b) Redundancy Payments and Sub-Contractor Losses; and
 - (c) the amount for which the share capital of Project Co and the Junior Debt could have been sold on an open market basis based on the Relevant Assumptions;

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:

- (d) all credit balances on any bank accounts held by or on behalf of Project Co on the Termination Date and the value of any right of Project Co to receive insurance proceeds (save where such insurance proceeds are (i) held in the Insurance Proceeds Account and are to be applied in accordance with Clause 36.19 of this Agreement in reinstatement, restoration or replacement or, (ii) in the case of any third party legal liability or employer's liability, in satisfaction of the claim, demand, proceeding or liability) or sums due and payable from third parties (but only when received from third parties) but excluding any claims under any Sub-Contracts or claims against other third parties which have not been determined or have been determined but not yet paid provided that in such case Project Co shall assign any such rights and claims under the Sub-Contracts or claims against other third parties to the Board and give the Board reasonable assistance in prosecuting such claims;
- (e) to the extent realised before the Invoice Date the market value of any other assets and rights of Project Co (other than those transferred to the Board pursuant to this Agreement) less liabilities of Project Co properly incurred in carrying out its obligations under this Agreement as at the Termination Date provided that no account should be taken of any liabilities and obligations of Project Co arising out of:
 - (i) agreements or arrangements entered into by Project Co to the extent that such agreements or arrangements were not entered into in connection with Project Co's obligations in relation to the Project; or
 - (ii) agreements or arrangements entered into by Project Co to the extent that such agreements or arrangements were not entered into in the ordinary course of business and on commercial arm's length terms; and
 - (iii) amounts which the Board is entitled to set off pursuant to Clause 48.12 of this Agreement.
- 3 To the extent that such assets and rights referred to in paragraph 2(d) above are not realised and applied by the Invoice Date, Project Co shall on payment of the Board Default Termination Sum assign such assets and rights to the Board.
- 4 If the aggregate of the amounts referred to in paragraphs 2 (a) and (c) is less than the Revised Senior Debt Termination Amount, then the Board Default Termination Sum shall be increased so that it is equal to the aggregate of the Revised Senior Debt Termination Amount and the amount referred to in paragraph 2 (b) provided always that (a) the amount referred to in paragraph 2 (b) shall only be paid to the extent that Project Co has demonstrated to the reasonable satisfaction of the Board that the

amount will not be applied (in whole or in part) in payment of any Distribution and (b) if, at the time of termination, there are any Additional Permitted Borrowings outstanding, no Sub-Contractor Losses shall be paid in respect of any Sub Contract in circumstances where there is an event of default under such Sub-Contract which would entitle Project Co to terminate such Sub-Contract.

- 5 If a Distribution is made whilst any Additional Permitted Borrowing is outstanding and Project Co has wilfully, or through gross negligence failed to comply with its obligations under Clause 10.4.4 (a) of the Funders Direct Agreement then in addition to the deduction of the Distribution made pursuant to paragraph (iv) of the definition of Revised Senior Debt Termination Amount, the Board shall be entitled to set off the value of that Distribution a second time against the Board Default Termination Sum, provided that the amount of the Board Default Termination Sum shall never be less than the Revised Senior Debt Termination Amount.
- 6 If Project Co has wilfully or through gross negligence failed to comply with its obligations under Clause 10.4.4 (b) of the Funders' Direct Agreement and there has been an overstatement of the cash balances by Project Co as at that Date which has caused the Board to reasonably believe that it would be required to pay a lesser sum at the Termination Date than it actually is required to pay under the terms of this Part A, then the Board Default Termination Sum shall be reduced by the amount of such overstatement (to the extent such overstatement is still applicable at the Termination Date), provided that the amount of the Board Default Termination Sum will never be less than the Revised Senior Debt Termination Amount.
- 7 The Board Default Termination Sum shall be payable in accordance with Section E of this Part 23 of the Schedule.

SECTION B: COMPENSATION FOR PROJECT CO DEFAULT

1 Compensation for Project Co Default

- 1.1 If the Board terminates this Agreement pursuant to Clause 44 (*Project Co Events of Default*) with the exception of termination pursuant to Clause 44.1(c)(ii) the Board shall pay to Project Co such sum as is calculated according to this Section B of this Part 23 of the Schedule.

Retendering

2 Retendering Election

- 2.1 The Board shall be entitled to retender the provision of the Project Operations in accordance with paragraph 3 (Retendering Procedure) and the provisions of paragraph 3 (*Retendering Procedure*) shall apply if:
- (a) the Board notifies Project Co on or before the date falling twenty (20) Business Days after the Termination Date ; and
 - (b) there is a Liquid Market; and either
 - (i) the Senior Funders have not exercised their rights to step-in under Clause 4 (Representative) of the Funders' Direct Agreement; or
 - (ii) Project Co or the Senior Funders have not procured the transfer of Project Co's rights and liabilities under this Agreement to a Suitable Substitute Contractor and have failed to use all reasonable efforts to do so

but otherwise the Board shall require a determination in accordance with paragraph 4 (*No Retendering Procedure*) and the provisions of that paragraph shall apply.

3 Retendering procedure

- 3.1 The objective of the Tender Process shall be to enter into a New Agreement with a Compliant Tenderer.
- 3.2 The Board shall use all reasonable endeavours to complete the Tender Process as soon as practicable.
- 3.3 The Board shall as soon as reasonably practicable notify Project Co of the Qualification Criteria and the other requirements and terms of the Tender Process, including the timing of the Tender Process and shall act reasonably in setting such requirements and terms.
- 3.4 Project Co authorises the release of any information by the Board under the Tender Process which would otherwise be prevented under Clause 52 (*Confidentiality*) that is reasonably required as part of the Tender Process.
- 3.5 For all or any part of a month, falling within the period from the Termination Date to the Compensation Date, the Board shall pay to Project Co:
- (a) the Post Termination Service Amount for each completed month, on or before the date falling ten (10) Business Days after the end of that month; and
 - (b) the Post Termination Service Amount for the period from the end of the last completed month until the Compensation Date, on or before the date falling twenty (20) Business Days after the Compensation Date.
- 3.6 Project Co may, at its own cost, appoint a person to monitor the Tender Process for the purpose of monitoring and reporting to Project Co and the Senior Funders on the Board's compliance with the Tender Process.

- 3.7 The Tender Process Monitor shall enter into a confidentiality agreement with the Board in a form acceptable to the Board and shall be entitled to attend all meetings relating to the Tender Process, inspect copies of all the tender documentation and bids and make representations to the Board as to compliance with the Tender Process. The Board shall not be bound to consider or act upon such representations but acknowledges that such representations may be put to the Expert in the event of a disagreement as to the Adjusted Highest Compliant Tender Price. The Tender Process Monitor will not disclose confidential information to Project Co or the Senior Funders but shall be entitled to advise Project Co and the Senior Funders on whether it considers that the Board has acted in accordance with the Tender Process and correctly determined the Adjusted Highest Compliant Tender Price.
- 3.8 If any Post Termination Service Amount is less than zero then it may be carried forward and may be set off against any future positive Post Termination Service Amounts.
- 3.9 As soon as practicable after tenders have been received, the Board shall (acting reasonably) review and assess the Compliant Tenders and shall notify Project Co of the Adjusted Highest Compliant Tender Price.
- 3.10 If Project Co refers a dispute relating to the Adjusted Highest Compliant Tender Price to dispute resolution in accordance with Clause 56 (*Dispute Resolution*), the Board shall irrespective of such dispute be entitled to enter into a New Agreement.
- 3.11 The Adjusted Highest Compliant Tender Price shall be paid in accordance with Section E of this Part 23 of the Schedule.
- 3.12 Subject to paragraph 1.6 of Part E and paragraph 3.14 below, if the Board has not paid an amount equal to the Adjusted Highest Compliant Tender Price to Project Co on or before the date falling two years after the Termination Date then the following provisions of this paragraph 3 shall not apply to that termination and the provisions of paragraph 4 (*No Retendering Process*) shall apply instead.
- 3.13 The Board may elect, at any time prior to the receipt of a Compliant Tender, to follow the no retendering procedure under paragraph 4 (*No Retendering Procedure*) by notifying Project Co that this election has been made.
- 3.14 If the Board has received all bids from bidders under the Tender Process and has received a Compliant Tender but decides not to complete the Tender Process, it shall notify Project Co of this decision and pay to Project Co an amount equal to the Adjusted Highest Compliant Tender Price within 20 Business Days of such notification.

4 No Retendering Procedure

- 4.1 Subject to paragraph 4.2, if the provisions of this paragraph 4 (*No Retendering Procedure*) apply Project Co shall not be entitled to receive any Post Termination Service Amount.
- 4.2 If the Board elects to require a determination in accordance with this paragraph 4 (*No Retendering Procedure*) after it has elected to follow the procedure under paragraph 3 (*Retendering Procedure*), then the Board shall continue to pay to Project Co each Post Termination Service Amount until the Compensation Date, in accordance with paragraph 3 (*Retendering Procedure*).
- 4.3 In agreeing or determining the Estimated Fair Value of the Agreement the parties shall be obliged to follow the principles set out below:
- (a) all forecast amounts of revenues and costs should be calculated in nominal terms at current prices, recognising the adjustment for indexation in respect of forecast inflation between the date of calculation and the forecast payment date(s) as set out in this Agreement;
 - (b) the total of all payments of the full Service Payments forecast to be made from the Termination Date to the Expiry Date shall be calculated and discounted at the Discount Rate;

- (c) the total of all costs reasonably forecast to be incurred by the Board as a result of termination shall be calculated and discounted at the Discount Rate and deducted from the payment calculated pursuant to paragraph 4.3(b) above, such costs to include (without double counting):
- (i) a reasonable risk assessment of any cost overruns that will arise, whether or not forecast in the relevant base case;
 - (ii) the costs of providing the Services reasonably forecast to be incurred by the Board from the Termination Date to the Expiry Date to the standard required and
 - (iii) any rectification costs required to deliver the Project Operations to the standard required (including any costs reasonably forecast to be incurred by the Board to complete the Works) and additional operating costs required to restore operating services standards less (to the extent that such sums are included in any calculation of rectification costs for the purposes of this paragraph) the aggregate of:
 - (aa) any insurance proceeds received (or held in the Insurance Proceeds Account) or which will be received pursuant to policies maintained in accordance with Clause 36 (*Insurance*); and
 - (bb) amounts payable by the Board in respect of Capital Expenditure under this Agreement which have not been paid,

in each case such costs to be forecast at a level that will deliver the Services to the standards required by the Project Agreement.

- 4.4 If the parties cannot agree on the Estimated Fair Value of the Agreement on or before the date falling twenty (20) Business Days after the date on which the Board elected or was obliged to require an expert determination in accordance with this paragraph 4 (*No Retendering Procedure*), then the Estimated Fair Value of the Agreement shall be determined in accordance with Clause 56 (*Dispute Resolution*).
- 4.5 The Adjusted Estimated Fair Value of the Agreement shall be paid in accordance with Section E of this Part 23 of the Schedule.

SECTION C: CONSEQUENCES OF TERMINATION FOR FORCE MAJEURE

1 Consequences of termination for force majeure

- 1.1 If Project Co or the Board terminates this Agreement pursuant to Clause 46.1 (*Force Majeure*) the Board shall pay to Project Co the "Force Majeure Termination Sum" as set out in paragraph 1.2.
- 1.2 Subject to paragraphs 1.4 to 1.6 the Force Majeure Termination Sum shall be an amount equal to the aggregate of:

- (a) the Base Senior Debt Termination Amount;
- (b) Redundancy Payments and Sub-Contractor Losses (but excluding therefrom any claims for loss of profit);
- (c) an amount equal to the Junior Debt less an amount equal to the aggregate of payments of interest paid on the Junior Debt provided that where such figure is a negative number it shall be instead fixed at zero; and
- (d) an amount equal to all amounts paid to Project Co by way of subscription for shares in the capital of Project Co less dividends and other distributions paid to the shareholders of Project Co provided that where such figure is a negative number it shall be instead fixed at zero;

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 of the amounts below:

- (e) all credit balances on any bank accounts held by or on behalf of Project Co on the Termination Date and the value of any right of Project Co to receive insurance proceeds (save where such insurance proceeds are (i) held in the Insurance Proceeds Account and are to be applied in accordance with Clause 36.19 (*Insurance*) of this Agreement in reinstatement, restoration or replacement, or (ii) in the case of third party legal liability or employer's liability, in satisfaction of the claim, demand, proceeding or liability) or sums due and payable from third parties (but only when received from third parties) but excluding any claims under any Sub-Contracts or claims against other third parties which have not been determined or have been determined but not yet paid provided that in such case Project Co shall assign any such rights and claims under the Sub-Contracts or claims against other third parties to the Board and give the Board reasonable assistance in prosecuting such claims;
 - (f) the market value of any other assets and rights of Project Co (other than those transferred to the Board pursuant to this Agreement) less liabilities of Project Co properly incurred in carrying out its obligations under this Agreement as at the Termination Date to the extent realised before the Invoice Date provided that no account should be taken of any liabilities and obligations of Project Co arising out of:
 - (i) agreements or arrangements entered into by Project Co to the extent that such agreements or arrangements were not entered into in connection with Project Co's obligations in relation to the Project; and
 - (ii) agreements or arrangements entered into by Project Co to the extent that such agreements or arrangements were not entered into in the ordinary course of business and on commercial arm's length terms; and
 - (g) amounts which the Board is entitled to set off pursuant to Clause 48.12 of this Agreement.
- 1.3 To the extent that such assets and rights referred to in paragraph 1.2(e) above are not realised and applied pursuant to that paragraph Project Co shall on payment of the Force Majeure Termination Sum assign such assets and rights to the Board.

