

Dated 4th May 2007

- (1) Forth Valley Health Board
- (2) Forth Health Limited

Project Agreement (REDACTED VERSION)

for the development of the site of the new acute hospital for Forth Valley
and the provision of services

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THIS AGREEMENT is made on 4th May 2007

BETWEEN

- (1) Forth Valley Health Board of Carseview House, Castle Business Park, Stirling, FK9 4SW (the "Board"); and
- (2) Forth Health Limited (registered number 05986479) whose registered office is Allington House, 150 Victoria Street, London, SW1E 5LB ("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 new acute hospital for Forth Valley (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 (S.I. 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 the Effective Date:

(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 Subject to Clause 3.2(a) (*Effective Date*) (which shall take immediate effect), 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 (and its right to carry out the Permitted Project Co 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.

3.2 *Effective Date*

(a) The rights and obligations of the parties under this Agreement (other than those under this Clause 3.2(a) (*Effective Date*) and the provisions of Clauses 1 (*Interpretation*), 2 (*Execution and Delivery of Documents*), 3 (*Commencement and Duration*), 47.9 (*Continuing Obligations*), 50.1 (*Assignment, Sub-Contracting and Changes in Control*) to 50.7 (*Assignment, Sub-Contracting and Changes in Control*) inclusive, 52 (*Confidentiality*), 57 (*Notices*), 58 (*Amendments*), 59 (*Waiver*), 60 (*No Agency*), 61 (*Entire Agreement*), 63 (*Severability*), 64 (*Costs and Expenses*), 65 (*Third Party Rights*) and 67 (*Governing Law and Jurisdiction*) shall be conditional upon the occurrence of the Effective Date.

- (b) A Project Co Condition Precedent shall be deemed to be satisfied on the date on which written notice confirming satisfaction and delivery of such document by Project Co to the Board, or a written waiver of such requirement is received by Project Co from the Board.
- (c) A Board Condition Precedent shall be deemed to be satisfied on the date on which written notice confirming satisfaction and delivery of such document by the Board to Project Co, or a written waiver of such requirement is received by the Board from Project Co.
- (d) If the Project Co Conditions Precedent and the Board Conditions Precedent have not been satisfied or waived in accordance with Clauses 3.2(b) (*Effective Date*) and 3.2(c) (*Effective Date*) on or before the Conditional Expiry Date, this Agreement shall terminate and, subject to Clause 47.9 (*Continuing Obligations*), shall cease to have effect.

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:

- (i) 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 either (A) there has been no objection in accordance with paragraph 3(b) 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, or (B) Project Co acts in accordance with paragraph 4.2 of Part 10 of the Schedule (*Review Procedure*); and

- (ii) in the circumstances specified in Clause 4.1(a) (*Ancillary Documents*), 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 (*Changes to Funding Agreements and Refinancing*) and 4.4 (*Changes to Funding Agreements and Refinancing*), 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 (*Changes to Funding Agreements and Refinancing*); 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 (*Project Documents*), 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) subject to Clause 5.7 (*Co-operation*) and Clauses 16.2 (*Consents and Planning Approval*), 16.3 (*Deed of Servitude*) and 16.4 (*Agricultural Lease*), in compliance with all Law and Consents (including 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 (taking into account the phased nature of the Works) 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 (*General*

Standards), the provisions of this Clause 5.2 (*General Standards*) will be given meaning and have effect in the descending order of precedence set out in this Clause 5.2 (*General Standards*).

- 5.2A Project Co shall at its own cost be solely responsible for procuring that the Permitted Project Co Operations undertaken by it are at all times performed:
- (a) subject to Clause 5.7 (*Co-operation*) and to Clauses 16.2 (*Consents and Planning Approval*), 16.3 (*Deed of Servitude*) and 16.4 (*Agricultural Lease*), in compliance with all Law and 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; and
 - (c) 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.

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

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 or Works 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;

(e) subject to Section 2 of the Joint Operating Protocol:

(i) use reasonable endeavours to procure completion of the Phase 1 Board Access Works on or before 25 July 2008 but in any event procure completion of the Phase 1 Board Access Works on or before 12 September 2008;

(ii) procure completion of the Phase 2 Board Access Works on or before the Phase 1 Actual Completion Date; and

(iii) procure free and uninterrupted road access to and egress from the Works Site from Stirling Road (such access road to be reasonably commensurate with the volume and type of construction traffic required to carry out the Works) from the Effective Date until such time as the Phase 1 Board Access Works have been completed in accordance with the standard specified in this Clause 5.3(e) (*Board's Undertaking*),

all in accordance with the standards specified in the "Works Information" section of the Board Access Works Contract, and shall not make or agree to any variation to such standards or to the terms and/or effect of clause 60.1(1) of the Board Access Works Contract without the prior written consent of Project Co, and shall promptly notify Project Co when it reasonably considers that the Phase 1 Board Access Works and the Phase 2 Board Access Works are so complete;

(f) not, during the Operational Term, to the extent permitted by law, invite, contract with or assist any third party to provide any catering service or food and beverage service at or from the Site that is similar or equivalent to or competes in whole or in part with the Catering Service, provided that where the parties have failed to agree:

(i) prices for standard hospitality menus in accordance with paragraph 28 of Section 5 of the Catering Service Specific Specification and the reason for such failure is that the prices proposed by Project Co for such standard hospitality menus are, on average, higher than the highest prices

charged for comparable services in other comparable PFI district general hospitals in Scotland and England; and/or

- (ii) changes to vending prices in accordance with paragraph 34 of Section 5 of the Catering Service Specific Specification and the reason for such failure is that the revised prices proposed by Project Co for the vending services are, on average, higher than the highest prices charged for comparable services in other comparable PFI district general hospitals in Scotland and England,

then the Board shall be entitled to contract with a third party for the provision of the relevant service on the Site.

(g) Not Used; and

(h) procure the completion of:

- (i) those of the Cable Diversion Works referred to in paragraph 1 of the Cable Diversion Works Specification on or before 29 June 2007; and
- (ii) those of the Cable Diversion Works referred to in paragraph 2 of the Cable Diversion Works Specification on or before 13 July 2007,

in each case, to the standard specified in the Cable Diversion Works Specification, and shall in each case promptly notify Project Co when it reasonably considers such works to be so complete;

(i) notwithstanding the terms of Clause 16.3 (*Deed of Servitude*) or any other rights granted under this Agreement, enter into or grant (or procure the Scottish Ministers shall enter into or grant), within 14 Business Days of the provision by Project Co to the Board of all relevant information in connection therewith, such wayleaves, deeds of servitude, leases or other similar agreements with any third party in respect of the Works Site, the Access Area or the Woodland Area where such right is necessary in order to enable Project Co to carry out the Project Operations, provided always that:

- (i) Project Co has obtained at its own cost the prior agreement of the third party or utility provider (in terms previously approved by the Board or, as the case may be, the Scottish Ministers, such approval not to be unreasonably withheld or delayed); and

- (ii) Project Co shall reimburse the Board for all costs and expenses reasonably and properly incurred by the Board in connection with entering into (or procurement of the Scottish Ministers entering into, as the case may be) any agreed wayleaves, deeds of servitude, leases or other similar agreements at the request of Project Co; and
- (j) before entering a contract with SP Distribution Limited (or other utility provider) to dispoise to SP Distribution Limited (or such other utility provider) land for the installation of a new electricity substation pursuant to the Cable Diversion Works, the Board shall liaise with Project Co and obtain Project Co's agreement to the precise location of the subjects to be dispoised, which agreement shall not be unreasonably withheld taking into consideration the conditions attached to the Planning Approval and Project Co's obligations to carry out the Project Co Operations, provided that this obligation shall not apply if the location of the subjects to be dispoised is as shown shaded yellow on the Works Site Plan,

provided that, to avoid doubt nothing in this Clause 5.3 (*Board's Undertaking*) 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. This obligation shall include a requirement for each party to co-operate with the other in relation to the co-ordination of the Works, the Board Access Works and the Cable Diversion Works so as to avoid any hindrance or delay to the Works and avoid, insofar as is reasonably practicable, any hindrance or delay to the Board Access Works and/or the Cable Diversion Works. 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.
- 5.6 Without prejudice to the generality of Clause 5.4 (*Co-operation*), each party agrees to comply with the terms of the Joint Operating Protocol.
- 5.7 Each party shall at its own cost comply with, and provide such assistance as is reasonably required by the other in order to procure compliance with, its respective obligations under the Fire (Scotland) Act 2005 and the Fire Safety

(Scotland) Regulations 2005 in relation to the Works and/or the Facilities, provided that nothing in this Clause 5.7 (*Co-operation*) shall require either the Board or Project Co to alter its staffing profile or numbers in order to procure such compliance.

5.8 Without prejudice to the generality of Clause 5.4 (*Co-operation*), during the carrying out of the Board Access Works and the Cable Diversion Works, Project Co shall not (and shall procure that its Sub-Contractors shall not) impede the carrying out of the Board Access Works pursuant to the Board Access Works Contract or the carrying out of the Cable Diversion Works (having regard always to the interactive nature of the activities of the Board and of Project Co and specifically to any arrangements agreed by the parties pursuant to Clause 5.4 (*Co-operation*) and/or the terms of the Joint Operating Protocol).

5.9 Without prejudice to the generality of Clause 5.4 (*Co-operation*), during the carrying out of the Board Access Works and the Cable Diversion Works, the Board shall not (and shall procure that its agents, contractors and/or sub-contractors of any tier engaged in the carrying out of the Board Access Works and/or Cable Diversion Works shall not) impede the carrying out of the Works (having regard always to the interactive nature of the activities of the Board and of Project Co and specifically to any arrangements agreed by the parties pursuant to Clause 5.4 (*Co-operation*) and/or the terms of the Joint Operating Protocol).

Excavated Materials from Board Access Works

5.10 Subject to the terms of the Joint Operating Protocol and Part 35 of the Schedule (*Planning Condition Responsibilities*), Project Co shall permit material excavated during the carrying out of the Board Access Works to be deposited on the area shown cross-hatched in black on the Works Site Plan, provided that such material meets the civil, structural, architectural and landscape specifications referred to in Project Co's Proposals.

PART B: GENERAL PROVISIONS

6. GENERAL OBLIGATIONS AND RESPONSIBILITIES OF PROJECT CO

Other business

6.1 Project Co shall:

- (a) not engage in any business or activity other than the business or activities related to, and conducted for, the purpose of the Project Operations and the Permitted Project Co Operations; and

- (b) be entitled to retain the income derived from the Permitted Project Co 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 (and any Permitted Project Co Operations) have full regard for the safety of all persons on the Site or the Works Site (whether lawfully or not) and shall keep the Site, the Works 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 areas of the Works Site where appropriate as are reasonable in accordance with Good Industry Practice to prevent access onto any part of the Works Site and/or the Facilities, as relate to a Phase of the Works being carried out, of any persons or creatures not entitled to be there.

7. **NOT USED**

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 and/or the Permitted Project Co 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;
- (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 and/or
- (e) any breach by Project Co of any of its obligations in this Agreement relating to the conduct of any Permitted Project Co Operations.

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 Works and/or 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 Clauses 8.2(c) (*Board indemnities to Project Co*) and 8.2(d) (*Board indemnities to Project Co*) 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) (*Conduct of Claims*), 8.3(d) (*Conduct of Claims*) and 8.3(e) (*Conduct of Claims*) below, on the giving of a notice by the Beneficiary pursuant to Clause 8.3(a) (*Conduct of Claims*) 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) (*Conduct of Claims*) 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) (*Conduct of Claims*) 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) (*Conduct of Claims*) 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) (*Conduct of Claims*) 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) (*Conduct of Claims*) 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) (*Conduct of Claims*), then the Indemnifier shall be released from any liability under its indemnity under Clause 8.1 (*Project Co indemnities to Board*) or Clause 8.2(c) (*Board indemnities to Project Co*) (as the case may be) and, without prejudice to any accrued liabilities, any liability under its indemnity given pursuant to Clause 8.2(b) (*Board indemnities to Project Co*) 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) (*Conduct of Claims*) to 8.3(e) (*Conduct of Claims*) 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) (*Tax Equalisation*) and Clauses 48.6 (*Tax Equalisation*) to 48.11 (*Tax Equalisation*) (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 an Unavailability Event or a Performance 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 an Unavailability Event or a Performance 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 Programme, which shall be operated as though the relevant Service had been performed free from such adverse interference; and
- (c) any such Unavailability Event or Performance 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 (*Excusing Causes*), 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; or
 - (v) the same arises from an act of the Board or a Board Party compliant with the Contractor's Site Rules;
- (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 Clause 28.10 (*Programmed and Unprogrammed Maintenance*) or Clauses 29.7 (*Board's remedial rights*) to 29.9 (*Board's remedial rights*) (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; or
- (g) Not Used;
- (h) the exercise of, or the instigation of legal proceedings by any person (other than Project Co or any Project Co Party) to enforce or protect, rights which may exist from time to time in respect of the Site or the

Works Site (other than third party rights disclosed in the Certificate of Title);

- (i) any error or omission in the Certificate of Title which impacts on or affects the carrying out of the Project Co Operations or the Permitted Project Co Operations, other than:
 - (i) an omission where, on the date of the Certificate of Title, the matter omitted did not exist but has subsequently been brought into existence by the acts or omissions of Project Co or any Project Co Party; or
 - (ii) an omission relating to a subject matter which is of a type that is generally not dealt with in a Scottish version of the City of London Law Society format upon which the Certificate of Title is based; or
- (j) failure by a utility company to carry out works or provide services, but only insofar as such failure results in disruption of natural gas supply to the Hospital laboratories.

Where in this Clause 8.7 (*Excusing Causes*) 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) (*Excusing Causes*) 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 (*Sole Remedy*) 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.

No Loss

- 9.6 Where the Board would otherwise be expressly liable to make payment by way of compensation to Project Co including amounts which, in turn, comprise compensation 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 such compensation, is conditional on the entitlement of, or receipt of payment by Project Co from the Board.

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, other than as

specifically set out in Clauses 41.3(i) (*Delay Events*) and Clause 41.11(d) (*Compensation*), 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 the Acute Operating Division Chief Executive Officer as appointed from time to time 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 Martin Watson 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 (*Procedures and practices*)); 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.
- 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**

Licence

Access during Construction

- 14.1 From the Effective Date until the Actual Completion Date or (if earlier) the Termination Date, the Board shall procure the grant of the Licence from the Scottish Ministers, to Project Co and the Project Co Parties, of the right to:

- (a) exercise the Ancillary Rights; and
- (b) enter upon and remain on the Works 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 a Phase Actual Completion Date the Board shall procure the grant to Project Co and Project Co Parties of the right to enter upon the Facilities completed during that Phase and all previous Phases, and/or the Site or (in the case of Clauses 14.2(b) (*Access following Construction*) and 14.2(c) (*Access following Construction*) only) the Works Site and to enter and remain upon the Retail Unit, 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 (*Access during Construction*)) and, in the case of the Retail Unit, the Permitted Project Co Operations; and
 - (b) the Finishing Works, the remedying of Defects and the carrying out of Snagging Matters relating to that Phase; and
 - (c) exercising the Ancillary Rights,
- 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 (*Access during Construction*) and 14.2 (*Access during Construction*) shall not operate or be deemed to operate as a lease of the Facilities, the Works Site or the Site or any part of the Facilities, the Works Site or the Site and Project Co shall not (subject to the terms of the Licence) have or be entitled to exclusive possession or any estate right or title or interest in and to the Site, the Works Site or the Facilities but shall occupy the Site and the Works Site as a licensee only.
- 14.4 Subject to Project Co exclusively licensing the Retail Unit to a third party for the purpose of the Permitted Project Co Operations pursuant to Clause 3.6 of the Licence, the rights referred to at Clauses 14.1 (*Access during Construction*) and 14.2 (*Access during Construction*) 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 of the relevant title conditions disclosed in the Certificate of Title or otherwise.
- 14.5 Project Co shall procure that:
- (a) all Project Operations and Permitted Project Co Operations carried out at the Site and the Works 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 of the title conditions disclosed in the Certificate of Title;

- (b) there shall be no action, or omission to act by Project Co or any Project Co Party, which shall give rise to a right for any person to obtain title to the Site or the Works Site or any part of the Site or the Works Site provided that for the avoidance of doubt Project Co may:
 - (i) enter into negotiations in respect of wayleaves, deeds of servitudes, leases or similar agreements as provided for in Clause 5.3(i) (*Board's Undertaking*); and/or
 - (ii) grant the exclusive licence referred to in Clause 3.6 of the Licence; and
- (c) if any damage is caused to the Access Areas, Drainage Area, Woodland Area and/or Works Drainage Scheme Area as a result of the exercise of the Additional Rights, such damage shall be made good at its own expense as soon as reasonably practicable following completion of the relevant Works in respect of which such Additional Rights have been exercised.

