

PART 22 OF THE SCHEDULE

VARIATION PROCEDURE

This is Part 22 of the Schedule comprising the Variation Procedure referred to in the Project Agreement relating to the design, financing, and construction of, and the provision of services at Gartnavel Royal Hospital

between

Greater Glasgow Health Board

and

Robertson Health (Gartnavel) Limited

Part 1: Variations

1 General

Subject to receiving the Variation Confirmation issued in accordance with the terms of this Part 22 of the Schedule and to any Consent which must be obtained or modified being so obtained or modified and subject to the other provisions of this Schedule, Project Co shall be under a duty to implement a Variation. Project Co will not be entitled to any payment or compensation for or in respect of a Variation save as provided in accordance with this Part 22 of the Schedule.

2 Variation Enquiries

2.1 A Variation Enquiry shall be a document issued by the Board's Representative which:

2.1.1 states on its face that it is a Variation Enquiry;

2.1.2 states, in the case of a Board Works Variation or a Board Additional Works Item, whether it is the intention of the Board that the Board will pay a capital sum in respect of the Variation in accordance with paragraph 3 of Part 2 of this Part 22 of the Schedule or whether it is the intention of the Board that Project Co should seek to obtain finance in accordance with Part 2 of this Part 22 of the Schedule; and

2.1.3 in the case of:

2.1.3.1 a Board Works Variation, specifies the nature of the Board Works Variation and which of the provisions of the Board's Construction Requirements and/or Project Co's Proposals are required to be amended to accommodate the relevant Board Works Variation; or

2.1.3.2 a Board Additional Works Variation, specifies:

2.1.3.2.1 the nature and scope of the relevant Board Additional Works Item to the same level of detail as set out in Project Co's Proposals and/or the Board's Construction Requirements; and

2.1.3.2.2 the times at or by which the Board wishes the work at the Facilities to implement the relevant Board Additional Works Item to be commenced and completed; or

2.1.3.3 a Board Service Variation specifies, the nature of the Board Service Variation and is accompanied by a marked up or amended version of the relevant section(s) of the Method Statements and/or Service Level Specifications.

2.2 The Board's Representative may not issue a Variation Enquiry other than in accordance with the provisions of this Part 1.

3 Project Co Response to Variation Enquiry

Preliminary Indicative Information

3.1 Prior to giving a notice referred to in paragraph 3.2 of this Part 1:

3.1.1 Project Co may at its option within ten (10) Business Days of receipt of a Variation Enquiry:

3.1.1.1 give to the Board in good faith a preliminary non-binding indication of the estimated cost of implementing the Variation and provide such other information about the Variation as is available to Project Co and which it believes is useful to the Board; and

3.1.1.2 in the case of a Board Works Variation, such information shall include in particular Project Co's estimated effect on the date when the Actual Completion Date will occur;

3.1.2 if Project Co provides an indication referred to in paragraph 3.1.1, the Board shall within a further five (5) Business Days of its receipt confirm whether or not it wishes Project Co to proceed to respond to the Variation Enquiry in accordance with provisions of paragraph 3.2; and

3.1.3 in the case of a Variation Enquiry for a Board Works Variation or a Board Additional Works Item where the Board has stated an intention that Project Co should obtain finance, Project Co will, if so required in the Variation Enquiry, use reasonable endeavours to obtain an initial non-binding response from the Funders as to availability of finance for the Variation in advance of performing its obligations under Part 2 of this Part 22 of the Schedule.