- 1.4 If the aggregate of the amounts referred to in paragraphs 1.2 (a), (c) and (d) is less than the Revised Senior Debt Termination Amount, then the Force Majeure Termination Sum shall be increased so that it is equal to the aggregate of the Revised Senior Debt Termination Amount and the amount referred to in paragraph 1.2 (b) provided always that (a) the amount referred to in paragraph 1.2 (b) shall only be paid to the extent that Project Co has demonstrated to the reasonable satisfaction of the Board that the amount will not be paid (in whole or in part) in payment of any Distribution and (b) if, at the time of termination, there are any Additional Permitted Borrowings outstanding, no Sub-Contractor Losses shall be paid in respect of any Sub Contract in circumstances where there is an event of default under such Sub-Contract which would entitle Project-Co to terminate such Sub-Contract.
- 1.5 If a Distribution is made whilst any Additional Permitted Borrowing is outstanding and Project Co has wilfully, or through gross negligence failed to comply with its obligations under Clause 10.4.4 (a) of the Funders Direct Agreement then in addition to the deduction of the Distribution made pursuant to paragraph (iv) of the definition of Revised Senior Debt Termination Amount, the Board shall be entitled to set off the value of that Distribution a second time against the Force Majeure Termination Sum, provided that the amount of the Force Majeure Termination Sum shall never be less than the Revised Senior Debt Termination Amount.
- 1.6 If Project Co has wilfully or through gross negligence failed to comply with its obligations under Clause 10.4.4 (b) of the Funders' Direct Agreement and there has been an overstatement of the cash balances by Project Co as at that date which has caused the Board to reasonably believe that it would be required to pay a lesser sum at the Termination Date than it actually is required to pay under the terms of this Part C, then the Force Majeure Termination Sum shall be reduced by the amount of such overstatement (to the extent such overstatement is still applicable at the Termination Date), provided that the amount of the Force Majeure Termination Sum will never be less than the Revised Senior Debt Termination Amount.
- 1.7 The Force Majeure Termination Sum shall be paid in accordance with Section E of this Part 23 of the Schedule.

SECTION D: CORRUPT GIFTS AND FRAUD

1 Consequences of termination for corrupt gifts and fraud

- 1.1 If the Board terminates this Agreement pursuant to Clause 54.3 (*Corrupt Gifts*) or Clause 44.1(c)(ii) (*Refinancing*) the Board shall pay to Project Co the "Corrupt Gifts Termination Sum" as set out in paragraph 2.
- 1.2 The Corrupt Gifts Termination Sum shall be:
- (a) an amount equal to the Revised Senior Debt Termination Amount;
- LESS, to the extent it is a positive number, the aggregate of (without double counting):
- (b) all credit balances on any bank accounts held by or on behalf of Project Co on the Termination Date and the value of any right to receive insurance proceeds (save where such insurance proceeds are (i) held in the Insurance Proceeds Account and are to be applied in accordance with Clause 36.19 of this Agreement in reinstatement, restoration or replacement or (ii) in the case of third party legal liability or employer's liability, in satisfaction of the claim, demand, proceeding or liability) or sums due and payable from third parties (but only when received from third parties) but excluding any claims under any Sub-Contracts or claims against other third parties which have not been determined or which have been determined but not paid provided that in such case Project Co shall assign any such rights and claims under the Sub-Contracts or claims against other third parties to the Board and give the Board reasonable assistance in prosecuting such claims; and
- (c) the market value of any other assets and rights of Project Co (other than those transferred to the Board pursuant to this Agreement) less liabilities of Project Co properly incurred in carrying out its obligations under this Agreement as at the Termination Date to the extent realised before the Invoice Date provided that no account should be taken of any liabilities and obligations of Project Co arising out of:
- (i) agreements or arrangements entered into by Project Co to the extent that such agreements or arrangements were not entered into in connection with Project Co's obligations in relation to the Project; and
- (ii) agreements or arrangements entered into by Project Co to the extent that such agreements or arrangements were not entered into in the ordinary course of business and on commercial arm's length terms.
- 1.3 To the extent that such assets and rights referred to in paragraph 1.2(c) above are not realised and applied pursuant to that paragraph, Project Co shall on payment of the Corrupt Gifts Termination Sum assign such assets and rights to the Board.
- 1.4 The Corrupt Gifts Termination Sum shall be paid in accordance with Section E of this Part 23 of the Schedule.

SECTION E: GENERAL

1 Payment and interest

Following termination for Board Default, Force Majeure or Corrupt Gifts or Fraud.

- 1.1 In respect of the termination payments to be made pursuant to any of Sections A, C or D of this Part 23 of the Schedule, as soon as practicable after, and in any event within twenty (20) Business Days of, the Termination Date Project Co shall give to the Board an invoice for the relevant termination sum and sufficient supporting evidence, reasonably satisfactory to the Board, justifying the amount of the relevant termination sum including a breakdown of each of the individual elements of such sum.
- 1.2 Subject to paragraph 1.3 below, the Board shall pay to Project Co:
- (a) the relevant termination sum within forty (40) Business Days of the Invoice Date; and
 - (b) interest on the relevant termination sum (or any part of such sum that remains outstanding) from the Termination Date until the date of payment:
 - (i) at the No Default Interest Rate for the period from (but excluding) the Termination Date to (and including) the date which is forty (40) Business Days after the Invoice Date; and
 - (ii) thereafter, at the Default Interest Rate.
- 1.3 The Board shall be entitled to pay the Force Majeure Termination Sum in 4 equal instalments by serving notice on Project Co within thirty (30) Business Days of the Invoice Date, in which case the provisions of paragraph 1.4 shall apply.
- 1.4 In the event that the Board elects to pay the Force Majeure Termination Sum in instalments pursuant to paragraph 1.3 then:
- (a) the first such instalment (together with interest therein calculated pursuant to (b) below) shall be due on the first Business Day occurring six (6) months after the date of the Board's notice served pursuant to paragraph 1.3 above and the remaining instalments (together with interest therein calculated pursuant to (b) below) shall be due, respectively, on the first Business Day occurring twelve (12), eighteen (18) and twenty-four (24) months after the date of such notice; and
 - (b) the Board shall pay interest on the Force Majeure Termination Sum (or any part of such sum that remains outstanding) from the Termination Date until the date of payment at the No Default Interest Rate.

If the Board fails to make a payment under paragraph (a) or (b) above in full within ten (10) Business Days of the due date for payment, or an Adverse Law or a Proposal for an Adverse Law is made then the outstanding amount of the Force Majeure Termination Sum shall be immediately due and payable and, thereafter, the Board shall pay interest on such sum at the Default Interest Rate.

Following Retendering

- 1.5 Subject to paragraph 1.6, following a retendering exercise under Section B of this Part 23 of the Schedule the Board shall pay to Project Co an amount equal to the Adjusted Highest Compliant Tender Price no later than the date falling twenty (20) Business Days after the later of:
- (a) the date on which the Board receives the Market Value of the Agreement from the New Project Co; and
 - (b) if Project Co has referred a dispute relating to the Adjusted Highest Compliant Tender Price to dispute resolution pursuant to paragraph 3.10 of Section B of this Part 23 of the

Schedule, the date on which the dispute is finally determined in accordance with Clause 56 (*Dispute Resolution*),

provided that, to avoid doubt, if the dispute referred by Project Co to dispute resolution (pursuant to 1.5(b) above) concerns only a proportion of the Adjusted Highest Compliant Tender Price then the Board shall pay the undisputed proportion of such sum no later than 20 Business Days after the date referred to in (a) above (the "Undisputed Payment Date") and the Board shall pay interest to Project Co on any amount of the Adjusted Highest Compliant Tender Price which has been withheld, from the Undisputed Payment Date until the date on which payment is made under paragraph (b) above at the No Default Interest Rate.

- 1.6 If the Adjusted Highest Compliant Tender Price is zero or a negative number then, on entering into the New Agreement with the New Project Co, the Board shall have no obligation to make any payment to Project Co and (if a negative number) an amount equal to the Adjusted Highest Compliant Tender Price shall be due and payable by Project Co to the Board on the date of the New Agreement.

Following no retendering

- 1.7 If the Board follows the no retendering procedure set out in paragraph 4 of Section B of this Part 23 of the Schedule then, subject to paragraph 1.8, the Board shall pay to Project Co an amount equal to the Adjusted Estimated Fair Value of the Agreement no later than the date falling twenty (20) Business Days after the Compensation Date together with interest on such amount calculated in accordance with paragraph 1.2(b) above unless the Board has paid Post Termination Service Amounts pursuant to paragraph 3.5 of Section B above.
- 1.8 To the extent that the Adjusted Estimated Fair Value of the Agreement is less than zero, then an amount equal to the Adjusted Estimated Fair Value of the Agreement shall be due and payable by Project Co to the Board on the Compensation Date.

2 Full and final settlement

- 2.1 Any and all sums irrevocably paid by the Board to Project Co under this Schedule will be in full and final settlement of each party's rights and claims against the other for breaches and /or termination of this Agreement and any other Project Document whether under contract, tort, restitution or otherwise but without prejudice to:
- (a) any antecedent liability of Project Co to the Board which the Board has been unable to set off pursuant to Clause 48.12 of this Agreement;
 - (b) any antecedent liability of either party to the other that arose prior to the Termination Date (but not from the termination itself) to the extent such liability has not already been taken into account in determining or agreeing the Board Default Termination Sum, Adjusted Highest Compliant Tender Price, or Adjusted Estimated Fair Value of the Agreement, the Force Majeure Termination Sum or the Corrupt Gifts Termination Sum as the case may be; and
 - (c) any liabilities arising in respect of any breach by either party of their obligations under Clause 47.9 (*Effect of Termination*) of this Agreement which arises or continues after the Termination Date.
- 2.2 If either the Adjusted Highest Compliant Tender Price or (as the case may be) the Adjusted Estimated Fair Value of the Agreement is zero or a negative number the Board shall be released from all liability to Project Co for breaches and/or termination of this Agreement and any other Project Document whether under contract, delict, restitution or otherwise save for:
- (a) any antecedent liability of the Board which arose prior to the Termination Date (but not from the termination itself) to the extent such liability has not already been taken into account in determining the Adjusted Highest Compliant Tender Price or the Adjusted Estimated Fair Value of the Agreement (as the case may be); and

- (b) any liabilities arising in respect of any breach by either party of their obligations under Clause 47.9 (*Effect of Termination*) of the Agreement which continues after the Termination Date.

3 Costs

The costs and/or expenses to be taken into account in the calculation of all termination sums due pursuant to this Schedule shall only be such costs and/or expenses to the extent that they are reasonable and proper in quantum and shall have been or will be reasonably and properly incurred and shall only be counted once.

4 Undisputed amounts

If the calculation of any termination amount is disputed then any undisputed element of that amount shall be paid in accordance with this Section E of this Part 23 of the Schedule and the disputed element shall be dealt with in accordance with Part 26 of the Schedule (*Dispute Resolution Procedure*).

5 Outstanding senior debt amount

- 5.1 The Board shall be entitled to rely on the certificate of the Senior Funders' Agent as conclusive as to the amount of the Senior Debt Amount outstanding at any relevant time.
- 5.2 The receipt of the Senior Funders' Agent shall discharge the Board's obligation to pay any element of compensation due to Project Co that is equal to the Senior Debt Amount (and where appropriate any accrued interest or breakage costs as certified in accordance with paragraph 5.1 above).

SECTION F: DEFINITIONS

"Adjusted Estimated Fair Value of the Agreement"

means the Estimated Fair Value of the Agreement adjusted as follows:

- (a) where in respect of any month or part of a month from the Termination Date to the Compensation Date the Post Termination Service Amount is a negative number, the aggregate of all such negative Post Termination Service Amounts shall be set against and shall reduce the Estimated Fair Value of the Agreement (whether or not such amounts have been set-off by the Board pursuant to paragraph 3.8 of Section B of this Part 23 of the Schedule);

the aggregate of the following amounts shall be deducted from the Estimated Fair Value of the Agreement;

- (b) the Post Termination Service Amounts actually paid by the Board to Project Co prior to the Compensation Date;
- (c) the Tender Costs; and
- (d) amounts that the Board is entitled to set off or deduct,

the aggregate of the following amounts shall be added to the Estimated Fair Value of the Agreement:

- (e) all credit balances on any bank accounts held by or on behalf of Project Co on the date that the Estimated Fair Value is calculated; and
- (f) any insurance proceeds and other amounts owing to Project Co (and which Project Co is entitled to retain), to the extent not included in (e);

to the extent that:

- (i) (e) and (f) have not been directly taken into account in calculating the Estimated Fair Value of the Agreement; and
- (ii) the Board has received such amounts in accordance with this Agreement or such amounts are standing to the credit of the Insurance Proceeds Account

"Adjusted Highest Compliant Tender Price"

means the price offered by the Compliant Tenderer (if any) with the highest tender price and, if no Compliant Tenders are received, zero, adjusted as follows:

- (a) where in respect of any month or part of a month from the Termination Date to the Compensation Date the Post Termination Service Amount is a negative number, the aggregate of all

such negative Post Termination Service Amounts shall be set against and shall reduce such highest tender price (whether or not such amounts have been set-off by the Board pursuant to paragraph 3.9 of Section B of this Part 23 of the Schedule);

the aggregate of the following amounts shall be deducted from such highest tender price:

- (b) the Post Termination Service Amounts actually paid by the Board to Project Co prior to the Compensation Date;
- (c) the Tender Costs; and
- (d) amounts that the Board is entitled to set off or deduct,

the aggregate of the following amounts shall be added to such highest tender price:

- (e) all credit balances on any bank accounts held by or on behalf of Project Co on the date that the highest priced Compliant Tender is received; and
- (f) any insurance proceeds and other amounts owing to Project Co (and which Project Co is entitled to retain), to the extent not included in (d);

to the extent that:

- (i) (e) and (f) have not been directly taken into account in that Compliant Tender; and
- (ii) the Board has received such amounts in accordance with this Agreement

"Base Senior Debt Termination Amount"

means

- (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
- (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,

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):

- (i) any amounts claimable on or after the Termination Date in respect of Contingent Funding Liabilities;

- (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;
- (iii) any Additional Permitted Borrowings and any interest and Default Interest on such Additional Permitted Borrowings;
- (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
- (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.