14.6 The Board undertakes pursuant to the grant of the Licence in terms of Clauses 14.1 (*Access during Construction*) and 14.2 (*Access during Construction*) 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 or the Works Site of their 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 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 loadbearing 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) satisfied itself as to the adequacy of the rights of access to and through the Site as disclosed in the Certificate of Title 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 (but to the extent that the foregoing relate to matters of title only on the basis of the Certificate of Title); 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 (but subject to any right or claim Project Co may have against the Board pursuant to Clauses 41.3(m) (*Delay Events*) or 41.10 (*Compensation*) in relation to Contamination arising out of or in connection with the Enabling Works and, in the case of Clauses 15.1(c) (*The Site*) and 15.1(d) (*The Site*), subject to reliance on the Certificate of Title to the extent therein specified), 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 and otherwise dealing with any Contamination (other than Board 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 any Consents, orders, notices or directions of any regulatory body (whether made against the Board or Project Co).

15.3 Not Used.

15.4 Not Used.

16. **CONSENTS AND PLANNING APPROVAL**

16.1 Subject to Clause 16.2 (*Consents and Planning Approval*), 16.3 (*Deed of Servitude*) and 16.4 (*Agricultural Lease*) Project Co shall be responsible for:

- (a) obtaining all Consents which may be required for the performance of the Project Operations and any Permitted Project Co Operations; and
- (b) implementing each Consent within the period of its validity in accordance with its terms.

16.2 Each party shall, at its own cost, comply with its responsibilities for complying with or discharging the conditions attached to the Planning Approval, as determined by reference to the table set out in Part 35 of the Schedule (*Planning Condition Responsibilities*).

Deed of Servitude

16.3

16.3.1 No later than two (2) Business Days following Financial Close, Project Co shall deliver to the Board a draft form of the Deed of Servitude together with the design, specification and drawings identifying the extent of the works to be carried out in connection with the Carron Drainage Scheme and a form of covering letter addressed to the Landowner (including information as to the timing and likely duration of the works to be carried out in connection with the Carron Drainage Scheme).

16.3.2 Project Co and the Board shall co-operate in good faith in all respects in order to agree reasonable terms of the Deed of Servitude and the covering letter to be addressed to the Landowner on Board headed notepaper by no later than five (5) Business Days after the receipt of the draft Deed of Servitude and the design, specification and drawings and covering letter referred to in Clause 16.3.1 (*Deed of Servitude*). If the terms of the Deed of Servitude and covering letter cannot be agreed between the parties within such five (5) Business Day period the matter shall be referred to the Dispute Resolution Procedure.

16.3.3 The Board shall forward the Deed of Servitude together with the design, specification and drawings and covering letter agreed, or determined in accordance with Part 26 of the Schedule (*Dispute Resolution Procedure*) to the Landowner as soon as reasonably

practicable following the terms of such Deed of Servitude and covering letter being agreed or determined in accordance with Clause 16.3.2 (*Deed of Servitude*).

16.3.4 Following the Initial Approach the following provisions shall apply:

16.3.4.1 Where a written response is received by the Board from or on behalf of the Landowner a copy of the response will be provided to Project Co within two (2) Business Days after the receipt of the response by the Board;

16.3.4.2 Where a verbal response is received from the Landowner a record of the conversation(s) between the Board and the Landowner shall be provided to Project Co within two (2) Business Days after the conversation(s);

16.3.4.3 Where no response is received from the Landowner within five (5) Business Days from the date of the Initial Approach the Board shall make regular attempts to make contact with the Landowner in order to elicit a response to the Initial Approach. Where the Board successfully makes contact with the Landowner the Board shall within two (2) Business Days: (1) of any conversation between the Board and the Landowner provide to Project Co a record of such conversation; or (2) of receipt of any correspondence from or on behalf of the Landowner provide to Project Co a copy of any such correspondence;

16.3.4.4 The Board shall provide to Project Co along with a copy of any written response from the Landowner (in terms of Clauses 16.3.4.1 (*Deed of Servitude*) or 16.3.4.3 (*Deed of Servitude*)) or of a record of conversation(s) between the Board and the Landowner (in terms of Clauses 16.3.4.2 (*Deed of Servitude*) or 16.3.4.3 (*Deed of Servitude*)) a draft or note of any proposal the Board intends to put to the Landowner which deviates from the Initial Approach.

16.3.4.5 Subject to Clause 16.3.4.6 (*Deed of Servitude*) Project Co shall within two (2) Business Days of the receipt by Project Co of a copy of any written response from the Landowner (in terms of Clauses 16.3.4.1 (*Deed of Servitude*) or 16.3.4.3 (*Deed of Servitude*)) or of a record of conversation(s) between the Board and the Landowner (in terms of Clauses 16.3.4.2 (*Deed of Servitude*) or 16.3.4.3 (*Deed of Servitude*)) together with a draft or

note of any proposal that the Board intends to put to the Landowner (in terms of Clause 16.3.4.4 (*Deed of Servitude*)) respond to the Board confirming whether Project Co accepts or rejects the Board's proposal. If Project Co rejects the Board's proposal Project Co and the Board shall seek to agree an alternative proposal that is acceptable to both Project Co and the Board, both Project Co and the Board being bound to act reasonably, and the Board shall as soon as reasonably practicable communicate the alternative approach to the Landowner.

16.3.4.6 Notwithstanding the terms of Clauses 16.3.4.1 (*Deed of Servitude*) to 16.3.4.5 (*Deed of Servitude*) following a response from the Landowner rejecting the Initial Approach the Board shall have the authority to offer the Landowner a cash settlement up to a maximum of £20,000 in order to procure the grant by the Landowner of the Deed of Servitude without the necessity of the Board obtaining the agreement of Project Co in terms of Clause 16.3.4.5 (*Deed of Servitude*).

16.3.4.7 The provisions of Clauses 16.3.4.1 (*Deed of Servitude*) to 16.3.4.5 (*Deed of Servitude*) shall apply on every occasion where the Board receives a written or verbal response to a proposal agreed between the Board and Project Co pursuant to Clause 16.3.4.5 (*Deed of Servitude*) which is on terms different to the agreed proposal (or where a response is received from the Landowner pursuant to a proposal made by the Board in terms of Clause 16.3.4.6 (*Deed of Servitude*) where that response is not an acceptance of the Board's proposal).

16.3.5 The Board shall within two (2) Business Days of receipt of a validly executed Deed of Servitude from the Landowner arrange for the execution of the Deed of Servitude by the Scottish Ministers and provide a certified true copy of the Deed of Servitude to Project Co and shall arrange for the Deed of Servitude to be submitted for recording/registration in the Register of Sasines/Land Register of Scotland against (1) the title of the Scottish Ministers to the land owned by the Scottish Ministers of which the Works Site forms part and (2) the title of the Landowner and as soon as reasonably practicable thereafter shall provide Project Co evidence of its recording/registration.

- 16.3.6 The Board shall issue a Board Works Variation Enquiry in order to implement the Alternative Drainage Scheme within two (2) Business Days of receipt of a written notice from Project Co requesting the Board to do so, accompanied by a draft of the Board Works Variation Enquiry required. In no circumstances shall the Board be entitled to withdraw the Board Works Variation Enquiry after it has been issued.
- 16.3.7 Notwithstanding the terms of Part 22 of the Schedule (*Variation Procedure*):
- 16.3.7.1 the Board shall be bound to accept the Alternative Drainage Scheme in terms of the designs and specifications prepared by Project Co;
- 16.3.7.2 there shall be no alteration to the Completion Date, Phase Completion Dates, Finishing Works Completion Date or Commissioning End Dates; and
- 16.3.7.3 Project Co shall bear all costs associated with the acquisition of the Deed of Servitude (including the payment of any amount offered to and accepted by the Landowner as referred to in Clause 16.3.4.6 (*Deed of Servitude*)) and/or any Board Works Variation implementing the Alternative Drainage Scheme, other than professional and advisors' costs incurred by the Board (which shall be borne by the Board). For the avoidance of doubt, no amount shall be payable by the Board to Project Co pursuant to this Clause 16.3 (*Deed of Servitude*).

Agricultural Lease

16.4

- 16.4.1 The Board shall, by no later than one Business Day following Financial Close, procure the continuing consent of any party having rights under an agricultural tenancy of any part(s) of the Works Site to the carrying out of the Project Operations on the Works Site, until such time as a certified copy of a valid renunciation of such agricultural tenancy is delivered to Project Co.
- 16.4.2 In the event that the Board conveys, leases or otherwise transfers or grants to a third party any right over any land over which the Ancillary Rights are granted, it shall procure that there is reserved to the Board adequate rights so as to enable the Board to continue to comply with its obligations under Clause 14 (*Nature of Land Interests*).

16A CHALLENGE TO CONSENTS

In the event that there is a Planning Challenge, the following provisions of this Clause 16A (*Challenge to Consents*) shall apply:

16A.1 Project Co shall continue to discharge its obligations pursuant to this Agreement unless:

16A.1.1 Project Co is prevented by Law or any interim order of a Relevant Authority from progressing the Works as a consequence of the Planning Challenge (which shall include an Adverse Planning Decision); or

16A.1.2 Project Co receives a written instruction to cease the carrying out of the Works pursuant to Clause 16A.3 (*Challenge to Consents*).

Where Project Co is prevented from discharging its obligations pursuant to this Agreement as a consequence of the events listed in Clauses 16A.1.1 (*Challenge to Consents*) or 16A.1.2 (*Challenge to Consents*), such event shall be treated as a Delay Event and a Compensation Event.

16A.2 The Board will consult with Project Co upon becoming aware of a Planning Challenge. Such consultation will include discussion as to the likelihood of the Planning Challenge being defeated, whether either party or both parties should take any action to seek to resist the Planning Challenge, and/or whether an application for a new Planning Permission should be submitted as referred to in Clause 16A.5 (*Challenge to Consents*). As part of such consultation, the Board shall be entitled to issue a written request to Project Co seeking the provision of an estimate of:

16A.2.1 the costs and liabilities and other consequences that Project Co expects will be incurred if the Works are suspended and then recommenced following the determination of the Planning Challenge; and/or

16A.2.2 the costs that Project Co expects will be incurred in respect of an application for a new Planning Permission.

Project Co shall provide a written response to such request within 10 Business Days of its submission and the Board shall reimburse Project Co's proper and reasonable costs, demonstrably incurred, of compliance with this Clause 16A.2 (*Challenge to Consents*) within 28 days of receipt of a valid invoice therefor.

16A.3 Without prejudice to Clause 41.10 (*Compensation*), the Board shall be entitled at any time following a Planning Challenge to instruct Project Co to cease the carrying out of any Works that relate to the relevant Planning Approval by notice

in writing to Project Co. Such instruction shall cease to have effect upon Planning Challenge Dismissal being notified to Project Co by the Board.

- 16A.4 In the event of an Adverse Planning Decision, the parties shall as soon as reasonably practicable meet and in good faith seek to agree the arrangements that will apply to the Project as a result (which arrangements may include the submission of a new planning application by Project Co at the Board's expense as referred to in Clause 16A.5 (*Challenge to Consents*)), provided that if the parties are unable to agree (each acting reasonably) the actions to be taken within 30 Business Days of the date of determination of the Planning Challenge, the Board shall be deemed to have served a notice under Clause 46.2 (*Voluntary termination*) requiring the termination of this Agreement.
- 16A.5 The Board shall be entitled at any time following a Planning Challenge to instruct Project Co to seek a new Planning Permission for the Works. Such request shall constitute a Board Works Variation Enquiry.
- 16A.6 If, following a Planning Challenge, a new Planning Permission is obtained relating to the Works, then:
- 16A.6.1 if an Adverse Planning Decision has already occurred, the Board shall be deemed to have issued a Board Works Variation Enquiry covering the variation of this Agreement, the Board's Construction Requirements and the Service Level Specifications if and to the extent necessary to allow completion of the Works in accordance with the requirements of the new Planning Permission, and the Board shall not be entitled to withdraw such deemed Board Works Variation Enquiry; and
- 16A.6.2 if an Adverse Planning Decision has not already occurred, may elect whether or not to issue a Board Works Variation Enquiry covering the variation of this Agreement, the Board's Construction Requirements and the Service Level Specifications if and to the extent necessary to allow completion of the Works in accordance with the requirements of the new Planning Permission, provided that if an Adverse Planning Decision subsequently occurs and the Board has not previously issued a Board Works Variation Enquiry covering the variation of this Agreement, the Board's Construction Requirements and the Service Level Specifications if and to the extent necessary to allow completion of the Works in accordance with the requirements of the new Planning Permission, then the Board shall be deemed to have issued such a Board Works Variation Enquiry on the date of the Adverse Planning Decision and the Board shall not be entitled to withdraw such deemed Board Works Variation Enquiry.

16A.7 If, within a period of twelve months commencing on the date of the parties' agreement pursuant to Clause 16A.4 (*Challenge to Consents*) a new Planning Permission has not been issued in relation to the Site or the Works Site then, subject to Clause 16A.8 (*Challenge to Consents*), the Board shall be deemed to have served a notice under Clause 46.2 (*Voluntary termination*).

16A.8 The parties may agree in writing (each acting reasonably and in good faith, having regard to whether there is a realistic prospect of an alternative planning application succeeding) prior to the expiry of the twelve month period referred to in Clause 16A.7 (*Challenge to Consents*) that the twelve month period should be extended.

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) (*Overall Responsibility*), 17.1(b) (*Overall Responsibility*) and 17.1(c) (*Overall Responsibility*) are independent obligations. In particular:

- (a) 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
- (b) 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 (*Thermal and energy efficiency*), an "average year figure" means the latest 20 year annual average Degree Day (as defined in Part 18 of the Schedule (*Payment Mechanism*)) figure available at the date which is two (2) years following the Commissioning End Date for Phase 3, calculated to a base of 18.5 degrees Celsius, as published by DH Estates and Facilities for the West of Scotland area (Area 13). During the period of two (2) years following the Commissioning End Date for Phase 3, the parties shall monitor the actual Energy Consumption at the Hospital Facilities in accordance with the procedure set out in Section 7 of Part 8 of the Schedule (*Construction Matters*), with a view to establishing the Annual Energy Target for the Hospital Facilities for the first Energy Year pursuant to Part 18 of the Schedule (*Payment Mechanism*) and ascertaining whether and to what extent the thermal and energy efficiency of the Hospital Facilities is in excess of 52.372 Giga Joules/100 m³ per year. If the average 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 where the 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 Commissioning End Date for Phase 3.

If as a result of such monitoring there is any indication that the thermal and energy efficiency of the Hospital Facilities causes energy use exceeding 52.372 Giga Joules/100m³ per year, the parties shall investigate the matter to determine the cause of such failure either in the manner agreed between them or in such manner as may be determined in accordance with Part 26 of the Schedule (*Dispute Resolution Procedure*).

17.3A Project Co shall, at its own cost install equipment to record and monitor energy consumption in the Hospital Facilities. Such equipment must be suitable to enable a detailed monitoring of the energy trends and consumption to allow analysis of the data collected to enable various matters, including:

- (a) comparisons to be made with the declared energy targets; and
- (b) early warning of deviations from norms and malfunctions.

17.3B All information gathered in accordance with Clause 17.3A (*Thermal and energy efficiency*) shall be secured so that it is not lost or degraded as a result of any equipment or service malfunctions. In addition, such information shall be secured from any adjustment, modification or loss from any other source.