3.2 *Project Co Response*

3.2.1 Within one (1) month of receipt of a Variation Enquiry or (if the provisions of paragraph 3.1.2 apply) within one (1) month of the Board confirming that it wishes Project Co to proceed with responding to the Variation Enquiry or in either case such longer period as may be agreed by the parties or determined in accordance with part 26 of the Schedule (Dispute Resolution Procedure) as reasonable given the nature of the Variation Enquiry and all other relevant considerations, Project Co shall either:

3.2.1.1 give notice to the Board's Representative that it objects to the Variation Enquiry stating the grounds of the objection. Project Co may only object to a Variation Enquiry on one or more of the following grounds:

3.2.1.1.1 that implementation of the Variation would materially and adversely affect the health and safety of any person; or

3.2.1.1.2 that implementation of the Variation would:

a infringe any Law; or

- b cause any existing Consent (which is not reasonably likely, on a balance of probabilities, to be capable of modification) to be revoked; or
- c require a new Consent which will not (using all reasonable endeavours) be obtainable; or
- d have a material and adverse effect on the performance of the Project Operations (except those Project Operations which have been specified as requiring to be amended in the Variation Enquiry) in a manner not compensated pursuant to this Part 22 of the Schedule; or
- e be a departure from Good Industry Practice; or

3.2.1.1.3 that the Board does not have the legal power or capacity to require the Variation to be implemented or to do anything envisaged by this Part 22 of the Schedule in respect of, or in connection with, the Variation; or

3.2.1.1.4 in the case of a Variation Enquiry where the Board has stated an intention that Project Co should obtain finance, either that Project Co has performed its obligations under paragraphs 1.1 and 1.2 of Part 2 of this Part 22 of the Schedule and that finance is not available at the date of such notice to Project Co to implement the Variation, or that Project Co has not yet performed such obligations in which case the provisions of paragraph 3.3 of Part 1 shall apply; or

3.2.1.1.5 that the Variation would, if implemented, result in a change in the essential nature of the Facilities; or

3.2.1.1.6 that the Variation Enquiry does not comply with paragraph 2 of this Part 1; or

3.2.1.1.7 in the case of:

- a a Board Works Variation, that the Capital Expenditure required in respect of the Board Works Variation, when taken together with the Capital Expenditure in respect of other Board Works Variations which are Qualifying Variations, exceeds the Works Variation Capital Limit; or
- b a Board Works Variation, that the delay to the date on which the Actual Completion Date will occur caused by the Board Works Variation, when taken together with the delays caused by other Board Works Variations which are Qualifying Variations, will exceed the Works Variation Delay Limit; or

- c a Board Additional Works Item, that the time specified for commencement and/or completion of the Board Additional Works Item cannot reasonably be achieved by Project Co; or
- d a Board Service Variation, that the time (if any) specified for implementation of the Board Service Variation cannot reasonably be achieved by Project Co; or

3.2.1.1.8 that the information contained in the Variation Enquiry is inadequate to enable Project Co to respond in accordance with paragraph 3.2.2 below (on the assumption, whether or not the case, that it has no objection under paragraphs 3.2.1.1 to 3.2.1.7);

or

3.2.2 give notice to the Board's Representative stating:

3.2.2.1 the steps which Project Co proposes to take to implement the Variation giving such level of detail as is reasonable and appropriate in all the circumstances;

3.2.2.2 Project Co's estimated out of pocket expenditure or estimated savings in respect of the Variation having regard to all relevant facts and matters, including:

3.2.2.2.1 any costs (by line item) incurred or to be incurred under paragraph 5 of this Part 1 (Consents);

3.2.2.2.2 in the case of a Board Works Variation, the provisions governing the valuation of variations (however described) in the Construction Contract and any capitalised interest or other costs which may be incurred by Project Co as a result of any delay to the Actual Completion Date by reason of such Board Works Variation; and

3.2.2.2.3 in the case of a Board Service Variation, any Capital Expenditure or other lump sum expenditure likely to be incurred in the course of the implementation of the Board Service Variation;

3.2.2.3 in the case of a Board Works Variation, whether, in the view of Project Co, implementing the Board Works Variation Enquiry would be likely to prevent the Actual Completion Date from occurring at the Completion Date (prior to any adjustment being made to the Completion Date by reason of the implementation or proposed implementation of the Board Works Variation) and, if so, giving an estimate of the extension of time likely to be required (subject to any further time required to obtain or amend any Consent);