"Compensation Date"

means either:

- (a) if paragraph 3 of Section B of this Part 23 of the Schedule (*Retendering Procedure*) applies, the earlier of:
 - (i) the date that the New Agreement is entered into; and
 - (ii) the date on which the Board pays the Adjusted Highest Compliant Tender Price to Project Co, or
- (b) if paragraph 4 of Section B of this Part 23 of the Schedule (*No Retendering Procedure*) applies, the date that the Adjusted Estimated Fair Value of the Agreement has been agreed or determined

"Compliant Tender"

means a tender that meets all of the Qualification Criteria

"Compliant Tenderer"

means a tenderer who submits a Compliant Tender

"Contingent Funding Liabilities"

means any contingent liability of the Shareholders in respect of financial obligations owed to 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 this Agreement 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

"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:

- (a) 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;
- (b) any accrued Service Failure Points and outstanding Warning Notices shall be cancelled; and
- (c) the term of such agreement shall be for a period equal to the term from the Termination Date to the Expiry Date
- "Discount Rate" means a discount rate expressed as $[(1 + \text{real base case project IRR} + \text{Gilt B} - \text{Gilt A}) * (1 + i) - 1]$;
- where:
- "real base case project IRR" is the real pre-tax Project IRR as set out in the Base Case at Financial Close;
- "i" is the agreed assumed forecast rate of increase in RPI;
- "Gilt A" is the real yield to maturity on a benchmark government Gilt instrument of the same maturity as the average life of the outstanding Senior Debt as shown in the Financial Model at Financial Close; and
- "Gilt B" is the real yield to maturity on a benchmark government Gilt instrument of the same maturity as the average life of the outstanding Senior Debt as shown in the Financial Model as on the date of Termination
- "Estimated Fair Value of the Agreement" means the amount determined in accordance with paragraph 4 of Section B of this Part 23 of the Schedule (*No Retendering Procedure*) that a third party would pay to the Board as the market value of the Deemed New Agreement
- "Invoice Date" means, in respect of the Board Default Termination Sum, the Force Majeure Termination Sum or the Corrupt Gifts Termination Sum (as appropriate), the date that is the later of:
- (a) the date on which the Board receives an invoice from Project Co for the relevant termination sum; and
- (b) the date on which the Board receives the supporting evidence required pursuant to paragraph 1.1 of Section E of this Part 23 of the Schedule
- "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

"Longstop Date"	means the date falling twelve (12) months after the Completion Date
"Market Value Availability Deduction Amount"	means for any month or part of a month, an amount equal to the availability deduction that was made to the Service Payment under Section 1 of Part 18 of the Schedule in the month immediately preceding the Termination Date, less an amount equal to any availability deduction that was made for a Functional Part (as defined in Schedule Part 18) which was unavailable at the Termination Date but which has subsequently become available whether as a result of the Board incurring Rectification Costs or otherwise
"Market Value of the Agreement"	means the value of the consideration payable by the New Project Co to the Board in consideration for the entering into of the New Agreement
"Maximum Service Payment"	means the Service Payments payable at any time before any deductions under Section 1 of Part 18 of the Schedule but allowing for indexation in accordance with this Agreement
"New Agreement"	<p>means an agreement on the same terms and conditions as this Agreement at the Termination Date, but with the following amendments:</p> <ul style="list-style-type: none"> • 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 to achieve the Actual Completion Date prior to the Longstop Date; • any accrued Service Failure Points and Warning Notices shall be cancelled; • the term of such agreement shall be equal to the term from the Termination Date until the Expiry Date; and • any other amendments which do not adversely affect the Project Co
"New Project Co"	means the person who has entered or who will enter into the New Agreement with the Board
"No Default Interest Rate"	means the rate applicable under clause 5.1 of the loan agreement forming one of the Initial Funding Documents
"Post Termination Service Amount"	<p>means for the purposes of paragraph 3 of Section B of this Part 23 of the Schedule (<i>Retendering Process</i>), for the whole or any part of a month for the period from the Termination Date to the Compensation Date, an amount equal to the Maximum Service Payment which would have been payable under this Agreement had this Agreement not been terminated, less an amount equal to the aggregate of (without double counting):</p> <ul style="list-style-type: none"> (a) the reasonable and proper cost to the Board of procuring the Services; (b) the Market Value Availability Deduction Amount

	for that month; and
	(c) the Rectification Costs incurred by the Board in that month
"Qualification Criteria"	means the criteria that the Board requires tenderers to meet as part of the Tender Process, which (subject to the compliance with procurement regulations) shall be: <ul style="list-style-type: none"> (a) the New Agreement terms; (b) tenderers should have the financial ability to pay the capital sum tendered for the New Agreement and the financial ability to deliver the Works and/or the Services (as appropriate) for the price tendered; (c) the tenderers may only bid on the basis of a single capital payment to be made on the date of the New Agreement; (d) the tenderer is experienced in providing the Services or similar services; (e) the technical solution proposed by the tenderers is capable of delivery and the tenderer is technically capable of delivery of the Services; and (f) any other tender criteria agreed by the Board and Project Co
"Rectification Costs"	means, for the purposes of any Termination Date that occurs after the Actual Completion Date, an amount equal to the reasonable and proper costs incurred by the Board in a particular month or part of a month in ensuring that the Services are available
"Redundancy Payments"	means redundancy payments and other termination payments which are required under Law to be made to employees of Project Co reasonably and properly incurred by Project Co arising as a direct result of terminating this Agreement (provided that Project Co shall use all reasonable endeavours to mitigate its loss) and provided that in calculating such amount no account should be taken of any liabilities and obligations of Project Co arising out of: <ul style="list-style-type: none"> (a) contracts of employment or other agreements or arrangements entered into by Project Co to the extent that such contracts of employment agreements or arrangements were not entered into in connection with the Project; and/or (b) contracts of employment or other agreements or arrangements entered into by Project Co to the extent that such contracts of employment agreements or arrangements were not entered into in the ordinary course of business and on commercial arm's length terms
"Relevant Assumptions"	means the assumptions that the sale of Project Co is on the basis that there is no default by the Board, that the

sale is on a going concern basis, that no restrictions exist on the transfer of share capital, that no Additional Permitted Borrowing has taken place and therefore that the effect of the Additional Permitted Borrowing on the calculation of such amount is disregarded but that otherwise the actual state of affairs of Project Co and the Project is taken into account

"Revised Senior Debt Termination Amount"

means, subject to Clause 4.2 (*Changes to Funding Agreements*)

- 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 including in respect of Permitted Borrowings other than any such amounts that are in respect of Additional Permitted Borrowings;
- b. all amounts of Additional Permitted Borrowings including interest but excluding Default Interest outstanding at the Termination Date, including such Additional Permitted Borrowings accrued at that date; and
- c. 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 including in respect of Permitted Borrowings, subject to Project Co and the Senior Funders mitigating all such costs to the extent reasonably possible,

less

- (i) any amounts claimable on or after the Termination Date in respect of Contingent Funding Liabilities;
- (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 including in respect of Permitted Borrowings;
- (iii) 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;
- (iv) all APB Distributions; and
- (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;

"Senior Debt"	means the financing provided by the Senior Funders under the Senior Funding Agreements
"Senior Debt Amount"	means the Revised Senior Debt Termination Amount or the Base Senior Debt Termination Amount as relevant
"Senior Funders' Agent"	means the person appointed as agent for the Senior Funders under the Senior Funding Agreements and authorised to act on behalf of the Senior Funders
"Senior Funding Agreements"	means the documents numbered [1 to 13] in Part 3 of Part 1 of the Schedule as at the date of this Agreement or as amended, substituted or replaced from time to time in accordance with the terms of this Agreement or otherwise with the prior written approval of the Board
"Sub-Contractor Losses"	<p>means:</p> <ol style="list-style-type: none"> 1. the amount reasonably and properly payable by Project Co to the Contractor under the terms of the Construction Contract as a direct result of the termination of this Agreement provided that such amount shall be reduced to the extent that Project Co fails to use all reasonable endeavours to mitigate such amount; and 2. the amount reasonably and properly payable by Project Co to the Service Providers [under their respective contracts with Project Co] (as the case may be) as a direct result of the termination of this Agreement provided that such amount shall be reduced to the extent that Project Co fails to use all reasonable endeavours to mitigate such amount; <p>provided that in both cases no account should be taken of any liabilities and obligation of Project Co to the Sub-Contractors arising out of:</p> <ol style="list-style-type: none"> (i) agreements or arrangements entered into by Project Co and/or the sub-Contractors to the extent that such agreements or arrangements were not entered into in connection with those parties obligations in relation to the Project; and/or (ii) agreements or arrangements entered into by Project Co and/or the Sub-Contractors to the extent that such agreements or arrangements were not entered into in the ordinary course of business and on commercial arm's length terms
"Subordinated Funding Agreements"	has the meaning given in Part 29 of the Schedule (Refinancing)
"Suitable Substitute Contractor"	as defined in the Funders' Direct Agreement
"Tender Costs"	means the reasonable and proper costs of the Board incurred in carrying out the Tender Process and/or in connection with any calculation of the Estimated Fair Value of the Agreement
"Tender Process"	means the process by which the Board requests tenders from any parties interested in entering into a

New Agreement, evaluates the responses from those interested parties and enters into a New Agreement with a new service provider, in accordance with paragraph 3 of Section B of this Part 23 of the Schedule (*Retendering Procedure*); and

"Tender Process Monitor"

means the person appointed under paragraph 3.6 of Section B of this Part 23 of the Schedule hereof.

PART 24 OF THE SCHEDULE: HANDBACK PROCEDURE

- 1.1 On the Expiry Date, each element of the Facilities shall be in a condition which is:
- 1.1.1 consistent with due performance by Project Co of the Service Level Specification and Method Statement for the Services; and
 - 1.1.2 consistent with the Facilities and each of the elements of them having been designed and constructed in accordance with the applicable design life requirements set out in the Board's Construction Requirements,
- together referred to as the "Handback Requirements".
- 1.2 Not less than two years prior to the Expiry Date, Project Co and the Board's Representative shall conduct a joint inspection of the Facilities.
- 1.3 Within twenty (20) Business Days after the completion of the inspection, if it is found that any element of the Facilities is not in a condition consistent with the Handback Requirements, Project Co shall forthwith provide to the Board Representative's in accordance with Part 10 of the Schedule (Review Procedure):
- 1.3.1 Project Co's proposal as to the maintenance works (if any) (the "Handback Works") required to be carried out in respect of the Facilities in order to procure that they will, on the Expiry Date, satisfy the Handback Requirements;
 - 1.3.2 Project Co's proposal as to the programme (the "Handback Programme") for the carrying out of the Handback Works over the remainder of the Project Term, such programme shall describe the total works to be carried out and the method of carrying out such works during the overall period in which the Handback Works are to be executed; and
 - 1.3.3 Project Co's estimate of the cost of carrying out the Handback Works (the "Handback Amount").
- 2 The Board's Representative may, within fifteen (15) Business Days after receipt of the details set out in paragraph 1.3 from Project Co, raise comments in accordance with paragraph 3 of Part 10 of the Schedule (*Review Procedure*) on Project Co's proposals and estimate referred to in paragraph 1 above.
- 3.1 On agreement, or determination in accordance with Part 26 of the Schedule (*Dispute Resolution Procedure*), of the Handback Works, the Handback Programme and/or the Handback Amount (as the case may be), Project Co shall procure that the Handback Works are carried out in accordance with the Handback Programme. Project Co shall carry out the Handback Works at its own cost notwithstanding that the actual cost of the Handback Works may be higher than the Handback Amount.
- 3.2 Project Co shall (unless paragraph 3.5 applies) within twenty (20) Business Days of the agreement (or determination in accordance with Part 26 of the Schedule (*Dispute Resolution Procedure*)) envisaged in paragraph 3.1, procure the provision of a bond (the "Handback Bond") in favour of the Board for an amount equal to the Handback Amount from a bank or insurance company authorised to carry out business in the United Kingdom.
- 3.3 Project Co shall carry out the Handback Works to the satisfaction of the Board's Representative in accordance with Good Industry Practice and in accordance with the Handback Programme so as to meet the Handback Requirements.
- 3.4 Notwithstanding:
- (a) the agreement of the Board's Representative to any Handback Works, the Handback Programme or the Handback Amount;
 - (b) the participation of the Board's Representative in any inspection under this Schedule; and/or

- (c) the complete or partial carrying out of the Handback Works,

Project Co shall not be relieved or absolved from any obligation to conduct any other inspection or to perform any other works in accordance with the Service Level Specification and Method Statement for the Services.

- 3.5 Project Co may elect by notice in writing to the Board to opt not to procure a Handbank Bond as set out in paragraph 3.2, in which case from the date the Handbank Works are scheduled to commence, the Board shall be entitled to withhold up to 30% of each Monthly Service Payment up to the amount of the Handback Amount ("Withheld Amount") provided that this election shall only be available if the amount of the Handback Amount does not exceed 30% of the aggregate Monthly Service Payments for the unexpired part of the Term.
- 4.1 Not later than sixty (60) Business Days before the Expiry Date, Project Co and the Board's Representative shall conduct a joint inspection of the Facilities. Such inspection shall confirm whether or not the condition of the Facilities is in accordance with paragraph 1 above.
- 4.2 On, or within twenty (20) Business Days after, the Expiry Date, the Board's Representative shall either:
- (a) issue to Project Co a Handback Certificate and return the Handback Bond to Project Co; or
- (b) notify Project Co of its decision not to issue the Handback Certificate stating the reasons for such decision.
- 4.3 Any notice given by the Board's Representative in accordance with paragraph 4.2(b) shall set out each respect in which the Handback Works have not been completed or the Facilities do not comply with the Handback Requirements and shall state the Board Representative's estimate of the cost of procuring that the Facilities comply in all respects with the Handback Requirements.
- 4.4 Project Co may, within ten (10) Business Days after receipt of the notice given in accordance with paragraph 4.2(b) by notice to the Board's Representative, object to any matter set out in the Board Representative's notice. The notice from Project Co shall give details of the grounds of such objection and shall set out Project Co's proposals in respect of such matters.
- 4.5 If no agreement is reached between Project Co and the Board's Representative as to any matter referred to in Project Co's notice given in accordance with paragraph 4.4 within fifteen (15) Business Days of receipt of that notice by the Board's Representative, then either Project Co or the Board's Representative may refer the matter for determination in accordance with Part 26 of the Schedule (Dispute Resolution Procedure) as to:
- (a) whether the Facilities comply in all respects with the Handback Requirements; and
- (b) the estimated cost of procuring that the Facilities comply in all respects with the Handback Requirements, where the Facilities do not comply in all respects with the Handback Requirements.
- 5 If it is agreed or determined in accordance with Part 26 of the Schedule (*Dispute Resolution Procedure*) that the Facilities did not, at the Expiry Date, comply in all respects with the Handback Requirements, Project Co shall pay to the Board an amount equal to the estimated cost of completing such Handback Works or procuring that the Facilities comply in all respects with the Handback Requirements. Such payment shall be made not later than fifteen (15) Business Days after the estimated cost has been agreed or determined and, upon such payment being received by the Board, the Board's Representative shall issue the Handback Certificate and return the Handback Bond or pay the Withheld Amount (as appropriate) to Project Co.