- 17.4 If following any investigation pursuant to Clause 17.3 (*Thermal and energy efficiency*), it is agreed by the parties or determined in accordance with Part 26 of the Schedule (*Dispute Resolution Procedure*) that such failure arises as a consequence of the design and construction of the Facilities by Project Co failing to achieve a thermal and energy efficiency of equal to or less than the Construction Energy Target, Project Co shall compensate the Board for any costs, losses or expenses incurred by the Board as a result of such failure, during the period of monitoring referred to in Clause 17.3 (*Thermal and energy efficiency*) above, and, 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 face any additional liability upon early termination of this Agreement and the provisions of Part 23 of the Schedule (*Compensation on Termination*) shall be amended as necessary to achieve this; and
 - (b) such compensation shall be a sum equal to the cost of procuring the excess Energy predicted to be consumed at the Facilities (including the cost of any additional Greenhouse Gas Emissions Permits (required pursuant to Part 18 of the Schedule (*Payment Mechanism*)) the capital costs of which are capped at the sterling equivalent of 20 euros (index linked) per tonne per permit) as a result of the relevant defect until the end of the Project Term, taking into consideration the likely future cost of Energy sources and Greenhouse Gas Emissions Permits, as determined by an appropriately qualified representative of CIBSE, provided that the cost of such opinion shall be borne by Project Co. 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 (*NHS Construction Projects – Corporate Identity and Signage*), 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 other Relevant Authority in relation to such matters whether by Health Service Circular or otherwise.
- (d) Notwithstanding Clauses 17.5(b) (*NHS Construction Projects – Corporate Identity and Signage*) and 17.5(c) (*NHS Construction Projects – Corporate Identity and Signage*), 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 the contents of Project Co's Proposals as have been signed or 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 paragraphs 4.1 to 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 (*Overall Responsibility*), 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 Works 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, the Joint Operating Protocol 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 Works Site on reasonable prior notice appropriate to the circumstances, provided that the notice procedures in this Clause 18.1(a)(i) (*Access to Site*) 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 Works 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 Works 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 (*Right to Open Up*), the Board's Representative shall have the right at any time prior to the relevant Phase Actual Completion Date to request Project Co to open up and inspect any part or parts of a Phase of the Works where the Board's Representative reasonably believes that such part or parts of that Phase 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 (*Right to Open Up*) 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 (*Right to Open Up*), 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 (*Right to Open Up*), 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 (*Right to Open Up*), 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 (*Right of Access of Board's Representative*) 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 (*Right of Access of Board's Representative*).

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 (excluding the Finishing 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, or between a Phase Completion Date and the relevant Phase Actual Completion Date or between the Finishing Works Completion Date and the Finishing Works 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 Section A of Part 9 of the Schedule (*The Programme*) and has been prepared on the assumption of Financial Close occurring by 2 May 2007. On Financial Close, a revised Programme will be substituted reflecting the date of Financial Close. Any further 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 a Phase Actual Completion Date will be earlier than the relevant Phase 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 will, on or prior to the Effective Date, in compliance with all Law relating to procurement which is applicable to either party, appoint 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 (*Replacement*), 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**

The parties shall procure, supply, install, maintain and renew the Equipment to the extent required under Part 13 of the Schedule (*Equipment*).

22. **PRE-COMPLETION COMMISSIONING AND COMPLETION**

Final Commissioning Programme

22.1 Not Used.

22.1A A Final Commissioning Programme shall be prepared for each Phase. The Final Commissioning Programme relating to the relevant Phase shall be prepared in accordance with the requirements of the Completion Process. Before the date specified by the Completion Process for each Phase Project Co shall provide the Board with a draft of the Final Commissioning Programme relating to the relevant Phase as jointly developed by the Board and Project Co in accordance with the provisions of Clauses 22.2 (*Final Commissioning Programme*) and 22.3 (*Final Commissioning Programme*). The Board shall provide Project Co with

comments on the draft Final Commissioning Programme for each relevant Phase submitted to it within the period stated in the Completion Process. The parties shall, within twenty (20) Business Days of receipt by Project Co of the Board's comments agree the terms of the Final Commissioning Programme for the relevant Phase provided that the Board may by prior notice to Project Co change the scope and time of the Board's Commissioning and such changes shall be treated as a Qualifying Variation. If the parties are unable to agree the Final Commissioning Programme for each relevant Phase or the change in scope or time of the Board's Commissioning by the date specified in the Completion Process for the relevant Phase the matter shall be referred for determination in accordance with Part 26 of the Schedule (*Dispute Resolution Procedure*).

- 22.2 The Final Commissioning Programme for each Phase shall be in accordance with the Outline Commissioning Programme and shall impose no greater or more onerous obligations on the Board or Project Co than those set out in the Outline Commissioning Programme (unless otherwise agreed by the parties in their absolute discretion). The Final Commissioning Programme shall then replace the Outline Commissioning Programme as it relates to that Phase.
- 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 insofar as relevant for each Phase of the Works:
- (a) that Project Co's Pre-Completion Commissioning and the Board's Commissioning will not delay the Phase Actual Completion Date from occurring by the Phase Completion Date; and
 - (b) that Project Co's Post Completion Commissioning and the Board's Post Completion Commissioning is completed by the Commissioning End 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 as Project Co's Pre-Completion Commissioning and Project Co's Post Completion Commissioning in Table A of Appendix A to Part 12 of the Schedule (*Outline Commissioning Programme*) and, in the case of the Board's activities, the activities described as Board Commissioning and Board's Post Completion Commissioning in Table A of Appendix A to 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 any Phase of the Works will be complete in accordance with the 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.

Pre-Completion Commissioning

22.7 Not Used.

22.7A Project Co shall, insofar as relevant for each Phase:

(a) undertake Project Co's Pre-Completion Commissioning in accordance with the relevant Final Commissioning Programme; and

(b) permit the Board to undertake the Board's Commissioning including permitting specialist contractors engaged by the Board to deliver and install equipment on dates agreed between the Board and Project Co, within the period defined in the Completion Process and in accordance with the relevant 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 in respect of each Phase 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 relevant Final Commissioning Programme to enable the Board to undertake the Board's Commissioning within the period defined in the Completion Process and in accordance with the relevant Final Commissioning Programme for the period prior to completion of the relevant Phase.

Pre-Completion inspection

22.10 Project Co shall give the Independent Tester and the Board's Representative not less than the appropriate notice period for that Phase as set out in the Completion Process of the date upon which Project Co considers that the relevant Phase of the Works will be complete and the Completion Tests required for the relevant Phase 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 (*Pre-Completion inspection*) the Board's

Representative and the Independent Tester shall be entitled to inspect the relevant Phase of the Works on the date or dates reasonably specified by Project Co in accordance with this Clause 22.10 (*Pre-Completion inspection*), and to attend any of the Completion Tests and/or undertake inspections of any Phase in accordance with the periods specified in the Completion Process. 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 (*Pre-Completion inspection*), notifies Project Co and the Board of any outstanding matters (including, without limitation, the repetition of any of the Completion Tests which are required to be carried out and passed in accordance with the relevant Final Commissioning Programme) which are required to be attended to before the relevant Phase of the Works can be considered to be complete in accordance with the Completion Criteria. Project Co shall attend to such matters and shall, if necessary, give the Independent Tester further notices in accordance with Clause 22.10 (*Pre-Completion Commissioning*) (but dealing only with matters raised in the notification under this Clause 22.11 (*Pre-Completion matters*)) so that the procedures in Clause 22.10 (*Pre-Completion inspection*) and this Clause 22.11 (*Pre-Completion matters*) are repeated as often as may be necessary to ensure that all outstanding matters in relation to the relevant Phase of the Works are attended to.

Phase 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 of a Phase has occurred in accordance with the Completion Criteria, issue a Certificate of Practical Completion in respect of that Phase to that effect stating the date upon which, in his opinion, the Phase Actual Completion Date occurred. Subject to Clause 22.15A (*Phase Completion certificate*) and 22.16 (*Phase Completion certificate*), the issue of the Certificate of Practical Completion in respect of a Phase shall, in the absence of manifest error, bad faith or fraud, be conclusive evidence for the purpose only of ascertaining that Payment Commencement Date 1, Payment Commencement Date 2, Payment Commencement Date 3, the Phase Actual Completion Date or 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 in relation to a Phase notwithstanding that there are Snagging Matters. Where there are Snagging Matters, the parties shall procure that the Independent Tester shall, within two (2) Business Days of the date of issue of the relevant

Certificate of Practical Completion, 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 Post Completion Commissioning and the Board's use of the Facilities, rectify all Snagging Matters within thirty (30) Business Days of the issue of the Snagging Notice.
- 22.15 Not Used.
- 22.15A If, within thirty (30) Business Days of the date of issue of the Snagging Notice Project Co has failed to rectify all of those Snagging Matters specified in the Snagging Notice, the Board may by 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 in respect of a Phase shall in no way affect the obligations of Project Co under this Agreement including in respect of any Defects.

As-built specification

- 22.17 After the issue of the Certificate of Practical Completion in relation to a Phase to the extent relating to that Phase, 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 operation and maintenance manuals and results of technical commissioning, in accordance with paragraph 5.22 (*Record Information*) of Sub-Section C of the Board's Construction Requirements.

23. POST COMPLETION COMMISSIONING

Commissioning

- 23.1 Project Co and the Board shall, in accordance with the relevant Final Commissioning Programme, undertake and complete Project Co's Post-Completion Commissioning and the Board's Post Completion Commissioning, in accordance with the Final Commissioning Programme for the relevant Phase. Each party shall, at all times, and in particular in the period between the Phase Actual Completion Date and the Commissioning End Date for such Phase, use reasonable endeavours to assist the other party to ensure compliance with the Final Commissioning Programme.

Information

- 23.2 Project Co shall ensure that the Board's Representative is provided with all the information he may reasonably require in relation to Project Co's Post-Completion Commissioning and the Board shall ensure that Project Co is provided with all information Project Co may reasonably require in relation to the Board's Post Completion Commissioning.
- 23.3 If the Board's Representative, acting reasonably, makes any comment in relation to the carrying out of Project Co's Post-Completion Commissioning, such comments shall be taken into account by Project Co and if Project Co, acting reasonably, makes any comment in relation to the carrying out of the Board's Post Completion Commissioning, such comment shall be taken into account by the Board.
- 23.4 Not Used.

Operational Manuals

- 23.5 By the date:
- (a) three (3) months prior to each Phase Actual Completion Date, Project Co shall make available on the Site to the Board's Representative interim versions of all relevant operation and maintenance manuals in connection with the relevant Phase;
 - (b) referred to in paragraph 5.22 (*Record Information*) of Sub-Section C of the Board's Construction Requirements, Project Co shall following the Actual Completion Date make available on the Site to the Board's Representative the health and safety file required under the CDM Regulations.

Decanting and Equipment Installation

- 23.6 The Board and Project Co shall, as appropriate, undertake any necessary Decanting activities in accordance with the relevant requirements of the Final Commissioning Programme and Appendix A to Part 12 of the Schedule (*Outline Commissioning Programme*), and any Equipment installation in accordance with Part 13 of the Schedule (*Equipment*) such that Project Co is able to perform its obligations in subsequent Phases.

Finishing Works

- 23.7 Following the final Phase Actual Completion Date, Project Co shall carry out and complete the Finishing Works by the Finishing Works Completion Date.

- 23.8 Pursuant to the terms of the Independent Tester Contract, the parties shall procure that the Independent Tester shall, when he is satisfied that completion of the Finishing Works has occurred in accordance with the Completion Criteria, issue the Finishing Works Completion Certificate, stating the date upon which, in his opinion, the Finishing Works Actual Completion Date occurred.
- 23.9 Without prejudice to Part 18 of the Schedule (*Payment Mechanism*), if Project Co fails to complete the Finishing Works by the Finishing Works Completion Date, the Board shall be entitled to notify Project Co that the Board will procure the completion of the Finishing Works. Following such notification, the Board shall be entitled to procure the completion of the Finishing Works, and Project Co shall reimburse the Board's reasonable and proper costs, demonstrably incurred in connection with such Finishing Works, within 28 days of a valid invoice therefor.

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 Works Site are or shall become, upon discovery, the absolute property of the Board.

Discovery

- 24.2 Without prejudice to Clauses 41.3(k) (*Delay Events*) and 41.11(a) (*Compensation*), 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 Without prejudice to Clauses 41.3(k) (*Delay Events*) and 41.11(a) (*Compensation*), Project Co shall promptly and diligently comply with any

instruction issued by the Board's Representative referred to in Clause 24.3 (*Action*) above (except and to the extent that such instruction constitutes a Board Works Variation pursuant to Clause 24.6 (*Action*) below in respect of which case the provisions of Part 22 of the Schedule (*Variation Procedure*) shall apply).

- 24.5 If directed by the Board's Representative, Project Co shall allow representatives of the Board to enter the Works 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 (*Action*) above includes a requirement for Project Co to carry out works (being any work of alteration, addition, demolition or extension or variation in the Works) 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 (*Quality Assurance*).
- 25.2 The quality management systems referred to in Clause 25.1 (*Quality Plans and Systems*) above shall be reflected in appropriate quality plans, the standard of which shall be consistent with BS EN ISO 9001 or 9002 (as the case may be) 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 (*Quality Plans and Systems*), 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 (*Quality Plans and Systems*) 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 (*Quality Plans and Systems*) (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 (*Quality Plans and Systems*) 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 (*Quality Plans and Systems*). 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 (*Quality Plans and Systems*);
- (b) the Quality Plans referred to in Clause 25.3 (*Quality Plans and Systems*);
- (c) the 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 (*Quality Plans and Systems*), 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 (*Quality Plans and Systems*) and 25.3 (*Quality Plans and Systems*) 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 cooperate and shall procure that any Sub Contractor cooperates 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

The provisions of the ICT Schedule shall apply in relation to the design, construction, provision, installation, refreshment, maintenance, support and upgrading of IT.

PART G: SERVICES

27. THE SERVICES

General obligations

27.1 Subject to Clause 27.2 (*The Services*), 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) (*The Services*), in such manner as ensures that the Service Level Specifications are met.

27.1A Not Used.

Commencement and phase in of Services

27.2 Project Co shall procure that provision of the Services in respect of each Phase commences from the relevant Phase 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 (*Project Co Services Changes*) 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 the relevant Phase Actual 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 relevant Phase Actual Completion Date to the expiry of that Contract Year, and where the Phase Actual Completion Date falls in the final three (3) months of a Contract Year, then the Schedule of Programmed Maintenance shall cover the period from the Phase Actual Completion Date to the expiry of the next following Contract Year.

- 28.2 Not later than three (3) months prior to the commencement of each Contract Year following the relevant Phase Actual 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 Services relating to all Phases completed to date for the forthcoming 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 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 (*Programmed Maintenance Works*);

- (b) in accordance with the procedures set out in Clause 28.8 (*Programmed and Unprogrammed Maintenance*); or
- (c) in an emergency, in accordance with Clause 28.9 (*Programmed and Unprogrammed Maintenance*).

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 Programmed 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 (*Programmed and Unprogrammed Maintenance*) 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 (*Payment Mechanism*)), 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 Part 10 of the Schedule (*Review Procedure*). Nothing in this Clause 28.8 (*Programmed and Unprogrammed Maintenance*) (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 Monthly 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 (*Programmed and Unprogrammed Maintenance*) shall prevent the Board from making any deductions from the Monthly 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 (*Programmed and Unprogrammed Maintenance*), 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 Phase 1 Completion Date, and not less than twenty (20) Business Days prior to the commencement of each Contract Year thereafter, the latest version of the 5 Year Maintenance Plan for the Estates Service and Grounds & Gardens Maintenance Service (each as defined in the Service Level Specifications).
- 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 (in each case to the extent applicable as at the date of inspection) 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*) and Part 18 of the Schedule (*Payment Mechanism*), 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 in the table below

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".

Service	Number of Service Failure Points
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Service	Number of Service Failure Points
Ward Housekeeping	279
Waste	61
Catering	226
Linen	61
Portering	175
Domestic	197
Reception	19
Switchboard	19
General	31
Estates	454
Grounds and Gardens Maintenance	26
Utilities Services	19
Helpdesk	19
Pest Control	21
Car Park Management	85
Security	80

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 two or more Warning Notices in any rolling three month period in respect of any 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 (*Board's remedial rights*) to 29.12 (*Board's remedial rights*) (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 in the table below:

Service	Number of Service Failure Points
Ward Housekeeping	805
Waste	134
Catering	654
Linen	216
Portering	501
Domestic	589
Reception	41
Switchboard	55
General	49
Estates	929
Grounds and Gardens Maintenance	73
Utilities	41
Helpdesk	57
Pest Control	41
Car Park Management	156
Security	195

or

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

29.7 In any of the circumstances set out in Clause 29.6 (*Board's remedial rights*), 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) (*Board's remedial rights*) (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) (*Board's remedial rights*); or
- (b) Project Co fails to take the steps notified to it by the Board pursuant to Clause 29.7(a) (*Board's remedial rights*) within such time as the Board, acting reasonably, shall think fit,

then (without prejudice to Clause 29.7(b) (*Board's remedial rights*)) 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 (*Board's remedial rights*) subsist or, in the circumstances set out in Clause 29.6(b) (*Board's remedial rights*), 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) (*Board's remedial rights*):

- (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 (*Monitoring of Performance*), 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 (*Board's remedial rights*) and 29.11 (*Board's remedial rights*):

- (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) (*Board's remedial rights*) 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 Clause 29.7 (*Board's remedial rights*) and Clause 29.8 (*Board's remedial rights*); 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

Employee Transfer

30.1 The Board and Project Co agree that the Transfer Regulations shall apply to the transfer on one or more dates agreed by the Parties (each a "Relevant Service

Transfer Date") to Project Co of responsibility for provision of (or procuring the provision by Service Providers of) the Services in accordance with this Agreement and that an Employee Transfer shall take place on each Relevant Service Transfer Date (or such date as may be determined by Law). The Relevant Service Transfer Date in respect of each Service is specified in Section 4 of Part 30 of the Schedule (Employee Information and Proposed Workforce Information).

- 30.2 As a consequence of Clause 30.1 (*Employee Transfer*) and in accordance with the Transfer Regulations, the contracts of employment of all Transferring Employees shall (subject to Regulation 4(7) of the Transfer Regulations) have effect after the Relevant Service Transfer Date (or such other date as may be determined by Law) as if originally made between those employees and the relevant Service Provider except insofar as such contracts relate to an occupational pension scheme.
- 30.3 The Board and Project Co agree and intend and shall take all reasonable steps to procure that there shall be an Employee Transfer on each occasion on which the identity of a Service Provider changes pursuant to this Agreement and that the contracts of employment of all those employees of the relevant Service Provider wholly or mainly engaged in the provision of the relevant Service or Services immediately before the change of identity of the Service Provider shall have effect (subject to Regulation 4(7) of the Transfer Regulations) thereafter as if originally made between those employees and the relevant Service Provider except insofar as such contracts relate to an occupational pension scheme. Project Co shall procure that both the former and the relevant Service Provider shall comply with their obligations under the Transfer Regulations. The provisions of this Clause 30.3 (*Employee Transfer*) do not apply to the Market Testing Procedure which shall be governed by the provisions of Part 17 of the Schedule (*Benchmarking and Market Testing Procedure*).
- 30.4 Subject to the provisions of Part 38 of the Schedule (*Transitional Arrangements*) and any appropriate adjustment to Annual Service Payment provided for in Clause 30.12 (*Provision of Information and Employment Costs*), if Project Co or the relevant Service Provider dismisses by reason of redundancy a Transferring Employee who had he or she been so dismissed before the Relevant Service Transfer Date would have been entitled to a payment pursuant to section 45 of the General Whitley Agreement or (as the case may be) Section 16 of the Agenda for Change: NHS Terms and Conditions of Service Handbook then Project Co shall provide, or shall procure that the relevant Service Provider shall provide, such employee with a payment or other benefit calculated in the same manner as would have been applied on dismissal by reason of redundancy immediately before the Relevant Service Transfer Date. For these purposes a dismissal by reason of redundancy is one so defined in section 139 Employment Rights Act 1996. If the provisions of this Clause 30.4 (*Employee Transfer*) and

the provisions of Clause 31.8 (*Pension Matters*) apply (or would apply but for this provision) to the same circumstances, then the provisions of Clause 31.8 (*Pension Matters*) shall apply instead of this Clause 30.4 (*Employee Transfer*).

- 30.5 The Board shall comply with its obligations under the Transfer Regulations in respect of each Employee Transfer pursuant to this Agreement and Project Co shall comply, and shall procure that the relevant Service Provider shall comply, with its obligations under the Transfer Regulations (including without limitation the obligation under Regulation 13(4) of the Transfer Regulations) in respect of each Employee Transfer pursuant to this Agreement and each of the Board and Project Co shall indemnify the other against any Direct Losses sustained as a result of any breach of this Clause 30.5 (*Employee Transfer*) by the party in default.

Offer of Employment

- 30.6 If the Transfer Regulations do not apply to any person who is a Transferring Employee, Project Co shall offer to, or shall procure the offer by the relevant Service Provider to each and every such employee, a new contract of employment commencing on the Relevant Service Transfer Date under which their terms and conditions including full continuity of employment shall not differ from those enjoyed by them immediately prior to the Relevant Service Transfer Date (except insofar as such terms and conditions relate to an occupational pension scheme or are varied by agreement for an ETO Reason in accordance with Part 38 of the Schedule (*Transitional Arrangements*)). This offer of employment shall be in writing, shall be open to acceptance for a period of not less than ten (10) Business Days and shall be made:

- (a) if it is believed that the Transfer Regulations will not apply to a person, not less than ten (10) Business Days before the Relevant Service Transfer Date, or
- (b) if it is believed that the Transfer Regulations apply to a person but it is subsequently decided that the Transfer Regulations do not so apply, as soon as is practicable and in any event no later than ten (10) Business Days after that decision is known to Project Co.

- 30.7 Where any such offer as referred to in Clause 30.6 (*Offer of Employment*) is accepted, the Board shall indemnify and keep indemnified in full Project Co on the same terms and conditions as those set out in Clauses 30.20 (*Board Indemnities*), 30.21 (*Board Indemnities*), 30.22 (*Board Indemnities*) and 30.27 (*Board Indemnities*) of this Agreement as if there had been an Employee Transfer in respect of each and every Transferring Employee who has accepted any such offer and the provisions of Clause 30.12 (*Offer of Employment*) shall

apply in the event of any increase or decrease in the costs of delivery of the Services and Reorganisation Costs.

- 30.8 Where any such offer as referred to in Clause 30.6 (*Offer of Employment*) is accepted, Project Co shall act and shall procure that each relevant Service Provider shall act in all respects as if the Transfer Regulations had applied to each and every Transferring Employee who has accepted any such offer and shall comply with Clause 31 (*Pension Matters*) of this Agreement in respect of each and every such employee who was immediately before the Relevant Service Transfer Date a Pensionable Board Employee.

Provision of Information and Employment Costs

- 30.9 The Board has supplied to Project Co the information, as at October 2005 which is contained in Section 1 of Part 30 of the Schedule (*Employee Information and Proposed Workforce Information*) (the "First Employee List") regarding the identity, number, age, sex, length of service, job title, grade, and terms and conditions of employment of and other matters affecting each of those employees of the Board and of any sub-contractor of the Board who it is expected, if they remain in the employment of the Board or of the sub-contractor of the Board as the case may be until immediately before the Relevant Service Transfer Date, would be Transferring Employees but the Board gives no warranty as to the accuracy or completeness of this information.
- 30.10 The Board shall supply to Project Co an update of the First Employee List at three-monthly intervals from the date of this Agreement and an updated list shall also be provided ten (10) Business Days before each Relevant Service Transfer Date. The Board shall also supply to Project Co within five (5) Business Days after each Relevant Service Transfer Date information, which was correct as at that Relevant Service Transfer Date, in respect of the Transferring Employees on all the same matters as should be provided in the First Employee List. This list is the "Final Employee List" and where there is more than one Relevant Service Transfer Date the "Final Employee List" means each list so prepared in respect of each Service and at each Relevant Service Transfer Date. The Board gives and shall give no warranty as to the accuracy or completeness of any information contained in any update of the First Employee List or in the Final Employee List.
- 30.11 Project Co has provided to the Board, and the Board has agreed, the details set out in Section 2 of Part 30 of the Schedule (*Employee Information and Proposed Workforce Information*) which show, in respect of each of the Services, the following information:
- (a) the workforce which Project Co proposes to establish to provide the Services (the "Proposed Workforce") classified by reference to grade,

job description, hours worked, shift patterns, pay scales, rates of pay and terms and conditions;

- (b) the costs, including any lump sum payments, which Project Co has allowed for the purposes of any reorganisation which may be required to establish the Proposed Workforce or a workforce which is as close as reasonably practicable to the Proposed Workforce (including but not limited to costs associated with dismissal by reason of redundancy or capability and costs of recruitment. These costs (the "Reorganisation Costs") have been calculated by Project Co and the Service Providers on the basis of (amongst other things) the information contained in the First Employee List.

30.11A The parties will comply with the provisions of Part 38 of the Schedule (*Transitional Arrangements*).

30.12 If at any time (including, for the avoidance of doubt, after the submission of the Final Employee List) the costs of delivery of the Services require to be adjusted on account of:

- (a) any difference as at the Relevant Service Transfer Date in the cost of employing Transferring Employees who have been subject to the Matching Process set out in Part 38 of the Schedule (*Transitional Arrangements*) from the cost set out in the Proposed Workforce; or
- (b) any inaccuracies in or omissions from the information contained in the First Employee List or the Final Employee List;

then (subject to Clauses 30.13 (*Provision of Information and Employment Costs*), 30.14 (*Provision of Information and Employment Costs*) and 30.15 (*Provision of Information and Employment Costs*)) there shall be a corresponding adjustment to the Annual Service Payment to compensate Project Co and/or the relevant Service Providers to reflect such adjustment, made on an open book basis according to the principles and agreed baselines set out in Section 3 of Part 30 of the Schedule (*Employee Information and Proposed Workforce Information*).

30.13 If the circumstances described in Clause 30.12 (*Provision of Information and Employment Costs*) arise:

- (a) in circumstances where there are more Transferring Employees than personnel required to provide the Proposed Workforce then the parties shall discuss the implications for the provision of Services, and the implementation of the Board Policy relating to change;

- (b) Project Co and the relevant Service Provider shall take all reasonable steps to mitigate any additional costs and any adjustment to the Annual Service Payment shall be calculated as if they had done so.

30.14 In calculating any adjustment which shall be made to the Annual Service Payment pursuant to Clause 30.12 (*Provision of Information and Employment Costs*):

- (a) no account shall be taken of a decrease in the costs of delivery of the Services or Reorganisation Costs to the extent that it arises from a reduction in the number of Transferring Employees or their whole time equivalent such that there are, immediately after the Relevant Service Transfer Date, fewer suitably qualified persons available than are required in order to establish the Proposed Workforce;
- (b) to avoid double counting, no account shall be taken of any change to the costs of delivery of the Services or the Reorganisation Costs to the extent that Project Co has been or will be compensated as a result of any indexation of the Annual Service Payment under this Agreement;
- (c) to avoid doubt any changes in costs which fall to be dealt with under Clause 30.12 (*Provision of Information and Employment Costs*) and which arise from a Change in Law shall be dealt with in accordance with the provisions of Clause 30.12 (*Provision of Information and Employment Costs*) and shall not be taken into account for the purposes of Clause 39 (*Changes in Law*);
- (d) no adjustments under Clause 30.12 (*Provision of Information and Employment Costs*) shall be made in respect of overpayments made by Project Co or a Service Provider to Transferring Employees which arise from reliance on the Final Employee List to the extent that Project Co or the Service Provider is unable to correct overpayments in respect of continuing employment having taken reasonable steps to do so;
- (e) if there are underpayments by Project Co or a Service Provider to Transferring Employees, whether claimed or established as unlawful deductions from wages or as a breach of contract, which arise from reliance on the Final Employee List, there shall be an immediate increase to the Annual Service Payment in respect of all such liabilities of Project Co or the Service Provider for all such underpayments which are retrospective (save that any such liabilities which relate to the period prior to the Relevant Service Transfer Date shall be dealt with in accordance with Clauses 30.20 (*Board Indemnities*) or 30.21 (*Board Indemnities*)) and an appropriate increase in respect of such liabilities of Project Co which represent ongoing costs but this provision shall not

apply to any underpayment relating to an Equal Pay Ruling (which underpayment shall be dealt with in accordance with Clauses 30.24 (*Board Indemnities*) and 30.27 (*Board Indemnities*)).

To the extent that it is appropriate to do so, in order to ensure that the parties are treated fairly and reasonably, a lump sum payment may be made in place of some or all of any adjustment referred to above which would otherwise have been required to the Annual Service Payment.

- 30.15 Either party may propose an adjustment to the Annual Service Payment pursuant to Clause 30.12 (*Provision of Information and Employment Costs*) by giving not less than ten (10) Business Days notice to the other. Each party will provide or procure the provision to the other on an open book basis access to any information or data which the other party reasonably requires for the purpose of calculating or confirming the calculation of any adjustment pursuant to Clause 30.12 (*Provision of Information and Employment Costs*).
- 30.16 In relation to all matters described in Clause 30.13 (*Provision of Information and Employment Costs*), Project Co and the Board shall, and Project Co shall procure that the relevant Service Provider shall, co-operate with the other or others and take all reasonable steps to mitigate any costs and expenses and any adverse effect on industrial or employee relations.
- 30.17 The Board shall and Project Co shall and Project Co shall procure that each and every Service Provider shall take all reasonable steps, including co-operation with reasonable requests for information, to ensure that each and every Employee Transfer pursuant to this Agreement takes place smoothly with the least possible disruption to the services of the Board including the Services and to the employees who transfer.
- 30.18 The Board shall and shall procure if it has the contractual or legal powers to do so and shall otherwise use all reasonable endeavours to procure that every relevant sub-contractor of the Board shall supply to Project Co no later than five (5) Business Days prior to the Relevant Service Transfer Date true copies of its Recognition Agreement(s) and Project Co shall and shall procure that each and every Service Provider shall in accordance with the Transfer Regulations recognise the trade unions representing Transferring Employees (as relevant to each Service Provider) after the transfer to the same extent as they were recognised by the Board or the relevant sub-contractor before the Relevant Service Transfer Date.
- 30.19 Project Co shall procure that, on each occasion on which the identity of a Service Provider changes pursuant to this Agreement, in the event that there is an Employee Transfer, the new Service Provider shall in accordance with the Transfer Regulations recognise the trade unions representing the employees

whose contracts of employment transfer to the new Service Provider to the same extent as they were recognised before the change of identity of the Service Provider in respect of the provision of the Services at the Board's premises. The provisions of this Clause 30.19 (*Provision of Information and Employment Costs*) do not apply to the Market Testing Procedure which shall be governed by the provisions of Part 17 of the Schedule (*Benchmarking and Market Testing Procedure*).

Board Indemnities

- 30.20 The Board shall indemnify and keep indemnified in full Project Co (for itself and for the benefit of each relevant Service Provider) against all emoluments and all other contractual or statutory payments due to any Transferring Employee, or former employee of the Board or its sub-contractors in respect of his or her employment by the Board or its sub-contractors or its termination by the Board or its sub-contractors which relate to any period of employment prior to or on the Relevant Service Transfer Date even if the liability to make any such payment does not arise until on or after the Relevant Service Transfer Date (which shall include any backdated pay award by the Board or its sub-contractors), and against all income tax and pension and national insurance contributions payable thereon.
- 30.21 Insofar as Clause 30.20 (*Board Indemnities*) does not apply, the Board shall indemnify and keep indemnified in full Project Co against all Direct Losses sustained by Project Co in consequence of any liability which transfers to Project Co or a Service Provider in accordance with the Transfer Regulations and/or the Acquired Rights Directive in relation to any Transferring Employee or former employee of the Board or its sub-contractors in respect of his or her employment by the Board or its sub-contractors or its termination by the Board or its sub-contractors which arises as a result of any act or omission by the Board or its sub-contractors occurring before or on the Relevant Service Transfer Date. The provisions of this Clause 30.21 (*Board Indemnities*) and of Clause 30.20 (*Board Indemnities*) shall not apply in respect of any claim that the terms and conditions of employment relating to Pay (as defined in Clause 30.25(b) (*Board Indemnities*)) of Transferring Employees contravene the Legislation including but not limited to any claim in respect of an Equal Pay Ruling (as defined in Clause 30.24 (*Board Indemnities*)).
- 30.22 Where any liability in relation to any Transferring Employee, or former employee of the Board or its sub-contractors in respect of his or her employment by the Board or its sub-contractors or its termination which transfers in whole or part in accordance with the Transfer Regulations and/or the Acquired Rights Directive arises partly as a result of any act or omission occurring on or before the Relevant Service Transfer Date and partly as a result of any act or omission occurring after the Relevant Service Transfer Date, the Board shall indemnify

and keep indemnified in full Project Co against only such part of the Direct Losses sustained by Project Co in consequence of the liability as is reasonably attributable to the act or omission occurring before the Relevant Service Transfer Date.

30.23 Not Used.

30.24 For the purposes of this Clause 30 (*TUPE and Employment Matters*):

“Equal Pay Ruling” means:

- (a) a determination by an employment tribunal or court of competent jurisdiction or the settlement or compromise to which the Board shall have consented in either case relating to any claim brought by any Transferring Employee before two (2) years after the date of the Relevant Service Transfer Date against the Board or Project Co or a Service Provider under the Legislation (as defined below) that the terms and conditions of employment relating to Pay (as defined below) of Transferring Employees, contravene the Legislation; and/or
- (b) in relation to any Transferring Employee (in relation to their period of employment until the Relevant Service Transfer Date), any alteration to salaries and pay scales prescribed by the Whitley Agreements or the Agenda for Change: NHS Terms and Conditions of Service Handbook in order to settle, address or compromise threatened or extant claims under the Legislation against National Health Service employers (to include without limitation NHS Trusts, Health Boards, Special Health Authorities and Primary Care Trusts) and/or employers engaged as at the date of this Agreement or subsequently in the provision of services to National Health Service employers.