PART 25 OF THE SCHEDULE: RECORD PROVISIONS**Section 1: General Requirements**

- 1 Project Co shall retain and maintain all the records (including superseded records) referred to in Section 2 of this Part 25 of the Schedule in accordance with this Section 1 of this Part 25 of the Schedule, the requirements of Good Industry Practice, in chronological order, in a form that is capable of audit and at its own expense. Project Co shall make such records available for inspection to the Board where it has reasonable cause for requiring such records, on giving reasonable notice.
- 2 Wherever practical, original records shall be retained and maintained in hard copy form. True copies of the original records may be kept by Project Co where it is not practicable to retain original records.
- 3 Those records relating to the Project Operations (including the design, construction, development, enhancement and maintenance of the Facilities) shall be retained for the duration of the Agreement.
- 4 Financial and other records (including without limitation all information provided in support of any Variation) shall be retained and maintained by Project Co for a period of at least six (6) years after the end of the Project Term in sufficient detail, in appropriate categories and generally in such a manner to enable Project Co to comply with its obligations under Clause 38.1 (*Information and Audit Access*) and where appropriate to enable the data in such records to be entered into the Financial Model so that the output from the Financial Model (on the basis of such data) can be directly compared with the actual financial cashflow and performance of Project Co.
- 5 Where Project Co wishes to dispose of any records maintained as provided in this Part of this Schedule which are more than fifteen (15) years old, or in respect of which the required period for their retention has expired, then Project Co shall notify the Board and if, within forty (40) Business Days of such notice, the Board elects to receive certain of those records, then Project Co shall deliver up such records to the Board in the manner and at the location as the Board shall reasonably specify, and the costs of retaining those records in safe storage and delivering up the same shall be borne by Project Co.
- 6 Subject to paragraph 5, for a period of not more than six (6) years following the termination for whatever reason of this Agreement, Project Co shall retain in safe storage all such records as are referred to in Section 2 of this Part 25 of the Schedule which were in existence at the date of termination of this Agreement. On the expiry of such period or at the earlier request of the Board, Project Co shall deliver up all those records (or where those records are required by statute to remain with Project Co or a Contracting Associate of Project Co, copies thereof) to the Board in the manner and at the location as the Board shall reasonably specify. The Board shall make available to Project Co all the records Project Co delivers up pursuant to this paragraph subject to reasonable notice. The costs of retaining those records in safe storage and delivering up the same shall be borne:
 - (a) by Project Co where the termination arises as a result of a Project Co Event of Default; and
 - (b) by the Board where the termination arises for any other cause.
- 7 Without prejudice to the foregoing, Project Co shall provide the Board:
 - (a) as soon as they may be available and in any event within sixty (60) Business Days after the end of the first six (6) months of each financial year of Project Co which falls during the Project Term, a copy, certified as a true copy by an officer of Project Co, of its unaudited interim accounts and, if appropriate, of consolidated unaudited interim accounts of Project Co, its Subsidiaries and Holding Company (if any) which would (if Project Co were listed on the London Stock Exchange whether or not it is) be required to be sent to shareholders as at the end of and for each such six (6) month period; and
 - (b) as soon as they shall have been sent to its shareholders in order to be laid before an annual general meeting of Project Co but not later than one hundred and thirty (130) Business Days after the end of each accounting reference period of Project Co part or all of which falls in a Contract Year, a copy of Project Co's audited accounts and if appropriate, of the consolidated audited accounts of Project Co and, its Associated

Companies (if any), in respect of that period, prepared in accordance with the Companies Act 1985 and generally accepted accounting principles and bases in Scotland, consistently applied together with copies of all related directors' and auditors' reports and all other notices/circulars to shareholders.

- 8 Any drawings required to be made or supplied pursuant to this Agreement shall be of a size appropriate to show the detail to be depicted clearly without magnifying aids and shall conform to British Standards 1192 or 308 or equivalent as appropriate. Where by prior agreement the Board has agreed to accept microfilm, microfiche or other storage media (which must include secure back up facilities), drawings and other documents shall be made or supplied in such form as has been agreed.
- 9 Project Co shall as soon as reasonably practicable and in any event, within ten (10) Business Days of a request by the Board, provide to the Board appropriate reports, copies of Service Information and other information pursuant to a request under the Freedom of Information (Scotland) Act 2002, to enable the Board to comply with any requests made pursuant to the Freedom of Information (Scotland) Act 2002.
- 10 The Board shall consult with Project Co prior to disclosing any information regarding Project Co, the Works, Services or this Agreement which may be commercially sensitive, in response to a request for such information pursuant to the Freedom of Information (Scotland) Act 2002. Project Co shall respond in writing promptly and the Board shall take into account Project Co's views, provided that the decision as to whether to disclose the information shall remain that of the Board.

Part 2: Records to be kept

- 1 The Project Agreement, its Schedule and the Project Documents including all amendments to such agreements.
- 2 All other documents, software or other information expressly referred to in this Agreement.
- 3 Records relating to the appointment and supersession of the Board's Representative and Project Co's Representative.
- 4 Project Data.
- 5 Documents, drawings, design data or submissions raised in accordance with Part 10 of the Schedule (Review Procedure).
- 6 Documents relating to planning applications, consents, refusals and appeals.
- 7 Records relating to any specialist or statutory inspections of the Facilities, including any roadways.
- 8 Notices, reports, results and certificates relating to completion of the Works and completion of the commissioning activities.
- 9 All operation and maintenance manuals.
- 10 Documents relating to events of Force Majeure, Delay Events and Relief Events and the consequences of the same.
- 11 All formal notices, reports or submissions made to or received from the Board's Representative in connection with the provision of Services, the Monitoring of Performance or the Availability of the Facilities which for the avoidance of doubt shall include all records made and/ or held by the Helpdesk.
- 12 All certificates, licences, registrations or warranties related to the provision of Services.
- 13 Documents in support of claims for Services Payments.
- 14 Documents submitted in accordance with Part 22 of the Schedule (*Variation Procedure*) and all documents provided in support.
- 15 Documents related to referrals to the Dispute Resolution Procedure.
- 16 Documents related to change in ownership or any interest in any or all of the shares in Project Co and/or HoldCo.
- 17 Documents relating to the rescheduling of the indebtedness of Project Co or refinancing of the Project.
- 18 Tax invoices and records related to Value Added Tax.
- 19 Financial records, including audited and unaudited accounts of HoldCo and Project Co and related reports.
- 20 Records required by Law (including in relation to Health and Safety matters and health and safety files prepared pursuant to CDM Regulations) and all Consents.
- 21 Documents relating to insurance and insurance claims.
- 22 All other records, notices or certificates required to be produced and/or maintained by Project Co pursuant to this Agreement or any Project Document.

PART 26 OF THE SCHEDULE: DISPUTE RESOLUTION PROCEDURE

SECTION 1

- 1 The procedure set out in this Part 26 of the Schedule (the "Dispute Resolution Procedure") shall apply to any dispute, claim or difference arising out of or relating to this Agreement (the "Dispute") except where it has been excluded from this procedure by an express term of this Agreement.
- 2 This Dispute Resolution Procedure shall not impose any pre-condition on any party or otherwise prevent or delay any party from:
 - 2.1 commencing proceedings in any court of competent jurisdiction in relation to any Dispute in which that party requires either:
 - 2.1.1 an order (whether interlocutory or final) restraining the other party from doing any act or compelling the other party to do any act; or
 - 2.1.2 a decree for a liquidated sum to which there is no stateable defence; or
 - 2.2 giving notice at any time of his intention to refer a Dispute to adjudication in accordance with paragraph 5 of Section 1 of this Part 26 of the Schedule.

Liaison Committee

- 3 Subject to paragraph 2 of Section 1 of Part 26 of the Schedule, all Disputes shall first be referred to the Liaison Committee for resolution. Any decision of the Liaison Committee shall be final and binding unless the parties otherwise agree.

Mediation

- 4 If the parties have been unable to resolve the Dispute within fifteen (15) Business Days of referral to the Liaison Committee, they may refer the Dispute to mediation on such conditions as may be agreed between the parties. Any mediation shall be completed within thirty (30) Business Days of such referral and any agreement arising therefrom shall be final and binding unless otherwise agreed by the parties.

5 Adjudication

- 5.1 Either party (the "**Applicant**") may serve upon the other (the "**Respondent**") a notice in writing of its intention to refer any Dispute to adjudication (the "**First Notice**"). The First Notice shall state in sufficient detail (i) the nature of the Dispute, (ii) the remedy sought and (iii) the legal basis for that remedy. The First Notice shall be accompanied by relevant extracts from the Project Agreement including this Schedule Part 26.
- 5.2 The First Notice, accompanied by the said extracts from the Project Agreement, shall also be served forthwith by the Applicant on the Adjudicator appointed in accordance with paragraphs 5.3 to 5.5

Appointment of the Adjudicator

- 5.3 Where the parties agree (or have agreed) upon the identity of an Adjudicator who within 3 days of the First Notice confirms his readiness and willingness to embark upon the Adjudication, then that person shall be the Adjudicator.
- 5.4 Where the parties have not so agreed upon an Adjudicator, or where such person has not so confirmed his willingness to act, then the Applicant shall serve the First Notice (accompanied by the extracts of the Project Agreement) on the relevant Nominating Body (if any) named in Section 2 of this Part 26 of the Schedule with a request that it nominates, within 5 days of the date of the First Notice, an appropriate individual to carry out the role of Adjudicator and the

nominated Adjudicator shall also within the same period, confirm acceptance of his appointment as Adjudicator.

- 5.5 Where the parties have not so agreed upon an Adjudicator, or where such person has not so confirmed his willingness to act within 3 days of the First Notice, or there is no relevant Nominating Body named in Section 2 of this Part 26 of the Schedule, the Applicant may send a copy of the First Notice to the Chairman, or failing him, the Vice-Chairman (or equivalent officers), of the Scottish branch of the Chartered Institute of Arbitrators with a request that he nominate, within 5 days of the First Notice, an appropriate individual to carry out the role of Adjudicator and the nominated Adjudicator shall also within the same period, confirm acceptance of his appointment as Adjudicator.
- 5.5A Any appointment under Paragraph 5.4 or 5.5 shall bind both parties immediately from the date upon which the nominated Adjudicator notifies parties of his willingness to act.

The Second Notice

- 5.6 Within seven (7) days of the date of the First Notice, the Applicant shall, by written notice, refer full particulars of the Dispute in writing to the Adjudicator (the "**Second Notice**") and the Second Notice shall be copied to the Respondent. The date of the Second Notice shall be the date of referral.

Impartiality

- 5.7 Howsoever an Adjudicator is appointed it shall be a requirement of such appointment that the Adjudicator has no subsisting connection to either party; and the Adjudicator shall be under a duty to act impartially.

Liability

- 5.8 Neither the Adjudicator nor any employee or agent of the Adjudicator will be liable for anything done or omitted in the discharge or purported discharge of the Adjudicator's functions, unless the act or omission is in bad faith.

Fees and Expenses

- 5.9 The Adjudicator immediately upon appointment shall be requested to notify both parties in writing of the fees and expenses applicable to the determination, and the procedure to be applied to the conduct of the determination.
- 5.10 The parties shall be jointly and severally responsible for the Adjudicator's fees and expenses and shall pay the same within seven (7) days of receipt of the Adjudicator's fee account.
- 5.11 The parties may at any time agree to revoke the appointment of the Adjudicator and in such circumstances the fees and expenses of that Adjudicator shall, subject to paragraph 5.12 be determined and payable in accordance with paragraph 5.10.
- 5.12 Where the revocation of the appointment of the Adjudicator is due to the default or misconduct of the Adjudicator the parties shall not be liable to pay the Adjudicator's fees and expenses.

Adjudicator's Powers and Duties

- 5.13 The Adjudicator shall have the power to take the initiative in ascertaining the facts and the law. Without prejudice to the generality of the foregoing the Adjudicator may:
- 5.13.1 open up, review and revise any decision taken or any certificate given by any person referred to in the Project Agreement.
- 5.13.2 decide that any of the parties to the Dispute is liable to make a payment under the Project Agreement or assess and/or make an award of damages in connection with the Project Agreement and, when those payments are due and the final date for payment;

- 5.13.3 having regard to any term of the Project Agreement relating to the payment of interest, decide the circumstances in which, the rates at which, and the period for which simple or compound rates of interest shall be paid;
 - 5.13.4 request any party to the Project Agreement to supply him with such documents as he may reasonably require including, if he so directs, any written statement, which may be limited in length at the discretion of the Adjudicator, from the other party supporting or supplementing the Second Notice and any response thereto;
 - 5.13.5 meet and question any of the parties to the Project Agreement and their representatives but not outwith the presence of the other party;
 - 5.13.6 subject to obtaining any necessary consent from a third party or parties, make such site visits and inspections as he considers appropriate, whether accompanied by the parties or not;
 - 5.13.7 subject to obtaining any necessary consent from a third party or parties, carry out any tests or experiments;
 - 5.13.8 obtain and consider such representations and submissions as he requires;
 - 5.13.9 give directions as to the timetable for the determination, any deadlines, or limits as to the length of written documents or oral representations to be complied with;
 - 5.13.10 issue such other directions relating to the conduct of the determination as he considers appropriate;
 - 5.13.11 with the prior written consent of the parties, not to be unreasonably withheld, resign on account of illness, incapacity or other material grounds;
 - 5.13.12 not used;
 - 5.13.13 make use of his own specialist knowledge;
 - 5.13.14 obtain advice from specialist consultants (including without limitation, legal advice), provided that at least one of the parties so requests or consents;
- 5.14 The Adjudicator shall act as an expert and not as an arbitrator and shall act fairly and impartially.
- 5.15 The parties shall not initiate or continue a reference to the Adjudicator and the Adjudicator must resign where the Dispute is the same or substantially the same as one which has previously been referred to adjudication under the Project Agreement, and a decision has already been given in that adjudication.

Resignation

- 5.16 Where the Adjudicator resigns pursuant to paragraph 5.13.11, or dies or becomes incapable of acting, the parties, acting in accordance with the procedure set out in paragraphs 5.3 to 5.5 may appoint a new expert to act as Adjudicator, and the Adjudicator so appointed shall conduct the reference *ab initio*.