30.25 For the purposes of this Clause 30 (*TUPE and Employment Matters*):

- (a) the “Legislation” means all and any anti-discrimination and equal pay opportunities laws, including but not limited to the Equal Pay Act 1970, the Sex Discrimination Act 1975, the Equal Pay Directive (Council Directive 75/117/EEC), the Equal Treatment Directive (Council Directive 76/207/EEC), Article 141 of the Treaty of Rome, the Part-Time Workers (Prevention of Less Favourable Treatment) Regulations 2000, the Fixed Term Employees (Prevention of Less Favourable Treatment) Regulations 2002, the Employment Equality (Sexual Orientation) Regulations 2003, the Employment Equality (Religion or Belief) Regulations 2003 and the Employment Equality (Age) Regulations 2006; and

- (b) "Pay" means the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the Transferring Employee receives either directly or indirectly in respect of his or her employment, from his/her employer.
- 30.26 If there is an Equal Pay Ruling relating to Transferring Employees then in respect of the period up to and including the Relevant Service Transfer Date relating to such employees, the cost of such Equal Pay Ruling shall be borne by the Board in the manner set out in Clause 30.27 (*Board Indemnities*) and in respect of any subsequent period where the Equal Pay Ruling is attributable to any act or omission of Project Co or the relevant Service Provider, the cost shall be borne by Project Co.
- 30.27 Where the costs of an Equal Pay Ruling are to be borne by the Board pursuant to the provisions of Clause 30.26 (*Board Indemnities*) then the Annual Service Payment shall immediately be adjusted in respect of all prospective payments by adding the direct costs of such Equal Pay Ruling to the Annual Service Payment. In respect of all payments relating to the period before the date of the Equal Pay Ruling, the Board shall indemnify Project Co and keep it indemnified against Direct Losses arising out of or in connection with the Equal Pay Ruling.
- 30.28 To avoid doubt Clause 8.3 (Conduct of claims) applies to the indemnities under Clauses 30.20 (*Board Indemnities*), 30.21 (*Board Indemnities*), 30.22 (*Board Indemnities*) and 30.27 (*Board Indemnities*).
- 30.29 Without prejudice to the provisions of Clause 30.12 (*Provision of Information and Employment Costs*) or Part 38 of the Schedule (*Transitional Arrangements*), nothing in Clauses 30.20 (*Board Indemnities*) or 30.21 (*Board Indemnities*) shall otherwise impose any liability upon the Board for any part of any statutory or contractual redundancy payment to any Transferring Employee which is payable as a result of any termination of employment of a Transferring Employee occurring after the Relevant Service Transfer Date.

Compliance with Law and Board Policies

- 30.30 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.
- 30.31 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.

30.32 Project Co shall or shall procure that it and/or any relevant Service Provider to whom any Transferring Board Employees transfer under an Employee Transfer shall:

- (a) ensure that all individuals (including Transferring Board Employees) employed or engaged from time to time in the provision of the Services ("Assigned Employees") are engaged on terms and conditions of employment which are no less favourable overall than those applying to the Transferring Board Employees;
- (b) subject to Clause 30.32(a) (*Compliance with Law and Board Policies*) ensure that the terms and conditions offered to any new employees who are being employed or engaged in the provision of the Services are offered after full consultation with the representatives of any recognised trade union of the Assigned Employees or, in the event that there is no recognised trade union for the Assigned Employees, with other elected representatives of such Assigned Employees;
- (c) subject to Clauses 30.32(a) (*Compliance with Law and Board Policies*) and 30.36 (*Project Co Indemnities*), ensure that any changes to the terms and conditions of the Assigned Employees are achieved after full consultation with the representatives of any recognised trade union of such Assigned Employees or, in the event that there is no recognised trade union for such Assigned Employees, with other elected representatives of such Assigned Employees;
- (d) use all reasonable endeavours to promote and conduct fair employment practices and best practice in relation to health and safety and equal opportunities and maintain a constructive approach to employee relations, including to the question of trade union recognition;
- (e) support any government sponsored review of any guidelines, recommendations or requirements in relation to public private partnerships in Scotland and that Project Co shall provide (and shall procure that any Service Provider shall provide) the Board with all such advice, information or other support as it shall require to enable it to assist any such reviews;

- (f) provide in writing to the Board immediately upon a request from the Board, subject to its obligations relating to data protection and confidentiality, all such information or documentation as the Board may require acting reasonably to enable it to review and monitor the extent to which Project Co (or any Service Provider) complies with the conditions set out in the document "Public Private Partnerships in Scotland - Protocol and Guidance Concerning Employment Issues" (or any such similar protocol, requirements or guidance issued and with which the Board, Project Co or any Service Provider may be required to comply) and in this Clause 30.32 (*Compliance with Law and Board Policies*) throughout the period of this Agreement. Such information may include (but shall not be limited to) information relating to:
- (i) the management arrangements for the Assigned Employees;
 - (ii) the pay, terms and conditions of the Assigned Employees, including details of the pension arrangements for Assigned Employees;
 - (iii) the variety of workforce training and development opportunities available to the Assigned Employees;
 - (iv) the framework for and conduct of employee relations relating to the Assigned Employees, including the employer's approach to trade union recognition and facilities;
 - (v) the health and safety, equal opportunities or other employment related procedures relating to the Assigned Employees;
- (g) provide to the Board as soon as reasonably practicable any further information or documentation in its possession or under its control (or which it can reasonably obtain) which updates any information or documentation provided in accordance with Clause 30.32(f) (*Compliance with Law and Board Policies*) above;
- (h) warrant that the information provided to the Board in accordance with Clauses 30.32(f) (*Compliance with Law and Board Policies*) and 30.32(g) (*Compliance with Law and Board Policies*) above will be full, complete and accurate;
- (i) indemnify the Board and keep the Board indemnified in full against all costs, claims, liabilities or expenses (including legal expenses) suffered or incurred by the Board which relate to or arise out of any breach by

Project Co (or any Service Provider) of any of the provisions of Clauses 30.32(f) (*Compliance with Law and Board Policies*) and 30.32(g) (*Compliance with Law and Board Policies*) above.

Project Co Indemnities

30.33 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:

- (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 on or after the Relevant Service Transfer Date but on or prior to the date of expiry or termination of this Agreement, and all income tax and pension and national insurance contributions payable thereon;
- (b) all Direct Losses sustained by the Board in connection with or as a result of any claim by any Transferring Employee that the identity of Project Co or any relevant Service Provider is to that Transferring Employee's detriment or that the terms and conditions to be provided by Project Co or the relevant Service Provider or any proposed measures of Project Co or the relevant Service Provider are to that Transferring Employee's detriment whether such claim arises before, on or after the Relevant Service Transfer Date; and
- (c) insofar as Clause 30.33(a) (*Project Co Indemnities*) 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 (*TUPE and Employment Matters*)) 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 Relevant Service Transfer Date and on or before the expiry or termination of this Agreement (including, without prejudice to the foregoing generality, in relation to negligence claims by any Transferring Employee or third party, unfair dismissal, redundancy, unlawful discrimination, breach of contract, unlawful deduction of wages and equal pay where the cause of action is

attributable to any act or omission of Project Co or the relevant Service Provider);

BUT the indemnities in Clauses 30.33(a) (*Project Co Indemnities*) and 30.33(c) (*Project Co Indemnities*) shall not apply:

- (i) in respect of any sum for which the Board is obliged to indemnify Project Co or a relevant Service Provider pursuant to Clauses 30.20 (*Board Indemnities*), 30.21 (*Board Indemnities*), or as a result of any adjustment to the Service Payments in accordance with Clause 30.12 (*Provision of Information and Employment Costs*); or
- (ii) to the extent that the claim arises from a wrongful act or omission of the Board.

30.34 Clause 8.3 (*Conduct of claims*) of this Agreement shall apply where any claim is made in respect of the indemnities given by Project Co under Clause 30.33 (*Project Co Indemnities*).

Position on expiry or earlier termination of this Agreement

30.35 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.

30.36 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.

30.37 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 or Pension-related Redundancy Payments).

- 30.38 If an offer of employment is made in accordance with Clause 30.37 (*Position on expiry or earlier termination of this Agreement*) 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 30.36 (*Position on expiry or earlier termination of this Agreement*).
- 30.39 Clauses 30.35 (*Position on expiry or earlier termination of this Agreement*) to 30.38 (*Position on expiry or earlier termination of this Agreement*) do not apply to Market Testing of any Services (which shall be governed by the provisions of Part 17 of the Schedule (*Benchmarking and Market Testing Procedure*)).

Staff Records

- 30.40 The Board shall deliver, subject to the requirements of the Law, to Project Co as soon as reasonably practicable after the Relevant Service Transfer Date all those records relating to the Transferring Employees which were in its possession or under its control at the Relevant Service Transfer Date, which shall include but not be limited to records relating to competence, qualifications and training.
- 30.41 The Board gives no warranty as to the accuracy or completeness of any records referred to in Clause 30.40 (*Staff Records*) except that it warrants that it has maintained all those records relating to the Transferring Employees it is required by Law to maintain to the extent which the Law requires.
- 30.42 Project Co shall procure that there shall be provided to each Transferring Board Employee who was employed by the Board immediately before the Relevant Service Transfer Date rights in respect of employment on or after the Relevant Service Transfer Date equivalent to those to which the employee would have been entitled under the NHS (Scotland) (Injury Benefit) Regulations 1998 as amended from time to time had he remained in Board employment.

31. PENSION MATTERS

- 31.1 Project Co shall procure that each Pensionable Board Employee shall be offered membership of a pension scheme for future service operated by Project Co (or

the relevant Service Provider), on the Relevant Service Transfer Date, which has been certified by the Government Actuary's Department as broadly comparable to the NHS Pension Scheme assessed following the principles set out in the Statement of Practice issued by the Government Actuary's Department as current at the time.

- 31.2 Project Co shall ensure that a certificate from the Government Actuary's Department referred to in Clause 31.1 (*Pension Matters*) for each relevant pension scheme shall be delivered to the Board on or before signature of this Agreement and shall provide confirmation that the certificate or an appropriate renewal or replacement of the certificate remains in force three months before each Relevant Service Transfer Date in respect of each Pensionable Board Employee who is to be offered membership of the pension scheme to which the certificate relates.
- 31.3 The Board shall provide Project Co with such information as it (or its Service Providers) may reasonably require in relation to the NHS Pension Scheme to enable Project Co (or its Service Providers) to submit a proposal to the Government Actuary's Department to assess the comparability of Project Co's (or the relevant Service Provider's) pension scheme. The Board may (at its option) provide such information directly to the Government Actuary's Department. Project Co shall (and it shall procure that its Service Providers shall) provide such documentation as is required to enable the Government Actuary's Department to consider the question of comparability including, but not necessarily limited to, the Trust Deed and Rules of any scheme operated by Project Co and its Service Providers, the latest actuarial valuation report, the latest trustees' report and accounts together with a statement giving details of the increases in pensions in payment and deferred pensions in each of the last ten years and details of any area where the trustees will operate discretion to improve benefits.
- 31.4 All costs incurred in obtaining a certificate of broad comparability from the Government Actuary's Department shall be borne by Project Co.
- 31.5 Where the employment of any Pensionable Board Employee is transferred on a second and/or subsequent occasion on a change of Service Provider during the subsistence of this Agreement, Project Co shall procure that each Pensionable Board Employee who is a member of, or eligible for membership of, the outgoing Service Provider's pension scheme shall be offered membership of a pension scheme operated by the incoming Service Provider which, as a minimum:
- (a) for future service offers the benefits which enabled any preceding Service Provider's pension schemes of which that Pensionable Board Employee was a member (or was eligible to be a member) to be certified as being broadly comparable in accordance with the provisions

of Clauses 31.1 (*Pension Matters*) to 31.3 (*Pension Matters*) inclusive;
and

- (b) in respect of accrued benefits meets the requirements for bulk transfer agreements contained in Clause 31.6 (*Pension Matters*).

- 31.6 Project Co shall procure that each relevant pension scheme of which any Pensionable Board Employee becomes a member, whether on initial transfer of their employment from the Board to the Service Provider or on a second or subsequent transfer, shall, on the initial transfer, be able to accept and (subject to one or more of the Pensionable Board Employees making the necessary election to transfer and in consideration of the payment of the bulk transfer payment attributable to them but otherwise without condition) shall accept a bulk transfer payment from the NHS Pension Scheme, or, on a second or subsequent transfer, a bulk transfer payment from any relevant pension scheme of a Service Provider of which that Pensionable Board Employee has become a member, in respect of benefits which that Pensionable Board Employee has accrued in the NHS Pension Scheme or subsequent relevant pension scheme. In respect of the initial transfer the terms which the Board and Project Co have agreed shall apply with respect to a bulk transfer payment from the NHS Pension Scheme are set out in Clause 31.10(d) (*Pension Matters*) and Clause 31.11 (*Pension Matters*). In respect of the second and subsequent transfers, the terms which shall apply with respect to the calculation of Transfer Values shall be such as shall provide Transfer Values which are not less than the Transfer Values which would result from applying the terms which the Board and Project Co have agreed shall apply with respect to a bulk transfer payment from the NHS Pension Scheme as set out in Clause 31.10(d) (*Pension Matters*) and Clause 31.11 (*Pension Matters*) unless the terms to be applied are otherwise agreed between the Board's Actuary and Project Co's Actuary (of the Service Provider's Actuary if Project Co so agrees).
- 31.7 The Board shall have the right, but not the obligation, on any second or subsequent transfer, to request the Government Actuary's Department to certify, in respect of any relevant pension scheme, that the requirements of Clauses 31.5 (*Pension Matters*) and 31.6 (*Pension Matters*) have been met. Project Co shall (and it shall procure that its Service Providers shall) provide all such documentation as is required to enable the Government Actuary's Department to make the necessary assessment.
- 31.8 Notwithstanding the provisions of Clause 30.4 (*Employee Transfer*) Project Co shall procure that there shall be provided for each Pensionable Board Employee, as far as practicable, on termination of employment on or after the Relevant Service Transfer Date, and on or before the Termination Date, rights which replicate those to which the employee would have been entitled under the NHS Superannuation Scheme (Scotland) Regulations 1995 and the NHS

(Compensation for Premature Retirement) (Scotland) Regulations 2003 as amended from time to time had he remained in Board employment or if any such Pensionable Board Employee cannot be given in any respect such equivalent rights he shall be provided with compensation which is broadly comparable or of equivalent value to the lost entitlement.

31.9 Project Co shall procure that any persons who may be employed by Project Co or by a Service Provider at any time during the subsistence of this Agreement who are not Pensionable Board Employees but who are nevertheless wholly or substantially engaged in the provision of any of the Services shall be offered membership of the broadly comparable pension scheme operated by Project Co (or the relevant Service Provider) pursuant to Clause 31.1 (*Pension Matters*) or Clause 31.5 (*Pension Matters*), as applicable, on the same basis as the relevant Pensionable Board Employees.

31.10 The Board and Project Co have agreed that, as at the date of this Agreement, the following shall apply:

- (a) the Serco Pension Scheme shall:
 - (i) for the purpose of Clauses 31.1 (*Pension Matters*) to 31.4 (*Pension Matters*) constitute the pension scheme for future service; and
 - (ii) for the purpose of Clause 31.6 (*Pension Matters*) constitute the relevant pension scheme for the initial transfer to receive any bulk transfer payment from the NHS Pension Scheme;
- (b) Project Co shall procure that from the Relevant Service Transfer Date applicable to them each Pensionable Board Employee shall automatically be admitted to membership of the Serco Pension Scheme;
- (c) Project Co shall procure that as soon as practicable after becoming active members of the Serco Pension Scheme, each Pensionable Board Employee shall be issued a letter from Serco Limited and the trustees of the Serco Pension Scheme notifying them of their membership and providing them with the under noted options:
 - (i) the option to continue in or opt out of membership of the Serco Pension Scheme with the option to opt-out being subject to their confirming their wish to opt-out by returning any relevant form to Serco Limited and the trustees of the Serco Pension Scheme by no later than one

calendar month from the date of their receipt of the letter;
and

- (ii) the option to elect to take a transfer payment representing their accrued benefits in the NHS Pension Scheme to the Serco Pension Scheme subject to their confirming their wish to do so by returning any relevant form to Serco Limited and the trustees of the Serco Pension Scheme by no later than three calendar months from the date of their receipt of the letter (such option form to provide sufficient details of the transfer payment to enable a Pensionable Board Employee and any independent financial adviser to make an informed decision or provide advice).

The proposed letter and option forms shall require to be approved by both the Board (acting through the Board's Actuary) and Project Co prior to the first Relevant Service Transfer Date; and

- (d) the actuarial method, basis and assumptions for calculating any bulk transfer payment payable from the NHS Pension Scheme to the Serco Pension Scheme at the initial transfer shall be the GAD Initial Bulk Transfer Terms.