The Decision

- 5.17 The Adjudicator shall, unless both parties have previously informed him in writing that they have reached agreement on the Dispute, be required to make his decision within twenty eight (28) days of the date of referral or such longer period as may be agreed by both parties in writing after service of the Second Notice. The Adjudicator may extend the twenty eight (28) day period by up to seven (7) days with the written consent of the Applicant (such consent copied to the Respondent).

- 5.18 The Adjudicator shall be required to give reasons in writing for his decision, unless both parties agree that the Adjudicator is not required to give reasons.
- 5.19 The decision may include, without prejudice to paragraph 5.10, a direction that one party should be responsible for the Adjudicator's fees and expenses. If no such directions are made, the parties shall bear the Adjudicator's fees and expenses in equal shares.
- 5.20 Such decision shall be binding on both parties unless and until the Dispute is finally determined by subsequent court proceedings pursuant to paragraph 7 or by agreement between the parties.
- 5.21 A decision shall be implemented without delay and the parties shall be entitled to summary enforcement thereof, regardless of whether such decision is or is to be the subject of any challenge or review. The parties agree to registration of the decision in the Books of Council and Session for execution.

Consolidation of Disputes

- 5.22 In the event of a Dispute which in the reasonable opinion of Project Co, relates to a dispute or potential dispute or difference ("**Related Dispute**") arising under, out of, or in connection with any other Agreement between Project Co and a third party (a "**Related Agreement**") and the Related Dispute is referred to adjudication in terms of a procedure which meets the requirements set out in section 108 of the Housing Grants, Construction and Regeneration Act 1996 and is in all material respects equivalent to the adjudication procedure in this Schedule 26 (the "**Related Procedure**"), then Project Co may by written notice (copied to the Board and to the other party to the Related Dispute) request the Adjudicator consolidate the Dispute and the Related Dispute with a view to allowing all questions arising out of the Dispute and the Related Dispute to be disposed of in the Adjudication. Project Co shall, or shall procure that the other party to the Related Dispute shall as soon as practicable, and in any case within seven (7) days of the referral of the Dispute to adjudication, give to the Adjudicator conducting the adjudication under this Agreement and also to the other parties to the Dispute and the Related Dispute, the particulars set out in paragraph 5.23 below.
- 5.23 The particulars referred to in paragraph 5.22 above are:
- 5.23.1 a copy of the Related Agreement;
- 5.23.2 a preliminary statement from Project Co and/or, as the case may be, the other party to the Related Dispute setting out:
- 5.23.2.1 the basis and grounds for consolidation of the Related Dispute and the Dispute;
- 5.23.2.2 the cases of the parties to the Related Dispute;
- 5.23.2.3 any relief sought by the parties to the Related Dispute; and
- 5.23.2.4 a list of any documents served in relation to the Related Dispute.
- 5.24 On receiving the particulars set out in paragraph 5.23 above prior to the Actual Completion Date and within seven (7) days of the referral of the Dispute to the Adjudicator, the Adjudicator may, at the request of Project Co, immediately order consolidation of the Dispute and the Related Dispute and shall have the authority and the power referred to in paragraph 5.31 below.
- 5.25 On receiving the particulars set out in paragraph 5.23 above on or after the Actual Completion Date and within seven (7) days of the referral of the Dispute to the Adjudicator, the Adjudicator shall immediately request that the parties to the Dispute and the other party to the Related Dispute attend a meeting with the Adjudicator with a view to determining whether or not the Dispute and the Related Dispute should be consolidated.
- 5.26 Project Co shall use its reasonable endeavours to procure that an authorised representative of the other party to the Related Dispute shall attend the meeting with the Adjudicator referred to in paragraph 5.25 above. Project Co and the Board each agree to send an authorised

representative or nominee to any meeting of this kind under this Agreement or under a Related Agreement, which they may be requested to attend.

- 5.27 At the meeting referred to in paragraph 5.25 above, the Board's Representative shall, as a preliminary matter, either:
- 5.27.1 confirm to the Adjudicator that the Board accepts the proposed consolidation of the Related Dispute with the Dispute; or
 - 5.27.2 inform the Adjudicator that the Board does not accept the proposed consolidation of the Related Dispute with the Dispute.
- 5.28 Where paragraph 5.27.1 above applies, the Adjudicator shall immediately order consolidation of the Dispute and the Related Dispute and shall have the authority and the power referred to in paragraph 5.31 below
- 5.29 Where paragraph 5.27.2 above applies, the Adjudicator shall issue within one (1) day of the meeting referred to in paragraph 5.25 above his written decision, which shall not include any reasons, as to whether or not there is demonstrably any basis or ground for consolidation of the Dispute and the Related Dispute. If the Adjudicator determines that there is demonstrably no basis or ground for consolidation of the Dispute and the Related Dispute, the Dispute and the Related Dispute shall not be consolidated. If the Adjudicator determines otherwise, or if the Adjudicator has failed or is unable to reach a decision within one (1) day of the meeting referred to in paragraph 5.25 above, the Adjudicator shall immediately order consolidation of the Dispute and the Related Dispute and shall have the authority and the power referred to in paragraph 5.31 below.
- 5.30 Notwithstanding anything to the contrary, a Related Dispute shall only be consolidated with a Dispute under this Agreement if the Adjudicator receives the particulars set out in paragraph 5.25 above within seven (7) days of the referral of the Dispute under this Agreement to the Adjudicator.
- 5.31 The Adjudicator shall have the authority and the power to consolidate the Dispute and the Related Dispute and to direct that all procedural and/or evidential matters arising in both the Dispute and the Related Dispute are consolidated in whatever manner the Adjudicator considers shall lead to the fair and expeditious resolution of both the Dispute and the Related Dispute and the parties (including the party to the Related Dispute) shall thereafter abide by and implement such consolidation and any such direction.
- 5.32 In the event that the Related Dispute is consolidated with the Dispute, the Adjudicator shall reach a decision on the Dispute and the Related Dispute at the same time and in any event shall reach a decision on the Dispute within twenty eight (28) days of the date of referral of the Dispute or such longer period as is agreed by the parties to the Dispute and shall reach a decision on the Related Dispute within 28 days of the date of referral of the Related Dispute to the Related Adjudicator or such longer period as is agreed by the parties to the Related Dispute. The Adjudicator shall be entitled to extend the said period of twenty-eight (28) days relating to the Dispute by up to seven (7) days with the consent of the Applicant and shall be entitled to extend the period of twenty eight (28) days relating to the Related Dispute by up to seven (7) days with the consent of the party by whom the Related Dispute was referred.
- 5.33 Without fettering or restricting the Adjudicator's power and authority in any way, it is the intention of Project Co and the Board that in the event that the Related Dispute is consolidated with the Dispute, the Adjudicator shall, insofar as is relevant, practicable and appropriate, come to the same conclusion as to the facts and apply the same reasoning and analysis in reaching a decision on both the Dispute and the Related Dispute.
- 5.34 In the event that an adjudicator under a Related Agreement (the "**Related Adjudicator**") orders that a Dispute under this Agreement be consolidated with a Related Dispute with which he is dealing under the Related Agreement, then:
- 5.34.1 notwithstanding anything in this Part 26 of the Schedule, with effect from the time of such order, the Adjudicator shall cease to have authority or jurisdiction to determine the Dispute which shall instead be determined by the Related

Adjudicator and the appointment of the Adjudicator under this Agreement shall cease; and

- 5.34.2 such order shall be binding on Project Co and the Board and both of them shall acknowledge the appointment of the Related Adjudicator as the adjudicator of the Dispute, with Project Co procuring that the third party who is a party to the Related Agreement shall with effect from the time of such order comply with the requirements of the Related Agreement (including if applicable any requirement or direction of the Related Adjudicator appointed under such Related Agreement) as to the future conduct of the determination of the Dispute and the Related Dispute; and
- 5.34.3 notwithstanding paragraphs 5.9 to 5.12 and paragraph 5.19 above, Project Co and the Board shall be jointly responsible with the third party who is a party to the Related Agreement for the Related Adjudicator's fees and expenses including those of any specialist consultant appointed by the Related Adjudicator under the adjudication procedure in the Related Agreement, in respect of the period in which the Dispute is consolidated with the Related Dispute pursuant to an order of the Related Adjudicator (the "**Consolidated Adjudication Costs**"). Project Co and the Board agree that the Related Adjudicator shall have the discretion to make directions to require Project Co, the Board and the third party who is a party to the Related Agreement to pay or make contribution to the Consolidated Adjudication Costs in different proportions. If no such directions are made, Project Co, the Board and the third party who is a party to the Related Agreement shall bear the Consolidated Adjudication Costs in equal shares, and if Project Co, the Board or the third party has paid more than such equal share, that party or third party shall be entitled to a contribution from the other party, parties or third party, as the case may be; and
- 5.34.4 notwithstanding anything to the contrary a Dispute under this Agreement shall only be consolidated with a Related Dispute, if:-
- (a) the Related Adjudicator receives particulars of the Dispute within seven (7) days of the referral of the Related Dispute to the Related Adjudicator under the Related Agreement; and
 - (b) if:
 - (i) the Board has previously consented in writing to the identity of the adjudicator appointed in respect of the Related Adjudication; or
 - (ii) the adjudicator in the Related Adjudication was appointed by one of the Nominating Bodies named in Section 2 of this Part 26 of the Schedule or the Chairman or Vice-Chairman of the Scottish branch of the Chartered Institute of Arbitrators.
- 5.35 Notwithstanding anything to the contrary above, Project Co shall pay the Board's reasonable costs arising from the consolidation of the Dispute and the Related Dispute in circumstances where Project Co has requested the Adjudicator to order consolidation of the Dispute and the Related Dispute and the Board does not accept the proposed consolidation of the Dispute and the Related Dispute and it is subsequently determined by the Adjudicator that there was no basis or ground for Project Co to request the Adjudicator to order consolidation of the Related Dispute and the Dispute.
- 5.36 If, in respect of any Dispute to which paragraphs 5.22 to 5.34 of this Part 26 of the Schedule Section 1 applies, any provision thereof is held to be or is rendered void or ineffective or will otherwise be unenforceable, then Project Co and the Board agree that the terms of paragraphs 5.37 to 5.37B shall apply.
- 5.37 If any Dispute arising under this Agreement raises issues which relate to:

- (i) any dispute between Project Co and the Contractor arising under the Building Contract or otherwise affects the relationship or rights of Project Co and/or the Contractor under the Building Contract (the "**Building Contract Dispute**"); or
- (ii) any dispute between Project Co and the Service Provider arising under the FM Contract or otherwise affects the relationship or rights of Project Co and/or the FM Contractor under the FM Contract (the "**FM Contract Dispute**");

then Project Co may include as part of its submissions made to the Adjudicator submissions made by the Contractor or by the Service Provider as appropriate.

- 5.37A The Adjudicator shall not have jurisdiction to determine the Building Contract Dispute or the FM Contract Dispute but the decision of the Adjudicator shall be binding on Project Co and the Contractor insofar as it determines the issues relating to the Building Contract Dispute and on Project Co and the Service Provider insofar as it determines the issues relating to the FM Contract Dispute.
- 5.37B Any submissions made by the Contractor or the Service Provider shall:
- (i) be made within the time limits applicable to the delivery of submissions by Project Co; and
 - (ii) concern only those matters which relate to the Dispute.
- 5.38 In the event that Project Co does not invoke the provisions of paragraphs 5.22 – 5.37 for whatever reason, and any Dispute arising under this Agreement raises issues which relate to a Building Contract Dispute or a FM Contract Dispute and these issues have previously been referred to an adjudicator, the Project Co may require and the Board consents to the same adjudicator being appointed as Adjudicator to determine the Dispute; and the Board and Project Co agree that without fettering or restricting the powers and authority of any Adjudicator thus appointed in any way, it is their intention that the Adjudicator shall, insofar as is relevant, practicable and appropriate, come to the same conclusion as to the facts and, insofar as is relevant, practicable and appropriate, apply the same reasoning and analysis in reaching a decision on the Dispute as the Adjudicator's conclusion, reasoning and analysis in the Building Contract Dispute or FM Contract Dispute (as appropriate).
- 5.39 Notwithstanding paragraphs 2 and 5.20 above, neither party shall make any application whatsoever to the Courts in relation to the conduct of the Adjudication or challenge the decision of the Adjudicator after the date one hundred and fifty (150) days from the date of the decision of the Adjudicator, or of the Related Adjudicator where the Dispute is consolidated with a Related Dispute, as the case may be. Nothing in this paragraph shall restrict the rights of either party to make an application to the Court to enforce the decision of the Adjudicator (or Related Adjudicator, as the case may be) or prevent either party from bringing proceedings in respect of the subject matter of any Dispute after the expiry of such one hundred and fifty (150) day period.

Confidentiality

- 5.40 All information, data or documentation disclosed or delivered by a party to the Adjudicator or Related Adjudicator (as appropriate) or to the other party in consequence of or in connection with the appointment of the Adjudicator (or Related Adjudicator) hereunder shall be treated as confidential save to the extent that it is already in the public domain or where disclosure is required by law, and the Adjudicator (or Related Adjudicator) and the Parties shall not disclose any such information, data or documentation to any person or company save with the consent of the party providing any such information, data or documentation. All such information, data or documentation shall remain the property of the party disclosing or delivering the same, and it and all copies thereof shall be returned on completion of the Adjudicator's (or Related Adjudicator's) work.
- 6 Not used.
- 7 Scottish Courts**
- 7.1 All Disputes, to the extent not finally resolved pursuant to procedures set out in the foregoing provisions of this Schedule, shall be referred to the Scottish Courts.

SCHEDULE PART 26
SECTION 2
Nominating Bodies

1. Nominating Bodies

The following procedure shall be followed in appointing the Adjudicator:

- i. if the Dispute arises under, out of, or in connection with or is related to the provision or delivery of Services such as those anticipated in this Agreement the Adjudicator shall be nominated by or on behalf of the President for the time being of the British Institute of Facilities Management;
- ii. if the Dispute arises under, out of, in connection with or is related to financial matters or methods of accounting or otherwise to matters usually and properly within the knowledge of a chartered accountant then the Adjudicator shall be a chartered accountant who has been professionally qualified for not less than 10 (ten) years nominated by or on behalf of the President for the time being of the Institute of Chartered Accountants in Scotland;
- iii. if the Dispute arises under, out of, in connection with or is related to building or construction matters usually and properly within the knowledge of a civil engineer then the Adjudicator shall be a civil engineer nominated by or on behalf of the President for the time being of the Institution of Civil Engineers;
- iv. if the Dispute arises under, out of, in connection with or is related to building or construction matters usually and properly within the knowledge of an architect then the Adjudicator shall be an architect nominated by or on behalf of the President for the time being of the Royal Institute of Architects in Scotland;
- v. if the Dispute arises under, out of, in connection with or is related to building or construction matters usually and properly within the knowledge of a chartered surveyor then the Adjudicator shall be a chartered surveyor nominated by or on behalf of the President for the time being of the Royal Institute of Chartered Surveyors in Scotland;
- vi. if the Dispute arises in connection with or is related to the meaning or construction of this Agreement or the parties are unable to agree that the Dispute falls within paragraphs 1.i to 1.v of this Section 2 of Schedule Part 26 then the Adjudicator shall be a Solicitor or Advocate of not less than ten (10) years' standing nominated by or on behalf of the President for the time being of the Law Society of Scotland;

2 Qualifications of the Adjudicator

The following provisions shall apply in respect of the qualification of the Adjudicator:

- i. no person shall be appointed to act as the Adjudicator unless he shall be qualified by education, experience and training to determine the Dispute. If within ten (10) Business Days of appointment of an Adjudicator in accordance with Section 1 of this Schedule Part 26 either party objects on the ground that the proposed Adjudicator is not so qualified then the person identified in paragraphs 1.i to 1.v of this Section 2 (whichever shall be appropriate) shall decide the issue and his decision shall be final and binding on the Parties. In so deciding he shall consider any submission either party may wish to make. If he shall decide that the proposed Adjudicator is not so qualified then the person identified in paragraphs 1.i to 1.vi of this Section 2 (whichever shall be appropriate) shall be requested to appoint a replacement in accordance with the provisions of Section 1 of this Schedule Part 26.
- ii. unless both Parties otherwise agree, no person shall be appointed as the Adjudicator who at the time of appointment is (or within three years before such appointment has been) a director, office holder or an employee of or retained as consultant to either party or any associated companies of Project Co or is the holder of shares in either party or any associated companies of Project Co (unless it is a company quoted on a recognised stock

- exchange and his shareholding is less than one per cent of the issued shares capital (of any class) in such company);
- iii. no person shall be appointed as the Adjudicator or continue to act as the Adjudicator if at the time of appointment or at any time before he gives his determination under such appointment he or his employer has or may have some interest or duty which conflicts or may conflict with his function under such appointment unless:-
- (a) before accepting such appointment he shall have disclosed such interest or duty stating that it conflicts or may conflict with his function under such appointment; and
 - (b) in respect of any such interest or duty arising after his appointment he shall have disclosed such interest or duty immediately he becomes aware of it; and
 - (c) in the opinion of the parties there is no material risk of such interest or duty prejudicing his decision as Adjudicator;
- iv. if either party objects to a proposed appointment of an Adjudicator or to an appointed Adjudicator continuing to act as such, on the grounds of a matter referred to in paragraphs 2.i to 2.iii of this Section 2, within four (4) Business Days of either such matter being disclosed, or becoming aware of a matter which has not hitherto been disclosed, then that party may apply to the person identified in paragraphs 1.i to 1.vi of this Section 2 (whichever shall be appropriate) who shall decide if there is a material risk that the decision of the proposed Adjudicator would be prejudiced and therefore whether he should not make or terminate the appointment (as the case may be). In so deciding he shall consider any submissions either party or the Adjudicator may wish to make. If he shall so decide then the appointment of the Adjudicator shall not be made or shall cease forthwith (as the case may be) and he shall appoint a replacement in accordance with the provisions of Section 1 of this Schedule Part 26.

PART 27 OF THE SCHEDULE: PROJECT CO INFORMATION**Section 1: Project Co Information**

1. Name : Robertson Health (Clackmannanshire) Limited
2. Date of Incorporation : 17/11/06
3. Registered number : SC312130
4. Registered office : 10 Perimeter Road, Pinefield Industrial Estate, Elgin, Moray IV30 6AE
5. Directors

Name	Address
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Bill Robertson	10 Perimeter Road, Pinefield Industrial Estate, Elgin, Moray IV30 6AE
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Alan Fordyce	10 Perimeter Road, Pinefield Industrial Estate, Elgin, Moray IV30 6AE
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6. Secretary : Peter Johnstone
7. Subsidiary undertakings at the date of this Agreement : None
8. Authorised and issued share capital at the date of this Agreement :

Name and address of registered holder	Number and class held	Amount paid up
Robertson Health (Clackmannanshire) Holdings Limited, 10 Perimeter Road, Pinefield Industrial Estate, Elgin, Moray, IV30 6AE	202,000 Ordinary Shares	£202,000

9. Loan Stock at the date of this Agreement issued as follows:

Name and address of registered holder	Nominal value of Loan stock
Robertson Health (Clackmannanshire) Holdings Limited, 10 Perimeter Road, Pinefield Estate, Elgin, Moray IV30 6AE	£1,716,059

10. Loan Stock Provisions : See the loan note instrument entered into on or around the date Hereof by Project Co/ Hold Co which forms one of the Subordinated Funding Agreements (as defined in Schedule Part 29)

Section 2: HoldCo Information

1. Name : Robertson Health (Clackmannanshire) Holdings Limited
2. Date of Incorporation : 26/01/07
3. Registered number : SC315451
4. Registered office : 10 Perimeter Road, Pinefield Industrial Estate, Elgin, Moray
IV30 6AE

5. Directors

Name	Address
-------------	----------------

- | | |
|----------------|--|
| Bill Robertson | 10 Perimeter Road, Pinefield Industrial Estate, Elgin, Moray
IV30 6AE |
| Alan Fordyce | 10 Perimeter Road, Pinefield Industrial Estate, Elgin, Moray
IV30 6AE |

6. Secretary : Peter Johnstone
7. Subsidiary undertakings at the date of this Agreement : Robertson Health (Clackmannanshire) Limited
8. Authorised and issued share capital at the date of this Agreement :

Name and address of registered holder	Number and class held	Amount paid up
Robertson Capital Projects Limited, 10 Perimeter Road, Pinefield Industrial Estate, Elgin, Moray, IV30 6AE	202,000 Ordinary Shares	£202,000

9. Loan Stock at the date of this Agreement issued as follows:

Name and address of registered holder	Nominal value of Loan stock
Robertson Capital Projects Limited, 10 Perimeter Road, Pinefield Estate, Elgin, Moray IV30 6AE	£1,716,059

10. Loan Stock Provisions : See the loan note instrument entered into on or around the date Hereof by Project Co/ Hold Co which forms one of the Subordinated Funding Agreements (as defined in Schedule Part 29)

PART 28 OF THE SCHEDULE: CERTIFICATES

Certificate of Commencement

Issued by: **FORTH VALLEY HEALTH BOARD**

Address: Carseview House, Castle Business Park, Stirling, FK9 4SW

Project Co: Robertson Health (Clackmannanshire) Limited

Address: 10 Perimeter Road, Pinefield Industrial Estate, Elgin, Moray
IV30 6AE

Issue date:

Works : Clackmannanshire Community Health Services Project

Situated at : The Site

Project Agreement dated:.....

I/we certify that this is the Commencement Certificate issued pursuant to Clauses 2 (*Execution and Delivery of Documents*) and 14 (*Nature of Land Interests*) and Section 2 of Part 2 of the Schedule of the above mentioned Project Agreement.

To be signed by or
for the issuer named
above.

Signed
FORTH VALLEY HEALTH BOARD

Handback Certificate

Issued by: Boards' Representative
Address: Carseview House, Castle Business Park, Stirling FK9 4SW
Board: **FORTH VALLEY HEALTH BOARD**

Project Co: Robertson Health (Clackmannanshire) Limited
Address: 10 Perimeter Road, Pinefield Industrial Estate, Elgin, Moray
IV30 6AE

Issue date:

Works : Clackmannanshire Community Health Services Project

Situated at : The Site

Project Agreement dated:.....

I/we certify that the condition of the Facilities is in accordance with Paragraph 1 of Part 24 of the Schedule of above mentioned Project Agreement.

To be signed by or
for the issuer named
above.

Signed.....
FORTH VALLEY HEALTH BOARD

***Certificate of Practical Completion**

Issued by: Independent Tester - **Faithful and Gould Limited**
 Address: Woodcote Grove at Ashley Road Epsom Surrey KT18 5BW
 Project Co: Robertson Health (Clackmannanshire) Limited
 Address: 10 Perimeter Road, Pinefield Industrial Estate, Elgin, Moray
 IV30 6AE
 Board: **FORTH VALLEY HEALTH BOARD**

Address: Carseview House, Castle Business Park, Stirling, FK9 4SW

Contractor: Robertson Construction Central Limited
 Address: 10 Perimeter Road, Pinefield Industrial Estate, Elgin, Moray
 IV30 6AE

Issue date:

Works: Clackmannanshire Community Health Services Project

Situated at : The Site

Project Agreement dated:

Under the terms of the above-mentioned Project Agreement,

I/we certify that the Actual Completion Date of the Works was achieved on [].

To be signed by or
 for the issuer named
 above.

Signed.....
 Independent Tester

Certificate of Design Compliance

Issued by: **HLM Architects**
 Address: 5th Floor, Riverside House, 260 Clyde Street, Glasgow, G1 4JH
 Contractor: Robertson Construction Central Limited
 Address: 10 Perimeter Road, Pinefield Industrial Estate, Elgin, Moray IV30 6AE

Project Co: Robertson Health (Clackmannanshire) Limited
 Address: 10 Perimeter Road, Pinefield Industrial Estate, Elgin, Moray IV30 6AE

Board: **FORTH VALLEY HEALTH BOARD**

Address: Carseview House, Castle Business Park, Stirling, FK9 4SW
 Works: Clackmannanshire Community Health Services Project
 Situated at: The Site

Project Agreement dated:

Under the terms of the aforementioned Project Agreement,

We certify that the design of the work complies with the design that we have provided in accordance with our appointment dated

To be signed by or
 for the issuer named
 above.

Signed.....Partner/Director

Issue date:.....

Contractor's Certificate of Compliance

Issued by: Robertson Construction Central Limited

Address: 10 Perimeter Road, Pinefield Industrial Estate, Elgin, Moray IV30 6AE

Project Co: Robertson Health (Clackmannanshire) Limited

Address: 10 Perimeter Road, Pinefield Industrial Estate, Elgin, Moray IV30 6AE

Board: Forth Valley Health Board

Address: Carseview House, Castle Business Park, Stirling, FK9 4SW

Works: Clackmannanshire Community Health Services Project

Situated at: the Site

Project Agreement dated:

Under the terms of the aforementioned Project Agreement,

We certify that the Works has been designed and meets the requirements of the applicable Room Data Sheets, 1:50 loaded drawings, the relevant parts of the Board's Construction Requirements and Project Co's Proposals and the latest signed off Reviewable Design Data (or as varied by the variation procedure contained in Part 22 of the Schedule of the Project Agreement).

To be signed by or
for the issuer named
above.

Signed.....

Robertson Construction Central Limited

Issue Date

PART 29 OF THE SCHEDULE: REFINANCING

- 1 Project Co shall obtain the Board's prior written consent to any Qualifying Refinancing and both the Board and Project Co shall at all times act in good faith with respect to any Refinancing.
- 2 The Board shall be entitled to receive a 50% share of any Refinancing Gain arising from a Qualifying Refinancing.
- 3 The Board shall not withhold or delay its consent to a Qualifying Refinancing to obtain a greater than 50% share of the Refinancing Gain.
- 4 Project Co shall promptly provide the Board with full details of any proposed Qualifying Refinancing, including a copy of the proposed financial model relating to it (if any) and the basis for the assumptions used in the proposed financial model. The Board shall (before, during and at any time after any Refinancing) have unrestricted rights of audit over any financial model and documentation (including any aspect of the calculation of the Refinancing Gain) used in connection with the Refinancing whether that Refinancing is a Qualifying Refinancing or not).
- 5 The Board shall have the right to elect to receive its share of any Refinancing Gain as:
 - (a) a single payment in an amount less than or equal to any Distribution made on or about the date of the Refinancing;
 - (b) a reduction in the Service Payments over the remaining term of this Agreement; or
 - (c) a combination of any of the above.
- 6 The Board and Project Co will negotiate in good faith to agree the basis and method of calculation of the Refinancing Gain and payment of the Board's share of the Refinancing Gain (taking into account how the Board has elected to receive its share of the Refinancing Gain under paragraph 5 above). If the parties fail to agree the basis and method of calculation of the Refinancing Gain or the payment of the Board's share, the dispute shall be determined in accordance with Part 26 of the Schedule (*Dispute Resolution Procedure*).
- 7 The Refinancing Gain shall be calculated after taking into account the reasonable and proper professional costs that each party directly incurs in relation to the Qualifying Refinancing and on the basis that all reasonable and proper professional costs incurred by the Board will be paid to the Board by Project Co within 28 days of any Qualifying Refinancing.
- 8 "Distribution"

means:

 - (a) whether in cash or in kind, any:
 - (i) dividend or other distribution in respect of share capital;
 - (ii) reduction of capital, redemption or purchase of shares or any other reorganisation or variation to share capital;
 - (iii) payments under the Subordinated Funding Agreements (whether of principal, interest, breakage costs or otherwise);
 - (iv) payment, loan, contractual arrangement or transfer of assets or rights to the extent (in each case) it was put in place after Financial Close and was neither in the ordinary course of business nor on reasonable commercial terms;
 - (v) the receipt of any other benefit which is not received in the ordinary course of business and on reasonable commercial terms, or
 - (b) the early release of any Contingent Funding Liabilities, the amount of such release being deemed to be a gain for the purposes of any calculation of Refinancing Gain.

"EEA"

means from time to time the European Economic Area as created by The Agreement on the European Economic Area 1992 or any successor or replacement body, association, entity or organisation which has assumed either or both the function and responsibilities of the European Economic Area.

"Equity IRR"

means the projected blended rate of return to the Relevant Persons over the full term of this Agreement, having regard to Distributions made and projected to be made.