Additionally, the provisions of Clause 31.11 (*Pension Matters*) to Clause 31.17 (*Pension Matters*) shall apply.

- 31.11 Project Co shall procure that, following each Relevant Service Transfer Date, as soon as practicable after the forms in Clause 31.10(c)(ii) (*Pension Matters*) have been returned to Serco Limited and the trustees of the Serco Pension Scheme such forms are forwarded to the Board's Actuary. The Board shall as soon as practicable and in any event within one month following receipt of the forms instruct the Board's Actuary to calculate the bulk transfer payment payable from the NHS Pension Scheme to the Serco Pension Scheme using the GAD Initial Bulk Transfer Terms and to communicate the results of such calculation to both Project Co and to the Service Provider's Actuary. Following such communication Project Co and the Service Provider shall have one calendar month to notify the Board (which shall in turn notify the Board's Actuary) that they wish to verify the calculation with a view to agreeing the result within one month of the Project Co's Actuary and/or the Service Provider's Actuary receiving all the information reasonably required from the Board's Actuary to check such calculation. If no such notification is made to the Board or if following such notification the result of the calculation is agreed within the one month period the calculation of the bulk transfer payment in respect of the relevant Pensionable Board Employees

shall be regarded as final (the "Agreed Bulk Transfer Payment"). In the absence of agreement Clause 31.14 (*Pension Matters*) shall apply.

- 31.12 The Board shall procure that as soon as practicable and in any event within one month of the date of the last of the Agreed Bulk Transfer Payment and the Agreed Serco Pension Scheme Required Amount (as defined at Clause 31.13 (*Pension Matters*)) to be regarded as final the SPPA shall make payment of the Agreed Bulk Transfer Payment to the Serco Pension Scheme. Payment of the Agreed Bulk Transfer Payment shall be satisfied by the transfer of cash from the NHS Pension Scheme to the Serco Pension Scheme unless otherwise agreed between the SPPA and the trustees of the Serco Pension Scheme.
- 31.13 Project Co shall procure that, following each Relevant Service Transfer Date, as soon as practicable after the forms in Clause 31.10(c)(ii) (*Pension Matters*) have been returned to Serco Limited and the trustees of the Serco Pension Scheme copies of such forms are forwarded to the Service Provider's Actuary and that Serco Limited instructs the Service Provider's Actuary as soon as practicable and in any event within one month following receipt of the forms to calculate the amount of funds required by the trustees of the Serco Pension Scheme in order to provide past service benefits under the Serco Pension Scheme using the Serco Initial Bulk Transfer Terms and to communicate the results of such calculation to both Project Co and to the Board. Following such communication Project Co and the Board shall have one calendar month to notify the Service Provider (which shall in turn notify the Service Provider's Actuary) that they wish to verify the calculation with a view to agreeing the result within one month of the Project Co's Actuary and/or the Board's Actuary receiving all the information reasonably required from the Service Provider's Actuary to check such calculation. If no such notification is made to the Service Provider or if following such notification the result of the calculation is agreed within the one month period the calculation of the amount of funds required by the trustees of the Serco Pension Scheme in order to provide past service benefits under the Serco Pension Scheme in respect of the relevant Pensionable Board Employees shall be regarded as final (the "Agreed Serco Pension Scheme Required Amount"). In the absence of agreement Clause 31.14 (*Pension Matters*) shall apply.
- 31.14 Where a notification is made of a wish to verify a calculation with a view to agreeing the result pursuant to either Clause 31.11 (*Pension Matters*) or Clause 31.13 (*Pension Matters*) and no agreement is reached within the one month period, any of the Board, Project Co or the Service Provider may request any dispute or issue to be referred to an independent actuary. If they cannot agree on an independent actuary within two weeks of any of them advising the others of their wish to make a referral then any of them may apply to the President for the time being of the Institute or Faculty of Actuaries to make an appointment. The independent actuary so appointed shall act as an expert not as an arbitrator or arbiter and his decision shall be final and binding and his expenses shall be

met in equal shares by those disputing the accuracy of the calculation. In such circumstances the decision of the independent actuary shall constitute either the Agreed Bulk Transfer Payment and/or the Agreed Serco Pension Scheme Required Amount.

31.15 Where the Agreed Serco Pension Scheme Required Amount is greater than the Agreed Bulk Transfer Payment, Project Co shall procure that the Service Provider shall instruct the Service Provider's Actuary to issue, by no later than seven days of the date of the last of the Agreed Bulk Transfer Payment and the Agreed Serco Pension Scheme Required Amount to be regarded as final, a letter to both the Board and Project Co confirming the total amount of the difference ("Shortfall") required by the trustees of the Serco Pension Scheme as a condition to their agreeing to accept the Agreed Bulk Transfer Payment. In relation to the Shortfall the Board and Project Co agree that in respect of the amount of the Shortfall up to and including one million pounds sterling (£1,000,000) in total, the Board shall make payment to Project Co of such amount. The amount in terms of this Clause 31.15 (*Pension Matters*) shall be paid to Project Co by the Board at the same time as the Agreed Bulk Transfer Payment is paid by the SPPA to the Serco Pension Scheme. Project Co undertakes to the Board that it shall make payment of such amount to the Service Provider within seven days following receipt of cleared funds from the Board on the basis that the Service Provider undertakes to make payment of such amount to the trustees of the Serco Pension Scheme within seven days following receipt by the Service Provider of cleared funds from Project Co.

31.16 The Board and Project Co may vary or extend any of the dates set out in this Clause 31 (*Pension Matters*) by agreement in writing.

31.17 The Board and Project Co shall each instruct their respective actuaries (and in the case of Project Co only, shall procure that the Service Provider instructs the Service Provider's Actuary) to consult and co-operate with each other in relation to all matters set out in this Clause 31 (*Pension Matters*) concerning them including supplying each other with any relevant data or information.

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 and any other premises occupied by the Board, 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 or other premises occupied by the Board.

- 32.2 Action taken under Clause 32.1 (*Access*) 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 (comprising a completed Phase) 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. In complying with the provisions of the Board Policies in relation to Transferring Board Employees, Project Co shall, and shall procure that all Project Co Parties shall, comply with the relevant requirements of the Race Relations (Amendment) Act 2000 and the Board's Race Equality Scheme as if it were the Board.
- 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 (*Board Policies*), 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 (*Resources and training*) to the extent that such breach is caused or contributed to by the Board failing to comply with its obligations under Clause 32.9 (*Resources and training*).

- 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 Relevant Service Transfer Date to receive training and to make familiarisation visits to the Facilities in accordance with the arrangements described in Part 38 of the Schedule (*Transitional Arrangements*) (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 Board Employees 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 required to complete an appropriate disclosure form for submission to Disclosure Scotland.

- 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 the appropriate disclosure process, in either case of which Project Co or a Service Provider is aware or ought to be aware is employed or engaged (or as the case may be, further employed or engaged) in the provision 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 or whose presence or conduct on the Site or at work is otherwise considered by the Board's Representative (acting reasonably) to be undesirable. 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. To the extent that the Board receives any information concerning any employee of Project Co as a result of Project Co's compliance with the provisions of this Clause 32.14 (*Convictions and disciplinary action*), Project Co shall, and shall procure that any relevant Service Provider shall, ensure that all necessary consents are obtained from the relevant employee before such information is provided 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 Board Employees) 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 (*Site Security and Personnel Issues*) 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. Project Co shall procure such written consent from each staff member at the time of their medical screening examination or treatment.
- 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 (*Health Requirements*) 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 (*Health Requirements*) 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 (*Standards*).

- 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 Insofar as not in conflict with an express obligation of Project Co under this Agreement, in particular the carrying out of the Works in Phases, 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.

33.7 Not Used.

34. **VALUE OR MARKET TESTING**

The provisions of Part 17 of the Schedule (*Benchmarking and Market Testing Procedure*) shall apply to the Benchmarking and Market Testing of the Market Tested Services.

PART H: PAYMENT AND FINANCIAL MATTERS

35. PAYMENT

Monthly Service Payments

35.1A Not Used.

35.1 Project Co shall not be entitled to receive any Monthly Service Payments until Payment Commencement Date 1. Subject to the provisions of this Agreement, the Board shall pay Project Co the Monthly Service Payments in respect of each Contract Month following Payment Commencement Date 1, Payment Commencement Date 2 and Payment Commencement Date 3 in accordance with the provisions of Part 18 of the Schedule (Payment Mechanism).

Invoicing and payment arrangements

35.2 From Payment Commencement Date 1:

- (a) On or before the date falling ten (10) Business Days prior to the Payment Date, Project Co shall submit to the Board's Representative a statement (the "Monthly Service Payment Statement") setting out details of the following (where appropriate):
 - (i) the amount of the Monthly Service Payment payable for that Contract Month, supported by the relevant Performance Monitoring Report;
 - (ii) any uninvoiced Ad-Hoc Payment due, for which supporting information is available;
 - (iii) any uninvoiced amounts arising from Variations or Changes in Law, for which supporting information is available;
 - (iv) any uninvoiced costs payable pursuant to Clauses 29.10 *Board's remedial rights*) and 29.11 *Board's remedial rights*), for which supporting information is available;
 - (v) any adjustments to reflect previous overpayments and/or underpayments (each adjustment stated separately);
 - (vi) any other amount due and payable from one party to the other under this Agreement;
 - (vii) any VAT payable in respect of the above amounts; and

(viii) the total net amount owing to the Board to Project Co or by Project Co to the Board,

together with details of how such amounts have been calculated and a VAT invoice for that amount; and

(b) where the amount of the Monthly 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 on or before the first day of each Contract Month (or where that day is not a Business Day, on or before the first Business Day following such date) (the "Payment Date"), provided that if Project Co does not submit a Monthly Service Payment Statement and VAT invoice to the Board's Representative on or before the date falling fifteen (15) Business Days prior to the Payment Date, then the Board shall pay Project Co the amount set out in the VAT invoice on the day that is fifteen (15) Business Days following the date of receipt of the Monthly Service Payment Statement and VAT invoice by the Board's Representative.

Final Contract Months

35.2A On each Payment Date for the final three (3) Contract Months prior to the Expiry Date, the Board may withhold an amount equivalent to the average sum of Deductions made to the Monthly Service Payment in each Contract Month for the previous six Contract Months.

35.2B As soon as is reasonably practicable following the Expiry Date, Project Co shall provide to the Board a final Monthly Service Payment Statement excluding any element of Annual Service Payment and including:

- (a) final reconciliations of the elements of the Monthly Service Payment Statement not previously accounted for;
- (b) Performance Monitoring Reports in respect of the final three (3) Contract Months; and
- (c) reconciliation to any amounts withheld by the Board under Clause 35.2A (*Final Contract Months*).

35.2C Within fifteen (15) Business Days of receipt of the final Monthly Service Payment Statement the Board shall pay the balance of any monies set out in the final Monthly Service Payment Statement to Project Co or if it is agreed or determined that Project Co owes monies to the Board, Project Co shall pay such amounts to 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 Monthly Service Payments calculated in accordance with Clause 35.2 (*Invoicing and payment arrangements*), the undisputed amount of the Monthly 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 (*Disputes*) 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 Sections 1a and 2 of Part 21 of the Schedule (*Insurance Requirements*), are taken out prior to the Phase 1 Actual Completion Date and are maintained for the periods specified in Sections 1a and 2 of Part 21 of the Schedule (*Insurance Requirements*), as appropriate.

36.3 Without prejudice to the other provisions of this Clause 36 (*Insurance*), 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 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) in so far as they relate to damage to assets (including the Facilities), cover the same for the full reinstatement value;
- (d) comply with the relevant provisions of Sections 1, 1a and 2 of Part 21 of the Schedule (*Insurance Requirements*);
- (e) provide for 30 days' prior written notice of their cancellation, non-renewal or amendment to be given to the Board in accordance with Endorsement 1 in Appendix 2 to Part 21 of the Schedule (*Insurance Requirements*); and

- (f) in respect of the Physical Damage Policies, provide for payment of any proceeds received by Project Co to be applied in accordance with Clause 36.18 (*Application of Proceeds*).

36.5 Project Co shall ensure that its brokers give the Board a letter of undertaking in the form set out in Appendix 1 to Part 21 of the Schedule (*Insurance Requirements*).

Subrogation and Vitiatio

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, which for the purposes of this Clause 36.6(a) (*Subrogation and Vitiatio*) shall have the meaning given in Part 21 of the Schedule (*Insurance Requirements*)) in accordance with Endorsement 2 in Appendix 2 to Part 21 of the Schedule (*Insurance Requirements*); and
- (b) provide for non-vitiatio protection in respect of any claim made by the Board as co-insured in accordance with Endorsement 2 in Appendix 2 to Part 21 of the Schedule (*Insurance Requirements*),

provided that, to avoid doubt, this Clause 36.6 (*Subrogation and Vitiatio*) 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 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 30 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 provide to the Board:

- (a) copies on request of all insurance policies referred to in Clauses 36.1 (*Project Co Insurances*) to 36.3 (*Project Co Insurances*) (together with any other information reasonably requested by the Board relating to such insurance policies) and the Board shall be entitled to inspect them during ordinary business hours; and
- (b) evidence that the premiums payable under all insurance policies have been paid and that the Insurances are in full force and effect in accordance with the requirements of this Clause 36 (*Insurance*) and Part 21 of the Schedule (*Insurance Requirements*).

36.10 Renewal certificates in relation to the Insurances shall be obtained as and when necessary and copies (certified in a manner acceptable to the Board) shall be forwarded to the Board as soon as possible but in any event before the renewal date.

36.11 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 may recover any premiums from Project Co as a debt.

Acceptance and compliance

36.12 The supply to the Board of any draft insurance policy or certificate of insurance or other evidence of compliance with this Clause 36 (*Insurance*) 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.

36.13 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

36.14

- (a) If a risk usually covered by contractors' 'all risks' insurance, property damage insurance, third party and products liability insurance, delay in start up insurance (but not loss of profits), 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 risk becoming Uninsurable within five (5) Business Days of becoming aware of the same and in any event at least five (5) Business Days before expiry or cancellation of any existing insurance in respect of that risk;
- (ii) if both parties agree, or it is determined in accordance with Clause 56 (*Dispute Resolution*) that the risk is Uninsurable and that:
 - (aa) the risk being Uninsurable is not caused by the actions of Project Co or any sub-contractor of Project Co (of any tier); and
 - (bb) 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 Clause 36.14(a) (*Uninsurable Risks*) 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 (*Compensation on Termination*) and the Agreement will terminate, or

elect to allow the Agreement to continue and Clause 36.14(b)(ii) (*Uninsurable Risks*) below shall thereafter apply in respect of such risk; and

- (ii) in respect of such contractors' 'all risks' insurance, property damage insurance, third party and products liability insurance (if the Board elects to allow the Agreement to continue in accordance with Clause 36.14(b)(i) (*Uninsurable Risks*), delay in start up insurance (but not loss of profits), business interruption insurance (but not loss of profits) or statutory insurances, the 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 the Agreement will continue, or an amount equal to the amount calculated in accordance with Section C of Part 23 of the Schedule (*Compensation on Termination*) plus (in relation to third party liability insurance only) the amount of insurance proceeds that would have been payable whereupon the Agreement will terminate; and
- (iii) where pursuant to Clauses 36.14(b)(i) (*Uninsurable Risks*) and/or 36.14(b)(ii) (*Uninsurable Risks*) this Agreement continues then the Annual 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 Annual Service Payment shall be pro rated to the number of months for which the risk is Uninsurable;
- (iv) where pursuant to Clauses 36.14(b)(i) (*Uninsurable Risks*) and/or 36.14(b)(ii) (*Uninsurable Risks*) 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;

- (v) in respect of any period between the Board receiving notification in accordance with Clause 36.14(a)(i) (*Uninsurable Risks*) that a TPL Risk has become Uninsurable and the Board's notification to Project Co in accordance with Clause 36.14(b)(i) (*Uninsurable Risks*) in respect of such risk then, provided it is ultimately agreed that the requirements of Clause 36.14(a)(ii) (*Uninsurable Risks*) are satisfied in respect of occurrences of the Uninsurable TPL Risk during such period unless the parties otherwise agree how to manage the risk during this period; and
 - (vi) Clause 36.14(b)(v) (*Uninsurable Risks*) shall only apply provided Project Co does not unreasonably materially delay (a) agreement and/or determination in accordance with the Dispute Resolution Procedure as to whether the requirements of Clause 36.14(a)(ii) (*Uninsurable Risks*) are satisfied in respect of occurrences of the Uninsurable TPL Risk and/or (b) meeting with the Board to discuss the means by which the risk should be managed.
- (c) If, pursuant to Clause 36.14(b)(ii) (*Uninsurable Risks*), the Board elects to make payment to Project Co (such that the 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.