"Exempt Refinancing"

means:

- (a) any Refinancing that was fully taken into account in the calculation of the Service Payments;
- (b) a change in taxation or change in accounting treatment;
- (c) exercise of rights, waivers, consents and similar actions which relate to day to day administrative and supervisory matters, and which are in respect of:
 - (i) breach of representations and warranties or undertakings;
 - (ii) movement of monies between the Project Accounts in accordance with the terms of the Senior Funding Agreements as at Financial Close;
 - (iii) late or non-provision of information, consents or licences;
 - (iv) amendments to sub-contracts;
 - (v) approval of revised technical and economic assumptions for financial model runs (to the extent required for forecasts under the Funding Agreements);
 - (vi) restrictions imposed by the Senior Funders on the dates at which the Senior Debt can be advanced to Project Co under the Senior Funding Agreements and/or amounts released from the Proceeds Account during the Commitment Availability Period, each as defined in the Senior Funding Agreements and which are given as a result of any failure by Project Co to ensure that the construction work is performed in accordance with the agreed construction programme and which is notified in writing by Project Co or the Senior Funders to the Board prior to being given;
 - (vii) changes to milestones for drawdown and/or amounts released from the Proceeds Account during the Commitment Availability Period] set out in the Senior Funding Agreements and which are given as a result of any failure by Project Co to ensure that construction work is performed in accordance with the agreed construction programme and which is notified in writing by Project Co or the Senior Funders to the Board prior to being given;
 - (viii) failure by Project Co to obtain any consent by statutory bodies required by the Senior Funding Agreements; or
 - (ix) voting by the Senior Funders and the voting arrangements between the Senior Funders in respect of the levels of approval required by them under the Senior Funding Agreements;
- (d) any amendment, variation or supplement of any agreement (other than any Subordinated Funding Agreement) approved by the Board as part of any Qualifying Variation under this Agreement;

- (e) any sale of shares in Project Co by the shareholders or securitisation of the existing rights and/or interests attaching to shares in Project Co;
- (f) any sale or transfer of the Subordinated Funders' existing rights and/or interests under the Subordinated Funding Agreements or securitisation of the Subordinated Funders' existing rights and/or interests under the Subordinated Funding Agreements; or
- (g) any Qualifying Bank Transaction.

"Insurance Undertaking"

has the meaning given in the rules from time to time of the Financial Services Authority;

"Net Present Value"

means the aggregate of the discounted values, calculated as of the estimated dates of the Refinancing, of each of the relevant projected Distributions, in each case discounted using the Threshold Equity IRR;

"Pre-Refinancing Equity IRR"

means the nominal post-tax Equity IRR calculated immediately prior to the Refinancing.

"Project Accounts"

means the accounts referred to and required to be established under the Senior Funding Agreements

"Qualifying Bank"

means a bank that is authorised by the Bank of England to accept deposits in the United Kingdom.

"Qualifying Bank Transaction"

means:

- (a) the syndication by a Senior Funder, in the ordinary course of its business, of any of its rights or interests in the Senior Funding Agreements;
- (b) the grant by a Senior Funder of any rights of participation, or the disposition by a Senior Funder of any of its rights or interests (other than as specified in paragraph (a) above, in respect of the Senior Funding Agreements in favour of (i) any other Senior Funder, (ii) any institution which is recognised or permitted under the law of any member state of the EEA to carry on the business of a credit institution pursuant to Council Directive 2001/12/EC relating to the taking up and pursuit of the business of credit institutions or which is otherwise permitted to accept deposits in the United Kingdom or any other EU member state, (iii) a local authority or public authority, (iv) a trustee of a charitable trust which has (or has had at any time during the previous two years) assets of at least £10 million (or its equivalent in any other currency at the relevant time), (v) a trustee of an occupational pension scheme or stakeholder pension scheme where the Board has (or has had at any time during the previous two years) at least 50 members and assets under management of at least £10 million (or its equivalent in any other currency at the relevant time), (vi) an EEA or Swiss Insurance Undertaking, (vii) a Regulated Collective Investment Scheme, (viii) any Qualifying Institution or (ix) any other institution in respect of which the prior written consent of the Board has been given;
- (c) the grant by a Senior Funder of any other form of benefit or interest in either the Senior Funding Agreements or the revenues or assets of Project Co, whether by way of security or otherwise, in favour of (i) any other Senior Funder, (ii) any institution specified in paragraphs (b)(ii) to (vii) above, (iii) any Qualifying Institution or (iv) any other institution in respect of which the prior written consent of the Board has been given.

"Qualifying Refinancing"

means any Refinancing that will give rise to a Refinancing Gain greater than zero that is not an Exempt Refinancing.

"Refinancing"

means:

- (a) any amendment, variation, novation, supplement or replacement of any Funders' Agreement (other than any Subordinated Funding Agreement);
- (b) the exercise of any right, or the grant of any waiver or consent, under any Funders' Agreement (other than any Subordinated Funding Agreement);
- (c) the disposition of any rights or interests in, or the creation of any rights of participation in respect of, the Funders' Agreements (other than the Subordinated Funding Agreements) or the creation or granting of any other form of benefit or interest in either the Funders' Agreements (other than the Subordinated Funding Agreements) or the contracts, revenues or assets of Project Co whether by way of security or otherwise; or
- (d) any other arrangement put in place by Project Co or another person which has an effect which is similar to any of (a)-(c) above or which has the effect of limiting Project Co's ability to carry out any of (a)-(c) above.

"Refinancing Gain"

means an amount equal to the greater of zero and $[(A - B) - C]$, where:

A = the Net Present Value of the Distributions projected immediately prior to the Refinancing (taking into account the effect of the Refinancing using the Financial Model as updated (including as to the performance of the Project) so as to be current immediately prior to the Refinancing) to be made to each Relevant Person over the remaining term of this Agreement following the Refinancing;

B = the Net Present Value of the Distributions projected immediately prior to the Refinancing (but without taking into account the effect of the Refinancing and using the Financial Model as updated (including as to the performance of the Project) so as to be current immediately prior to the Refinancing) to be made to each Relevant Person over the remaining term of this Agreement following the Refinancing; and

C = any adjustment required to raise the Pre-Refinancing Equity IRR to the Threshold Equity IRR.

"Regulated Collective Investment Scheme"

has the meaning given in the rules from time to time of the Financial Services Authority;

"Relevant Person"

means a Shareholder and any of its Associated Companies.

"Shareholder"

means any person from time to time holding share capital in Project Co or Hold Co.

"Subordinated Funder"

means a person providing finance under a Subordinated Funding Agreement.

"Subordinated Funding Agreements"

means the shareholders agreement and/or loan note instruments entered into by Project Co and Hold Co and the Shareholder on or about the date hereof, as amended as permitted under this Agreement or otherwise with the prior written approval of the Board.

"Threshold Equity IRR"

means [REDACTED].

PART 30 OF THE SCHEDULE: EMPLOYEE INFORMATION

NOT USED

PART 31 OF THE SCHEDULE: BULK TRANSFER ASSUMPTIONS

NOT USED

PART 32 OF THE SCHEDULE: INSURANCE PROCEEDS ACCOUNT AGREEMENT

(1) ROBERTSON HEALTH (CLACKMANNANSHIRE) LIMITED

(2) FORTH VALLEY HEALTH BOARD

(3) THE CO-OPERATIVE BANK P.L.C. as Account Bank

(4) THE CO-OPERATIVE BANK P.L.C. as Security Trustee

JOINT INSURANCE PROCEEDS ACCOUNT AGREEMENT

AGREEMENT**AMONG:**

- (1) **ROBERTSON HEALTH (CLACKMANNANSHIRE) LIMITED** (registered under number SC312130) whose registered office is at 10 Perimeter Road, Pinefield Industrial Estate, Elgin, Moray, IV30 6AE (the "Issuer");
- (2) **FORTH VALLEY HEALTH BOARD** of Carseview House, Castle Business Park, Stirling, FK9 4SW (the "Board");
- (3) **THE CO-OPERATIVE BANK P.L.C**, acting through its office at PO Box 101, 1 Balloon Street, Manchester M60 4EP, as account bank pursuant to the Loan Agreement forming one of the Senior Finance Documents (the "Account Bank"); and
- (4) **THE CO-OPERATIVE BANK P.L.C**, acting through its office at PO Box 101, 1 Balloon Street, Manchester M60 4EP, as security trustee for the Finance Parties as defined in the Loan Agreement forming one of the Senior Finance Documents (the "Security Trustee")

WHEREAS

- (A) The Issuer and the Board have agreed to open an insurance proceeds account in their joint names pursuant to an agreement for the construction and operation of community health facilities in Clackmannanshire (the "Project Agreement").
- (B) The parties hereto have agreed to set out the terms on which payments may be made to or from that account in this Agreement.

IT IS AGREED as follows:**1 Definitions and Interpretation**

In this Agreement unless the context otherwise requires

"Credit Provider"	means the Senior Funders;
"Event of Default"	means an Event of Default or an Enforcement Event (each as defined in the Funders' Direct Agreement);
"Insurance Proceeds Account"	means a bank account opened by the Issuer with the Account Bank details of which are more particularly described in the Senior Finance Documents;
"Qualifying Bank"	has the meaning given in Part 29 of the Schedule to the Project Agreement;
"Senior Finance Documents"	means the Senior Funding Agreements;
"Security Documents"	means has the meaning given in the Senior Finance Documents.

- 1.1 Capitalised terms defined in the Project Agreement shall have the same meaning in this Agreement.

1.2 European Economic and Monetary Union

In the event that the United Kingdom joins EMU any figures expressed in "£" and "sterling" under this Agreement shall be converted into Euro at the rate for conversion of sterling into Euro established by the Council of the European Union pursuant to the Treaty (including compliance with rules relating to rounding in accordance with European Community regulations) and any reference to a figure in "£" or "Sterling" shall mean that figure adjusted into Euro.

2 Insurance proceeds account

Each of the Issuer and the Board (together the "Account Holders") hereby appoint The Co-operative Bank p.l.c. as the Account Bank.

- 2.1 The Account Bank has opened on its books, at its office at 1 Balloon Street, Manchester, M60 4EP, an account in the joint names of the Account Holders designated the Insurance Proceeds Account (the "Insurance Proceeds Account").
- 2.2 The Account Bank shall, save as otherwise provided herein, maintain the Insurance Proceeds Account in accordance with its usual practices, provided that, in the event of any conflict between the provisions of this Agreement and any applicable mandate, the provisions of this Agreement shall prevail.
- 2.3 Notwithstanding anything else in this Agreement, no person shall request or require that any withdrawal be made from the Insurance Proceeds Account if it would cause the Insurance Proceeds Account to become overdrawn.
- 2.4 Where any withdrawal required under this Agreement cannot be made in its entirety, the Account Bank shall promptly notify both of the Account Holders of that fact and provide details of the payment not made, the date on which it should have been made and enquire whether there is to be an alternative request for payment.
- 2.5 Each amount from time to time standing to the credit of the Insurance Proceeds Account shall bear interest at the rate agreed between the Account Bank and the Account Holders from time to time, such interest to be credited to the Insurance Proceeds Account in respect of which such interest has accrued in accordance with the relevant mandate.
- 2.6 Subject to and in accordance with the provisions of this Agreement, including without limitation Clause 4 (*General Provisions for the Insurance Proceeds Account*), the Account Bank agrees that it shall make such payments out of the amount standing to the credit of the Insurance Proceeds Account as may from time to time be requested by the Account Holders jointly subject to the restrictions as contained in this Agreement. Save as otherwise provided in this Agreement, no party shall be entitled to require the Account Bank to make, and the Account Bank shall not make, any payment out of the amount standing to the credit of the Insurance Proceeds Account.
- 2.7 Subject to Clause 8.6, the Account Holders shall maintain the Insurance Proceeds Account with the Account Bank until the termination of the Project Agreement. If so instructed after the termination of the Project Agreement, the Account Bank shall, at the sole cost and expense of the Issuer, terminate the Insurance Proceeds Account in accordance with the relevant instructions and pay any amount standing to the credit of such accounts as the Account Holders may elect in accordance with Clause 4.1.

3 Receipts and Payments

- 3.1 The parties agree that the Insurance Proceeds Account may only be used in accordance with the terms of and for the purposes set out in this Clause 3.
- 3.2 The Insurance Proceeds Account shall be used for receiving, to the extent required by Clause 36 (*Insurance*) of the Project Agreement, the proceeds of all Insurances..
- 3.3 Subject to restrictions set out in this Agreement, the Insurance Proceeds Account shall only be used for applying the proceeds of the Insurances in accordance with Clause 36 (*Insurance*) of the Project Agreement either directly or indirectly by way of the reimbursement to the Issuer of costs or expenses incurred or monies paid by it (or on its behalf) in or towards satisfaction of the reinstatement restoration or replacement requirements of that Clause 36. In the event that any amount standing to the credit of the Insurance Proceeds Account is not so required to be applied, such amount shall (subject to Clause 4.3 and 4.5 below) be paid by the Account Bank to the Insurance Account, or as otherwise instructed by the Security Trustee pursuant to Clause 4.5 below.

4 General Provisions for the Insurance Proceeds Account

4.1 Subject to Clauses 4.3 and 4.5 below, and provided that:

- (a) the Account Bank has received notice in writing from two signatories, one of which shall be an authorised signatory of the Issuer and the other an authorised signatory of the Board, as listed under the applicable mandate that such payment is authorised under this Agreement; and
- (b) no notice has been given to the Account Bank by the Credit Provider prior to the making of such payment or transfer of an Event of Default which is subsisting and the Account Bank has no actual notice that an Event of Default will occur as a result of the making of any such payment or transfer,

the Account Bank agrees that it shall only make payments or transfers from the Insurance Proceeds Account on the request of the Account Holders.

4.2

- (a) The Board undertakes to provide notice to the Account Bank as prescribed in Clause 4.1(a) for, the purposes of applying any part of the balance standing to the credit of the Insurance Proceeds Account in accordance with Clause 3.3.
- (b) Each of the Account Bank and the Issuer shall be entitled to treat any act of the authorised signatory of the Board as being expressly authorised by the Board and neither the Account Bank nor the Issuer shall be required to determine whether an express authority has in fact been given.

4.3 No payments or transfers from the Insurance Proceeds Account shall be made after an Event of Default which is continuing until the Credit Provider has confirmed to the Account Bank that such payment or transfer may be made except as expressly permitted under this Agreement. The Account Bank shall not be under any obligation to investigate the compliance of any payment with this Agreement.

4.4 All amounts withdrawn from the Insurance Proceeds Account for transfer to another account or for application in or towards making a specific payment or meeting a specific liability shall be transferred to that account or applied in or towards making that payment or meeting that liability, and for no other purpose.