Unavailability of Terms

36.15

- (a) If, upon the renewal of any Insurance:
 - (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 Clause 36.15(b) (*Unavailability of Terms*) shall apply.

- (b) If it is agreed or determined that Clause 36.15(a) (*Unavailability of Terms*) applies then the Board shall waive Project Co's obligations in Clauses 36.1 (*Project Co Insurances*), 36.2 (*Project Co Insurances*) and 36.3 (*Project Co Insurances*) and/or Part 21 of the Schedule (*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 Clause 36.15(a) (*Unavailability of Terms*) 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 Part 21 of the Schedule (*Insurance Requirements*).
- (d) Project Co shall notify the Board as soon as reasonably practicable and in any event within five days of becoming aware that Clause 36.15(a)(i) (*Unavailability of Terms*) and/or Clause 36.15(a)(ii) (*Unavailability of Terms*) 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.

- (e) In the event that Clause 36.15(a)(i) (*Unavailability of Terms*) and/or Clause 36.15(a)(ii) (*Unavailability of Terms*) 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 Clause 36.15(a)(i) (*Unavailability of Terms*) and/or Clause 36.15(a)(ii) (*Unavailability of Terms*) remain applicable to the Insurance Term. As soon as Project Co is aware that Clause 36.15(a)(i) (*Unavailability of Terms*) and/or Clause 36.15(a)(ii) (*Unavailability of Terms*) 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.

Risk Management

- 36.16 With effect from the Effective Date, the Board and Project Co shall each designate or appoint an insurance and risk manager and notify details of the same to the other party. 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 (*Risk Management*), 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 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 Physical Damage Policies in respect of a single event (or a series of related events) in an amount in excess of £1,000,000 (index linked) 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 Clause 36.22 (Reinstatement), 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.
- 36.20 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).
- 36.21 If the proceeds of any insurance claim are insufficient to cover the settlement of such claims, Project Co will make good any deficiency forthwith.
- 36.22 *Reinstatement*
- (a) Subject to Clause 36.23 (*Economic Test*), all insurance proceeds received under any Physical Damage Policy shall be applied to repair, reinstate and replace each part or parts of the Facilities in respect of which the proceeds were received.
 - (b) Not Used.
 - (c) Subject to Clause 36.23 (*Economic Test*), where a claim is made or proceeds of insurance are received or are receivable under any Physical Damage Policy in respect of a single event (or a series of related events) (the "Relevant Incident") in an amount in excess of £10,000,000 (index linked):

- (i) Project Co shall deliver as soon as practicable and in any event within 28 days after the making of the claim a plan prepared by Project Co for the carrying out of the works necessary (the "Reinstatement Works") to repair, reinstate or replace (the "Reinstatement Plan") the assets which are the subject of the relevant claim or claims in accordance with Clause 36.22(d) (*Reinstatement*) below. The Reinstatement Plan shall set out:
- (aa) if not the Contractor, the identity of the person proposed to effect the Reinstatement Works, which shall be subject to the prior written approval of the Board; and
 - (bb) the proposed terms and timetable upon which the Reinstatement Works are to be effected (including the date that the Project will become fully operational), the final terms of which shall be subject to the prior written approval of the Board, which approval shall not be unreasonably delayed;
- (ii) provided that the Board is satisfied that the Reinstatement Plan will enable Project Co to comply with Clause 36.22(d) (*Reinstatement*) below within a reasonable timescale:
- (aa) the Reinstatement Plan will be adopted;
 - (bb) Project Co shall enter into contractual arrangements to effect the Reinstatement Works with the person identified in the Reinstatement Plan approved by the Board;
 - (cc) prior to the earlier to occur of the Termination Date or the Expiry Date, any amounts standing to the credit of the Insurance Proceeds Account (the "Relevant Proceeds") (together with any interest accrued) may be withdrawn by Project Co from the Insurance Proceeds Account as required to enable it to make payments in accordance with the terms of the contractual arrangements referred to in Clause 36.22(c)(ii)(bb) (*Reinstatement*) above, and to meet any other reasonable costs and expenses of Project Co for the sole purposes of funding the Reinstatement

Works and the parties shall operate the signatory requirements of the Insurance Proceeds Account in order to give effect to such payments. Following the earlier to occur of the Termination Date and the Expiry Date, the Board may withdraw amounts standing to the credit of the Insurance Proceeds Account for the purposes of funding any Reinstatement Works;

- (dd) the Board agrees and undertakes that, subject to compliance by Project Co with its obligations under this Clause, and provided that Project Co procures that the Reinstatement Works are carried out and completed in accordance with the contractual arrangements referred to in Clause 36.22(c)(ii)(bb) (*Reinstatement*), it shall not exercise any right which it might otherwise have to terminate this Agreement by virtue of the event which gave rise to the claim for the Relevant Proceeds;
 - (ee) the Board undertakes to use reasonable endeavours to assist Project Co in the carrying out of the Reinstatement Plan;
 - (ff) after the Reinstatement Plan has been implemented to the reasonable satisfaction of the Board and in accordance with Clause 36.22(d) (*Reinstatement*) below the Board shall permit withdrawal by Project Co of any Relevant Proceeds then held in the Insurance Proceeds Account that have not been paid under Clause 36.22(c)(ii)(cc) (*Reinstatement*) above, in respect of the Relevant Incident, together with any interest accrued; and
 - (gg) subject to the provisions of Clause 8.1 (*Project Co Indemnity*) Project Co shall be solely responsible for the payment of any deficiency.
- (d) Where insurance proceeds are to be used, in accordance with this Agreement, to repair, reinstate or replace any Facility, Project Co shall carry out the work in accordance with the Board's Construction Requirements so that on completion of the work, the provisions of the Agreement are complied with.

36.23 *Economic Test*

- (a) If all of 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 senior debt loan life cover ratio as used in the Base Case (on the assumption that the Facilities are repaired or reinstated in accordance with Clause 36.22(c) (*Reinstatement*)).
- (b) If the calculation referred to in Clause 36.23(a) (*Economic Test*) above shows that the senior debt loan life cover ratio is greater than [REDACTED]¹: 1 then Project Co shall be subject to the procedure set out in Clause 36.22 (*Reinstatement*).
- (c) If the calculation referred to in Clause 36.23(a) (*Economic Test*) above shows that the senior debt loan life cover ratio is less than or equal to [REDACTED]²: 1 then an amount equal to the lesser of:
- (i) the insurance proceeds; and
 - (ii) the Base Senior Debt Amount, or, if any Additional Permitted Borrowing has been advanced, the Revised Senior Debt Termination Amount,
- shall be released from the Insurance Proceeds Account to Project Co.
- (d) If, pursuant to Clause 36.23(c) (*Economic Test*) above, insurance proceeds are released from the Insurance Proceeds Account Project Co shall be in breach of its obligations under this Agreement and shall not, pursuant to Clause 42 (*Relief Events*), be relieved of its obligations unless it can demonstrate, to the satisfaction of the Authority, that it can carry out the works necessary to repair, reinstate or replace the assets which are subject to the relevant claims in accordance with Clause 36.22(d) (*Reinstatement*) and within a reasonable timescale.

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

Insurance Premium Increase Risk Sharing Mechanism

36.25 In respect of increases in insurance premia the provisions of Section 3 of Part 21 of the Schedule (*Insurance Requirements*) shall apply.

¹ Redacted Section 36(2) of FOI(S)A 2002

² Redacted Section 36(2) of FOI(S)A 2002

37. **CUSTODY OF FINANCIAL MODEL**

37.1 Not Used.

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).

37.5 The parties shall comply with their respective obligations as set out in Part 3 of the Schedule (*Custody of the Financial Model*) with regard to the custody of the Financial Model.

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 (*Information and Audit Access*).

- 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, relating to environmental health and to comply with requirements for the provision of information relating to achievement of customer service targets.

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) (*General standards*)) following any Change in Law.

Relevant Changes in Law

- 39.2 Subject to Clause 39.4(c)(v) (*Relevant Changes in Law*) and 39.4(c)(vi) (*Relevant Changes in Law*) and, on the occurrence of any Relevant Change in Law, the parties shall be entitled to seek adjustments to the Annual Service Payment 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 (*Relevant Changes in Law*) to 39.7 (*Relevant Changes in Law*) (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 any completed Phase

comprising part of 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) (*Relevant Changes in Law*), the relevant date shall be the later to occur of the Completion Date and the Phase Actual Completion Date for the relevant Phase, save where the Phase Actual Completion Date is delayed by a Compensation Event, a Delay Event referred to in Clause 41.3(a) (*Delay Events*) or by a Delay Event referred to in Clause 41.3 (g) (*Delay Events*), in which case the relevant date shall be the later to occur of the Phase Completion Date and the date on which the Phase of 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 39.3(a) (*Relevant Changes in Law*) and 39.3(b) (*Relevant Changes in Law*) 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 pounds (£1,000) (index linked) per annum. To avoid doubt, any such amount of one thousand pounds (£1,000) (index linked) shall always be borne by Project Co;
- (ii) such Change in Law (other than any Emissions Specific Change in Law) was not reasonably foreseeable at the Effective Date 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 Effective Date; 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 39.4(a) (*Relevant Changes in Law*) 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 39.4(b) (*Relevant Changes in Law*), 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 (*Relevant Changes in Law*);

- (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 Annual Service Payment, shall be calculated in accordance with Clause 39.5 (*Discriminatory and NHS Specific*) or Clause 39.6 (*Works after Phase Actual Completion Date*) (as appropriate) provided that:
 - (aa) the amount of any compensation payable; or
 - (bb) the amount by which the Annual Service 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) (*Relevant Changes in Law*) above.

Discriminatory and NHS Specific

39.5 In relation to a Relevant Change in Law referred to in Clauses 39.3(a) (*Relevant Changes in Law*) or 39.3(b) (*Relevant Changes in Law*), any compensation payable, or reduction to the Annual Service Payment, 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) (*Relevant Changes in Law*) and 39.4(c)(vi) (*Relevant Changes in Law*) and:

- (a) the extent to which Project Co has been (or will be) compensated as a result of any indexation of the Annual Service Payment 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 (*Compensation*) shall be construed accordingly.

Works after Phase Actual Completion Date

39.6 In relation to a Relevant Change in Law referred to in Clause 39.3(c) (*Relevant Changes in Law*) (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 Changes 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) (*Works after Phase Actual Completion Date*), 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 (*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 Annual Service Payment.

39.7 For the purposes of Clause 39.6 (*Works after Phase Actual Completion Date*):

- (a) "Capital Cost of the Facilities" means the amount set out in the Financial Supplement;
- (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) (*Relevant Changes in Law*) and 39.4(c)(vi) (*Relevant Changes in Law*) and:
 - (i) the extent to which Project Co has been (or will be) compensated as a result of any indexation of the Annual Service Payment 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 (*Works after Phase Actual Completion Date*):
 - (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% - 0.5%	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 39.8(a) (*General Change in Law*) 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 (*General Change in Law*); 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 a Phase or Phases of the Works, the Finishing Works or the commissioning under the Final Commissioning Programme, 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 (*Delay Events*) 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 new Phase Completion Dates, a new Completion Date, a new Finishing Works Completion Date and/or new Commissioning End Dates (as relevant) which shall replace the existing Phase Completion Dates, Completion Date, Finishing Works Completion Date and Commissioning End Dates; 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 Events*) 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) (*Delay Events*) 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 a Phase or Phases of the Works, the Finishing Works or the commissioning under the Final Commissioning Programme:

- (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 or the Works 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 and the Works 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 or the Works 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 (*Right to Open Up*) to 18.7 (*Right to Open Up*) (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 Clauses 39.3(a) (*Relevant Changes in Law*), 39.3(b) (*Relevant Changes in Law*) or 39.3(c) (*Relevant Changes in Law*);
- (h) the exercise of, or the instigation of legal proceedings by any person (other than Project Co or any Project Co Party) to enforce or protect, rights which may exist from time to time in respect of the Site or the Works Site (other than third party rights disclosed in the Certificate of Title);

- (i) any error or omission in the Certificate of Title which impacts on or affects the carrying out of the Project Co Operations or the Permitted Project Co Operations, other than:
 - (i) an omission where, on the date of the Certificate of Title, the matter omitted did not exist but has subsequently been brought into existence by the acts or omissions of Project Co or any Project Co Party; or
 - (ii) an omission relating to a subject matter which is of a type that is generally not dealt with in a Scottish version of the City of London Law Society format upon which the Certificate of Title is based;
- (j) the suspension of the Works following a written request by the Board pursuant to Clause 16A.3, or Project Co being prevented by Law or any interim order of a Relevant Authority from progressing the Works as a consequence of a Planning Challenge (which shall include an Adverse Planning Decision);
- (k) the discovery of antiquities and/or other objects having artistic, historic or monetary value and/or human remains on or at the Works Site during the Construction Phase;
- (l) Not Used; or
- (m) the Enabling Works not having been completed to the standard specified in the Enabling Works Specification.

41.4 Without prejudice to the generality of Clause 41.1 (*Delay Events*), 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

relevant Phase or Phases of the Works and/or the Finishing Works and/or the Project Co's Post Completion Commissioning; 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 (*Delay Events*), or of further particulars under Clause 41.5 (*Delay Events*), 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 revised Phase Completion Dates, a revised Completion Date, a revised Finishing Works Completion Date and/or revised Commissioning End Dates (as relevant) in accordance with Clause 41.1(a) (*Delay Events*) as soon as reasonably practicable and in any event within ten (10) 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 (*Delay Events*) and the date of receipt of any further particulars (if such are required under Clause 41.6 (*Delay Events*)), 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 (*Delay Events*) and the date of receipt of any further particulars (if such are required under Clause 41.6 (*Delay Events*)), 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 (*Delay Events*), 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 ten (10) 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 (*Delay Events*); 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, revised Phase Completion Dates, a revised Finishing Works Completion Date or revised Commissioning End Dates 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, revised Phase Completion Dates, a revised Finishing Works Completion Date or revised Commissioning End Dates; or
- (b) Project Co considers that a different Completion Date, different Phase Completion Dates, a different Finishing Works Completion Date or different Commissioning End Dates 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) (*Compensation*) or there is an event referred to in Clause 41.11(b) (*Compensation*), Clause 41.11(c) (*Compensation*) or Clause 41.11(d) (*Compensation*) (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 (*Delay Events*) 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) (*Delay Events*) (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) (*Delay Events*).

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

- (a) any Delay Event referred to in Clause 41.3(b) (*Delay Events*), 41.3(c) (*Delay Events*), 41.3(d) (*Delay Events*), 41.3(j) (*Delay Events*), 41.3(k) (*Delay Events*) or 41.3(m) (*Delay 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;
- (b) in the period prior to the Actual Completion Date or, if later, the Finishing Works 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 or the Works Site pursuant to Clause 14.1 (*Licence*) or any obstruction of the Ancillary Rights afforded to Project Co pursuant to Clause 14.1 (*Licence*) 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; or
- (c) the exercise of, or the instigation of legal proceedings by any person (other than Project Co or any Project Co Party) to enforce or protect, rights which may exist from time to time in respect of the Site or Works Site (other than third party rights disclosed in the Certificate of Title);
- (d) any error or omission in the Certificate of Title which impacts on or affects the carrying out of the Project Co Operations or the Permitted Project Co Operations, other than:
 - (i) an omission where, on the date of the Certificate of Title, the matter omitted did not exist but has subsequently been brought into existence by the acts or omissions of Project Co or any Project Co Party; or
 - (ii) an omission relating to a subject matter which is of a type that is generally not dealt with in a Scottish version of the City of London Law Society format upon which the Certificate of Title is based; or

(e) Not Used.

41.12 Subject to Clause 41.13 (*Compensation*), 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:

(a) 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;

(b) in the case of compensation payable during the Operational Term, such compensation referred to in Clause 41.12(a) (*Compensation*) shall:

(i) where Project Co is able to obtain finance for an amount equal to such compensation be payable by means of varying the Monthly Service Payment in accordance with the General Procedure set out in Section 3 (*General Procedure*) of Part 22 of the Schedule (*Variation Procedure*) as if a Qualifying Variation had taken place (provided that, to avoid doubt, Project Co shall not be obliged to use reasonable endeavours to utilise any available "head room" for the purposes of financing any such compensation and paragraph 1.2 of Section 2 of Part 22 of the Schedule (*Variation Procedure*) shall not apply in such circumstances); or

(ii) where Project Co is unable (having used all reasonable endeavours to procure such finance on reasonable terms as are available to it) to obtain finance for an amount equal to such compensation, be payable by the Board by way of a capital sum in accordance with paragraph 3 (*Payment of capital sum by the Board*) of Section 2 of Part 22 of the Schedule (*Variation Procedure*) as if such capital sum were in respect of a Qualifying Variation; and

(iii) where Project Co incurs additional cost as a result of Capital Expenditure being incurred by Project Co at any time, be payable within thirty (30) days of receipt by the Board of a written demand by Project Co supported by all relevant information reasonably required by the Board; and

(c) 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 or the Service Level Specifications, failure or shortage of power, fuel or transport;
- (e) blockade or embargo falling short of Force Majeure;
- (f) Not Used; 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 (*Relief Events*) and 42.4 (*Mitigation*), 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 (*Relief Events*) 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) (*Mitigation*) above.

Notices

- 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 (*Notices*) 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 (*Notices*), 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.

No Compensation

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 and/or the Works Site from any of the events referred to in Clause 43.1(a) (*Force Majeure*) 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 (*Force Majeure*) and 43.4 (*Force Majeure*) 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.

Mitigation

- 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) (*Force Majeure*).
- 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*).

Notices

- 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 (*Notices*), 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 Phase Actual Completion Date for a Phase, the provisions of Part 18 of the Schedule (*Payment Mechanism*) shall apply to determine the payments to be made to Project Co in respect of that Phase during the existence of any event of Force Majeure.
- 43.10 If an event of Force Majeure occurs prior to the Phase Actual Completion Date for a Phase, Project Co shall not be entitled to receive any compensation in respect of that Phase 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 (*Modifications*).

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;
- (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; or
- (v) if Project Co shall suffer any event analogous to the events set out in Clauses 44.1(a)(i) (*Insolvency*) to 44.1(a)(iv) (*Insolvency*) in any jurisdiction in which it is incorporated or resident;

Long stop

- (b) Project Co failing to achieve the Actual Completion Date within a period of eighteen (18) 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 at the Hospital 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) (*Health and safety*), 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 (*Assignment*) or 50.5 (*Sub-contractors*);

Service Failure Points

- (i) Project Co being awarded a total of 17207 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) two hundred thousand pounds (£200,000) (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) (*Insolvency*), 44.1(b) (*Long stop*), 44.1(c)(ii) (*Default*), 44.1(f) (*Health and safety*), 44.1(g) (*Change in control*), 44.1(h) (*Assignment*) or 44.1(j) (*Payment*), 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 Clauses 44.1(c)(i) (*Default*), 44.1(d) (*Default*) and 44.1(e) (*Default*), 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)(i) (*Board's options*) 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) (*Service Failure Points*), if Project Co is awarded 8604 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)(i) (*Board's options*), 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) (*Board's options*) is not remedied before the expiry of the period referred to in Clause 44.3(b)(i) (*Board's options*); or
- (b) where Project Co puts forward a programme pursuant to Clause 44.3(b)(ii) (*Board's options*) 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) (*Board's options*) 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) (*Remedy provisions*) 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 all the Market Tested Services pursuant to any Service Contract(s) and appoint a replacement Service Provider in accordance with Clause 50 (*Assignment, Sub-Contracting and Changes in Control*) to provide all those parts of the Services which were performed pursuant to the previous Service Contract:

- (a) within sixty (60) Business Days, as an alternative to termination of this Agreement pursuant to the provisions of Clause 44.5 (*Remedy provisions*) in any circumstance in which the Board could exercise such power; or
- (b) within the period required to operate the procedures of Part 17 of the Schedule (*Benchmarking and Market Testing Procedure*), if Project Co:
 - (i) receives more than the number of Service Failure Points listed against that Service in the table below in a rolling six month period

Service	Number of Service Failure Points
Ward Housekeeping	4828
Waste	806
Catering	3923
Linen	1293
Portering	3008
Domestic	3534
Reception	164
Switchboard	332

or

- (ii) Project Co is awarded a total of 5110 or more Service Failure Points in any six month rolling period in respect of the Services listed in the table in Clause 44.6(b)(i) (*Replacement of a non-performing Sub-Contractor*).

44.7 If the Board exercises its rights under Clause 44.6 (*Replacement of a non-performing Sub-Contractor*), Project Co shall forthwith put forward proposals for the interim management or provision of the Market Tested Services performed pursuant to the previous Service Contract to the Board until such time as an alternative Service Provider 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 Market Tested 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 Market Tested Services itself and the provisions of Clauses 29.6 (*Board's remedial rights*) to 29.12 (*Board's remedial rights*) (inclusive) shall apply, changed according to context, to such Market Tested Services in those circumstances.

44.8 If Project Co fails to terminate the relevant Service Contract and to appoint a replacement Service Provider in accordance with the provisions of Clause 44.6(a) (*Replacement of a non-performing Sub-Contractor*) the Board shall be entitled at its option to exercise its rights in accordance with the provisions of Clause 44.5(b) (*Remedy provisions*).

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 and/or the Works 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) (*Board Events of Default*) or 45.1(c) (*Board Events of Default*) within sixty (60) Business Days of such notice, and in respect of Clause 45.1(b) (*Board Events of Default*) 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) (*Project Co's options*)) 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 or procure the 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 or a Service Provider if the Board so elects;
- (b) all goods and all materials on or near to the Works 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 handover to or procure the handover to, and there shall vest in, the Board, free from any Encumbrances, the Facilities (which in the case of the termination of this Agreement in accordance with Clause 46.3 (*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 manufacturers' 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*) and Clause 31 (*Pension 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 (*Transfer to Board of Assets, Contracts etc.*).

Termination

47.6 On completion of the transfer required by Clause 47.4 (*Transfer to Board of Assets, Contracts etc.*) (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 (*Transfer to Board of Assets, Contracts etc.*) (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 assignment 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) (*Transitional arrangements*) 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 (*Transitional Arrangements*), 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**

Force Majeure

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*).

Project Co Events of Default

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) (*Project Co Events of Default*), then the Board shall pay compensation to Project Co in accordance with Section B of Part 23 of the Schedule (*Compensation on Termination*).

Board Events of Default

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*).

Voluntary 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*).

Corrupt Gifts and Refinancing Breaches

48.5 If this Agreement is terminated pursuant to Clause 54.3 (*Remedies*) or Clause 44.1(c)(ii) (*Project Co Events of Default*), 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 and Refinancing Breaches*) (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 (*Compensation on Termination*):

- (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 Clause 48.7(c)(i) (*Tax equalisation*) 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 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 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 and Refinancing Breaches*), 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 Licences 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 (*Force Majeure*) to 48.5 (*Corrupt Gifts and Refinancing Breaches*) 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 Licences 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 Licences 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 (*Assignment*), 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 and the Service Contracts entered into by Project Co for the purposes of performing its obligations under this Agreement.
- 50.3 The provisions of Clause 50.2 (*Assignment*) 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 (*Sub-contractors*) shall be a reasonable ground for withholding consent and (ii) consent shall, without prejudice to the other provisions of Clause 50.5 (*Sub-contractors*), 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 (*Sub-contractors*) 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 (*Sub-contractors*) 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 (*Changes in Control*), prior to the expiry of a period of twelve (12) months commencing on the Actual Completion Date (the "Restricted Period"), no Change in Control in any or all of the shares in Project Co and/or HoldCo (or any company of which Project Co is a subsidiary excluding public quoted parent companies whose equity securities are listed on a recognised investment exchange as defined in Section 285 Financial Services and Markets Act 2000)) shall be permitted without the prior written approval of the Board.
- 50.9 Subject to Clause 50.10 (*Changes in Control*):
- (a) the conditions and restrictions in Clause 50.8 (*Changes in Control*) shall not apply to a Change in Control in any shares in Project Co or HoldCo held by any Third Party Shareholder; and
 - (b) the Principal Shareholder shall be entitled to transfer its shares in HoldCo to Associated Companies, provided that if the transferee ceases to be an Associated Company during the Restricted Period, the Principal Shareholder shall procure that the transferee shall transfer the relevant shares in HoldCo to the Principal Shareholder.
- 50.10 No Change in Control (at any time) in any or all of the shares in Project Co or HoldCo (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 is a subsidiary) shall be permitted without the prior written approval of the Board where the person acquiring control is a Restricted Person.
- 50.11 Project Co represents and warrants to the Board that at the Effective Date the legal and beneficial ownership of Project Co and HoldCo shall be as set out in Part 27 of the Schedule (*Project Co Information*) and that (other than any Shareholder pre-emption rights) no arrangements are in place that have or may result in any sale, transfer or disposal of any legal, beneficial or other interest in any or all of the shares in Project Co or HoldCo.
- 50.12 Project Co shall inform the Board as soon as reasonably practicable (and in any event, within 30 days) of any Change in Control occurring.
- 50.13 The Board may, not more than twice in any Contract Year, or at any time when a Project Co Event of Default is outstanding, request that Project Co inform it as

soon as reasonably practicable, and in any event within 30 days of receipt of the Board's request, for details of any Change in Control.

50.14 Project Co's obligations under Clauses 50.12 (*Changes in Control*) and 50.13 (*Changes in Control*) above shall, except where a legal transfer of shares has occurred, be limited to the extent of Project Co's awareness having made all reasonable enquiry.

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) (*Intellectual Property Rights*) 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 (*Maintenance of data*) 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 and/or the Permitted Project Co 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 Clause 51.8(a) (*Data Protection*) above.

52. **CONFIDENTIALITY**

Confidential Information

52.1

- (a) The parties agree that the provisions of this Agreement and each Ancillary Document shall, subject to Clause 52.1(b) (*Confidential Information*) below, not be treated as Confidential Information and may be disclosed without restriction.
- (b) Clause 52.1(a) (*Confidential Information*) above shall not apply to provisions of this Agreement or an Ancillary Document designated as Commercially Sensitive Information and listed in Section 1 of Part 34 of the Schedule (*Commercially Sensitive Information*) which shall, subject to Clause 52.2 (*Permitted Disclosure*), be kept confidential for the periods specified in that Section 1.
- (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 Clauses 52.1(b) (*Confidential Information*) and 52.1(c) (*Confidential Information*) 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 Part 26 of the Schedule (*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:
 - (i) any proposed new contractor, its advisers and lenders, should the Board decide to retender this Agreement; or
 - (ii) any person in connection with the operation of Part 17 of the Schedule (*Benchmarking and Market Testing Procedure*);
- (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; or
 - (iv) (without prejudice to the generality of Clause 52.2(d) (*Permitted Disclosure*) 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 Clause 52.2(j)(iv) (*Permitted Disclosure*) nor Clause 52.2(d) (*Permitted Disclosure*) 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 Clauses 52.2(b) (*Permitted Disclosure*), 52.2(d) (*Permitted Disclosure*), 52.2(e) (*Permitted Disclosure*), 52.2(h) (*Permitted Disclosure*) and 52.2(j) (*Permitted Disclosure*), 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 (*Confidentiality*) 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 (*Scottish Executive Health Department Disclosure*), 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 the parties agree that the Board and the Scottish Executive Health Department shall be free to use and disclose and/or make public such information on such terms and in such manner as the Board and the Scottish Executive Health Department see fit.
- 52.11 The Board shall notify Project Co in writing not less than five (5) Business Days prior to any intended disclosure of the terms of any of the documents referred to in Clause 52.10 (*Scottish Executive Health Department Disclosure*) to the Scottish Executive Health Department. 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 52.10 (*Scottish Executive Health Department Disclosure*), 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 (*Freedom of Information*) to 52A.8 (*Freedom of Information*).

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 or Information that is Commercially Sensitive Information 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 (*Freedom of Information*), and (where applicable) up until such time as Project Co has provided the Board with all the Information specified in Clause 52A.2(a) (*Freedom of Information*), 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 Information (Scotland) Regulations.
- 52A.7 In the event of a request from the Board pursuant to Clause 52A.2 (*Freedom of Information*), 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 Clause 52A.8(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 HM Revenue and Customs (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 (*VAT*):
- (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 (VAT), 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 (VAT) and 53.7 (VAT) 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 (VAT) 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 (VAT):
- (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 (VAT), 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) (VAT) 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 (*Changes in recoverability of VAT*), 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 (*Changes in recoverability of VAT*) 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 Scheme

53.11

- (a) In this Clause (but not otherwise):
 - (i) "FA 2004" means the Finance Act 2004;
 - (ii) "the Regulations" means the Income Tax (Construction Industry Scheme) Regulations 2005 (SI 2005/2045);

- (iii) "Contractor" means a person who is a contractor for the purposes of Chapter 3 Part 3 of the FA 2004; and
 - (iv) "subcontractor" means a person who is a subcontractor for the purposes of Chapter 3 Part 3 of the FA 2004.
- (b) Each of the Board and Project Co shall comply with Chapter 3 Part 3 of the FA 2004 and the Regulations.
- (c) If any payment due from the Board to Project Co under this Agreement is a contract payment under section 60(1) of the FA 2004, then the Board, as Contractor, shall verify, in accordance with paragraph 6 of the Regulations, whether the subcontractor is registered for gross payment or for payment under deduction or is not registered under Chapter 3 Part 3 of the FA 2004.
- (d) If any payment due from the Board to Project Co under this Agreement is a contract payment under section 60(1) of the FA 2004, then:
 - (i) if Project Co is registered for gross payment under section 63(2) of the FA 2004, the Board shall make a payment to Project Co without any deduction;
 - (ii) if the Project Co is not registered for gross payments under section 63(2) of the FA 2004, the Board shall make the payment to Project Co, subject to the deduction of the relevant percentage in accordance with section 61(1) of the FA 2004.
- (e) In the event of any conflict between this clause and any other term of this Agreement, the provisions of this clause shall prevail.
- (f) If any dispute arises between the Board and Project Co as to whether any payment due by the Board to Project Co under this Agreement is or is not a contract payment by virtue of the exemption in Regulation 23 of the Regulations, the parties will jointly apply to HM Revenue and Customs for a written ruling and until such ruling received it shall be assumed that such payment is a contract payment and the provisions of Clauses 53.11(a) (*Construction Industry Scheme*) to 53.11(e) (*Construction Industry Scheme*) shall apply accordingly.
- (g) Subject to Clause 53.11(f) (*Construction Industry Scheme*), the provisions of Clause 56 (*Dispute Resolution Procedure*) shall apply to any dispute or difference between the Board and the Project Co as to the operation of this Clause 53.11 (*Construction Industry Scheme*) except where the Act or the Regulations or any other Act of Parliament

or statutory instrument, rule or order made under any Act or Parliament provide for some other method of resolving such dispute or difference.

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) (*Remedies*) to 54.3(f) (*Remedies*) 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 Works and/or 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 Works and/or Services by another person, where relevant, in accordance with Clause 50 (*Assignment, Sub-Contracting and Changes 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 Works and/or Services by another person;
- (e) if the Prohibited Act is committed by any other person not specified in Clauses 54.3(a) (*Remedies*) to 54.3 (d) (*Remedies*) 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 Works and/or 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 (*Replacement of non-performing Sub-Contractor*) 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

Martin Watson
Project Director
Forth Health Project Office
3 Whitehouse Road
Springkerse Industrial Estate
Stirling
FK7 7SP

Fax: 01786 476779

Copied to:

The Company Secretary
Forth Health Limited
Allington House
150 Victoria Street
London
SW1E 5LB

If to the Board

The Chief Executive of the Board
Acute Operating Division, NHS Forth Valley
Carseview House
Castle Business Park
Stirling
FK9 4SW

Fax: 01786 451474

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 Martin Watson
Project Director
Forth Health Project Office
3 Whitehouse Road
Springkerse Industrial Estate
Stirling
FK7 7SP

Fax: 01786 476779

If to the Board's Representative The Director of Strategic Projects and
Property
Acute Operating Division, NHS Forth Valley
Carseview House
Castle Business Park
Stirling
FK9 4SW

Fax: 01786 451474

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 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.

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 Licences, 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 Funders' 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.

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.

68. **FURTHER ASSURANCE**

Each party shall do all things and execute all further documents necessary to give full effect to this Agreement.

IN WITNESS WHEREOF these presents typewritten on this and the preceding 164 pages together with the Schedule in 40 Parts are executed by the parties hereto as follows:

The Common Seal of **Forth Valley Health**)
Board was hereunto affixed in the presence of:)
)

Fiona Mackenzie
Signatory

Fiona Isabel Mackenzie
Signatory's Full Name

On 4th May 2007, at Edinburgh
Signatory

.....
Signatory's Full Name

SIGNED on behalf of **Forth Health Limited** by
Director

at EDINBURGH on 4th May 2007

in the presence of:

Irene Marsh
Director

Irene Mary Marsh
Signatory's Full Name

Scott Wagland
Witness Signature

Scott Wagland
Witness Full Name

1 Royal Standard Place
Nottingham
NG1 6FZ
Witness Address