4.5 Notwithstanding any other provision of this Agreement, at any time following the occurrence of any Event of Default which is continuing and has not been waived or remedied, the Security Trustee may at any time give notice to the Account Bank instructing it not to act on the instructions of or at the request of the Issuer in relation to any sums at any such time standing to the credit of the Insurance Proceeds Account. Without prejudice to the foregoing, the Account Bank agrees that it shall pay any amount standing to the credit of the Insurance Proceeds Account and payable to the Issuer in accordance with Clause 3.3 to such a bank account as the Security Trustee shall direct following the occurrence of any Event of Default. The Account Bank agrees that it shall not so act on the instructions of the Issuer and shall act on the instructions of the Security Trustee in place of the Issuer.

4.6 In establishing the balance standing to the credit of the Insurance Proceeds Account at any time, the Account Bank may take into account credits to and withdrawals from such Insurance Proceeds Account which are to be made on such day.

5 Qualifying Bank

If at any time the Account Bank ceases to be a Qualifying Bank, the Account Holders shall promptly open or cause to be opened a new account with a Qualifying Bank on the same terms as the Insurance Proceeds Account and the Account Holders shall take all such action as may be required to open the new account.

6 Charges

The charges of the Account Bank (if any) for the operation of the Insurance Proceeds Account shall be for the account of the Account Holders jointly and severally and may be debited from the balance standing to the credit of the Insurance Proceeds Account as from time to time agreed between the Account Bank, the Board and the Issuer.

7 Mandates

Each of the Account Holders will deliver to the Account Bank on or prior to the date hereof the applicable mandate together with authorised signature lists for both the Issuer and the Board.

8 The Account Bank

8.1 The Account Bank may:

- (a) engage and pay reasonable fees for the advice or services of any lawyers, accountants or other experts whose advice or services may to it seem necessary, expedient or desirable and rely upon any advice so obtained;
- (b) rely upon any communication or document believed by it to be genuine and, in particular, rely upon any notice, request or other communication of the Account Holders for the purposes of this Agreement if such notice, request or other communication purports to be signed or sent by or on behalf of an authorised signatory of each of the Account Holders;
- (c) assume that no Event of Default has occurred unless it has actual notice to the contrary; and
- (d) assume that all conditions for the making of any payment out of the amount standing to the credit of the Account which is specified in the Project Agreement or any of the Senior Finance Documents has been satisfied, unless it has actual notice to the contrary.

8.2 Notwithstanding anything to the contrary expressed or implied herein and subject to Clause 2 (*Insurance Proceeds Account*), the Account Bank shall not:

- (a) be bound to enquire as to the occurrence or otherwise of an Event of Default be affected by notice of any of the same except by reason of and to the extent expressly provided in this Agreement;
- (b) be bound to account to any other party hereto for any sum or the profit element of any sum received by it for its own account;
- (c) save as provided in this Agreement be bound to disclose to any other person any information relating to any other party hereto;
- (d) be under any fiduciary duty towards any other party hereto or under any obligations other than those for which express provision is made in this Agreement;
- (e) have any responsibility to ensure that the information set out in any instructions received by it hereunder are correct or to check or enquire as to or otherwise be affected by whether any condition has been or will be met or fulfilled or any instruction is properly given on behalf of the person from whom it purports to be given or any instruction is given properly other than to exercise the bankers duty of care; or
- (f) have any responsibility to any party if any instruction which should be given by the Account Holders to the Account Bank under or in connection with this Agreement is for any reason not received by the Account Bank or is not made at the time it should be made.

8.3 The Account Bank does not have and does not accept any responsibility for the accuracy and/or completeness of any information (other than statements provided in accordance with Clause 9.2) and the Account Bank shall not be under any liability as a result of taking or omitting to take

any action in relation to the Insurance Proceeds Account, save in the case of negligence or wilful misconduct or breach of its obligations under this Agreement.

- 8.4 Each of the other parties hereto agrees that it will not assert or seek to assert against any director, officer or employee of the Account Bank any claim it might have against the Account Bank in respect of the matters referred to in Clause 8.3 above.
- 8.5 The Account Bank may accept deposits from, lend money to, invest in and generally engage in any kind of banking or other business with the Account Holders, the Shareholders and any other party to any of the Project Documents.
- 8.6 The Account Bank may, at any time, (without assigning any reason therefor) notify the Account Holders in writing that it wishes to cease to be a party hereto as Account Bank (a "cessation notice"). Upon receipt of a cessation notice the Account Holders may nominate a Qualifying Bank as a successor to the Account Bank (a "successor Account Bank"). If no such nomination is made before the date specified in the cessation notice as being the date on which the Account Bank wishes to cease to be a party hereto (the "cessation date") (which date shall be a Business Day falling not less than thirty (30) days after the date of delivery of the cessation notice to the Account Holders) then the Account Bank may nominate a Qualifying Bank as successor Account Bank itself.
- 8.7 If a successor Account Bank is nominated under the provisions of Clause 8.6 above, then on the cessation date, provided the successor Account Bank has executed and delivered to the Account Holders a deed of novation in such form as the Account Holders may require undertaking to become a party to and bound by the terms and conditions of this Agreement and to become a party to such other documents as may be required by the Security Trustee in order to perfect the security created by the Senior Finance Documents:
- (a) the successor Account Bank shall open on its books at its principal office an account equivalent to that described in Clause 2 and any amounts standing to the credit of the Insurance Proceeds Account shall be transferred to the corresponding one of such account;
 - (b) any reference in the Project Agreement or any Senior Finance Document to the Insurance Proceeds Account shall be deemed to refer to the corresponding account opened pursuant to Clause 8.7(a);
 - (c) the Account Bank shall cease to be a party hereto as Account Bank and shall cease to have any obligation hereunder in such capacity (but without prejudice to any accrued liabilities under this Agreement and its obligations under this Clause 8) (but shall remain entitled to the benefit of the provisions of this Clause 8);
 - (d) the successor Account Bank and each of the other parties hereto shall have the same rights and obligations amongst themselves as they would have had if such successor Account Bank had been an original party hereto as Account Bank; and
 - (e) any reference in the Project Agreement or any Senior Finance Document to the Account Bank shall be deemed to refer to the successor Account Bank pursuant to Clause 8.7.

9 Acknowledgements by the Account Bank

- 9.1 Notwithstanding anything to the contrary in any applicable mandate, the Account Bank hereby waives so far as it may validly and lawfully do so any right it has or may hereafter acquire to combine, consolidate or merge the Insurance Proceeds Account with any other account of the Account Bank, Account Holders or the Security Trustee or any other person or with any liabilities of Account Holders or the Security Trustee or any other person to the Account Bank. In addition, the Account Bank agrees so far as it may validly and lawfully do so that it may not set off, combine, withhold or transfer any sum standing to the credit of the Insurance Proceeds Account in or towards satisfaction of any liabilities to the Account Bank of the Account Holders, the Security Trustee or any other person.

- 9.2 After the date hereof and until the Account Bank has been notified by the Account Holders of the termination of the Project Agreement or until the Account Bank ceases to be a party to this Agreement pursuant to the provisions of Clause 8.7, the Account Bank shall provide each of the Account Holders and the Security Trustee with statements in respect of the Insurance Proceeds Account, such statement to be supplied in accordance with any reasonable request therefor by the Account Holders.

10 Assignment

- 10.1 The Account Holders may not assign any of their rights under this Agreement or in relation to the Insurance Proceeds Account otherwise than pursuant to the Security Documents or as permitted under the Project Agreement. The Security Trustee may assign its rights under this Agreement to a successor Security Trustee appointed in accordance with the Senior Finance Documents and shall promptly give notice of any such assignment to the Account Bank. The Account Bank shall not be entitled to novate (except in accordance with Clause 8.7) or assign all or any part of its rights under this Agreement.

11 Security trustee

The Security Trustee is party hereto solely for the purpose of receiving the benefits and exercising the rights specifically allocated to it under the terms of this Agreement.

12 Further assurance

The parties hereto agree that they will co-operate fully to do all such further acts and things and execute any further documents as may be necessary or reasonably desirable to give full effect to the arrangements contemplated by this Agreement, subject to any such party being reimbursed to its satisfaction for any costs, expenses (including VAT) liabilities or fees reasonably incurred by it in the negotiation, preparation or execution of any such further documents.

13 Amendments

The provisions of this Agreement may not be amended (otherwise than in accordance with the terms hereof) except by written agreement between all the parties hereto.

14 Notices

- 14.1 Each communication to be made hereunder shall be made in writing and, unless otherwise stated, may be made by facsimile or letter delivered by registered post or courier.
- 14.2 Any communication or document to be made or delivered by one person to another pursuant to or in connection with this Agreement shall (unless that other person has by ten days' written notice to the other specified another address) be made or delivered to that other person at the address set out below and shall be deemed to have been made or delivered:
- (a) (in the case of any communication made by letter) when delivered to that address; or
 - (b) (in the case of any communication by facsimile) when transmission of such facsimile communication has been received in legible form and receipt has been confirmed,

provided that (a) if such communication or document would otherwise be deemed to have been received on a day which is not a Business Day it shall be deemed to have been received on the next subsequent Business Day, (b) if any communication is made or document is delivered to the Security Trustee, such communication or document shall be effective only if the same is expressly marked for the attention of the officer identified as the Security Trustee, as the case may be, below (or such other officer as the Credit Provider or the Security Trustee, as the case may be, shall from time to time specify for this purpose) and (c) if any communication or document is made or delivered to the Account Bank or the Security Trustee, such communication or document shall be effective only when received by the Account Bank, or the Security Trustee.

- 14.3 Notice to the Account Bank at any other office than the address set out below or such substitute address notified in accordance with Clause 14.2 shall not constitute notice to the Account Bank unless agreed in writing by the Account Bank by reference to this Agreement.

If to the Issuer: Robertson Capital Projects Limited
Lomond Court
Castle Business Park
Stirling
FK9 4TU

For Attention of The Finance Director

Fax: 01786 431650

If to the Board: NHS Forth Valley (NHS Board)
Carseview House,
Castle Business Park
Stirling
FK9 4SW

For Attention of The Chief Executive of the Board

Fax: 01786 471337

If to the Account Bank: The Co-operative Bank p.l.c.
PO Box 101, 1 Balloon Street
Manchester
M60 4EP

For Attention of the Senior Manager – PFI & Project Finance

Fax: 0161 835 4117

If to the Security Trustee: The Co-operative Bank p.l.c.
PO Box 101, 1 Balloon Street
Manchester
M60 4EP

For Attention of the Senior Manager – PFI & Project Finance

Fax: 0161 835 4117

15 Miscellaneous

- 15.1 The obligations of the parties who have executed this Agreement shall not be affected by the fact that not all of the parties hereto have validly executed this Agreement and such obligations shall be binding inter se.
- 15.2 The parties hereto each acknowledge that the Security Trustee when acting hereunder shall be acting in accordance with and subject to the terms of the Subordination Agreement (as defined in the Senior Finance Documents).

16 Governing law and jurisdiction

This Agreement is governed by, and shall be construed in accordance with the laws of Scotland.

17 Third party rights

Save to the extent expressly provided in this Agreement, it is expressly declared that no rights shall be conferred under and arising out of this Agreement upon any person who is not a party to

this Agreement and, without prejudice to the foregoing generality, there shall not be created by this Agreement a *jus quaesitum tertio* in favour of any person whatsoever.

IN WITNESS WHEREOF this Agreement consisting of this page and the preceding 8 pages is executed as follows:

PART 33 OF THE SCHEDULE : COMMERCIALY SENSITIVE INFORMATION**Section 1: Commercially Sensitive Contractual Provisions**

Information	Duration
The Financial Model (including but not limited to lifecycle costs)	Project Term
Project Co bank account information	Project Term
Threshold Equity IRR	Project Term
Minimum Unavailability Deduction	Project Term
Service Failure Point levels set out in Clauses 29 and 44 of Project Agreement.	Project Term
Clause 3 of Schedule Part 18 of the Project Agreement	Project Term
Schedule Part 18 of the Project Agreement, Sections F and G	Project Term
Schedule Part 14 of the Project Agreement	Project Term
Project Co's Proposals	Project Term
limits on liability	Project Term
level of indemnities	Project Term
nature of warranties	Project Term
pricing in so far as not covered by Financial Model excluding information ordinarily required for the full business case.	Project Term
insurance levels	Project Term
levels of damages	Project Term
amount of compensation means any amount actually paid out but excluding amount paid out on termination.	Project Term
Ancillary Documents to which the Board is not a Party	Project Term

PART 33 OF THE SCHEDULE : COMMERCIALY SENSITIVE INFORMATION

Section 2: Commercially Sensitive Material

Information	Duration
The terms of any Project Document to which the Board is not a party.	Project Term
Information which is personal data about individuals the disclosure of which would be in breach of the Data Protection Act 1998 but excluding the identity of the named Project Co's Representative.	At all times
Information about Project Co's processes, methodologies, working methods and information relating to the development of new processes and methodologies which amounts to a trade secret or the disclosure of which or could reasonably be considered to provide a commercial advantage to Project Co's competitors.	Trade Secrets – Project Term In all other cases - 5 Years
<p>(a) Any financial models provided by Project Co in relation to the Agreement including those provided prior to Financial Close;</p> <p>(b) The breakdown of prices within the overall contract price (but not the overall contract price);</p> <p>(c) Information on Project Co's costing mechanisms including information obtained from Project Co relating to project risks and pricing of the same and cost information relating to third party contractors and the Project Co's Sub-Contractors</p> <p>(d) Financial term sheets and related funding information including any funder pricing</p>	Project Term
Information relating to the "Preferred Bidder" appointment, including the Preferred Bidder Letter and correspondence, meeting minutes, e-mails relating to the same (except as otherwise listed in this Schedule)	5 Years
Information contained within or relating to Project Co's Bid documentation (except as otherwise listed in this Schedule)	5 Years
Information relating to the negotiation of the Agreement including <i>inter alia</i> correspondence, meeting minutes, emails, presentation materials, commercial papers and/or drafts to the extent it does not relate to the commercial information contained within the Agreement (except as otherwise listed in this Schedule).	5 Years
The terms of any Funding Agreement (other than the Direct Agreement)	Project Term

LIST OF ATTACHMENTS TO AGREEMENT:

- Attachment A - Board Policies
- Attachment B - Financial Model (in disk)
- Attachment C - Planning Approvals
- Attachment D - Site Plan A and Site Plan B