Part 2: Finance for Capital Expenditure in respect of Variations

1 General Principle

- 1.1 Project Co shall use reasonable endeavours to obtain finance for any Capital Expenditure required in respect of a Qualifying Variation (which term, when used in this Part, shall include reference to a proposed Variation which will be a Qualifying Variation when all matters in respect of it have been agreed or determined pursuant to this Agreement) in accordance with the other Parts of this Part 22 of the Schedule from any funds specifically available to it for this purpose under the Funding Agreements in force from time to time.
- 1.2 In particular, Project Co shall use reasonable endeavours to utilise (subject to their terms) any available stand-by facility or "head room" in the loan facilities (however described) (so far as not committed or reserved to fund cost overruns on the Works or otherwise) which is or becomes available to finance Qualifying Variations during the period up to the Actual Completion Date.
- 1.3 In the case of a Board Works Variation, Project Co shall not be required to take any steps to obtain finance beyond those contemplated in paragraphs 1.1 and 1.2. If within fifteen (15) Business Days (or such longer period as Project Co may decide which shall not, in any event, exceed thirty (30) Business Days) of Project Co initiating discussions with the Funders, confirmation has not been obtained from the Funders that they are prepared to enter into their respective credit processes with a view to obtaining credit approval to finance the Board Works Variation, Project Co shall notify the Board's Representative reporting on the response received from the Funders. Within twenty (20) Business Days after receiving such notice the Board shall:
 - 1.3.1 subject to the provisions of Part 1 of this Part 22 of the Schedule, instruct Project Co to proceed with development of the Board Works Variation on the basis that the Board will make payment to Project Co in accordance with paragraph 3 of this Part 2 in respect of the expenditure incurred and any increased cost of funding due to any delay to the Completion Date agreed or determined pursuant to Part 1 of this Part 22 of the Schedule, on a current basis in accordance with the provisions of Part 1 of this Part 22 of the Schedule; or
 - 1.3.2 withdraw the requirement for Project Co to implement the Board Works Variation in accordance with the provisions of Part 1 of this Part 22 of the Schedule.

2 Funding Shortfalls

- 2.1 If Project Co cannot obtain finance for all or any part of Capital Expenditure required in respect of a Qualifying Variation (other than a Board Works Variation in relation to which Project Co shall have no obligations pursuant to this paragraph 2 of this Part 2) (the "Funding Shortfall") from the sources referred to in paragraph 1 of this Part 2 and such Capital Expenditure exceeds £1,000,000 (index linked) then, at the Board's request, Project Co shall use all reasonable endeavours to procure such finance on such reasonable terms as are available to it. The use of reasonable endeavours shall include the preparation of an appropriate business plan in respect of the business of Project Co

- 3.1.2 the Board shall make payment to Project Co within fifteen (15) Business Days of receipt by the Board of invoices presented to the Board (in all material respects) in accordance with the agreed payment schedule (as the case may be, varied by agreement from time to time) accompanied by the relevant evidence (where applicable) that the relevant part of the Qualifying Variation has been carried out; and
- 3.1.3 if payment is not made in accordance with sub-paragraph 3.1.2 above, the Board shall pay interest to Project Co on the amount unpaid from the date fifteen (15) Business Days after receipt of the relevant invoice until paid at the Default Interest Rate.

Part 3: General Procedure

1 General

The procedure described in this Part ("the General Procedure") shall apply where required to determine the effect on payments of a Qualifying Variation.

2 Objective of the General Procedure

2.1 The objective of the General Procedure shall be to adjust the values of entries used in the calculation of the Service Payment in Part 18 of the Schedule (Payment Mechanism) after entering changes in costs shown in the Financial Model for the Project, taking into account all relevant matters including:

2.1.1 the effect of the Qualifying Variation (including, to avoid doubt, the method of financing the Qualifying Variation, the impact of the Qualifying Variation on the project economics as reflected in the Financial Model, taxation and the commercial income earned by Project Co through its participation in the Project);

2.1.2 any adjustments pursuant to paragraph 2.4 of this Part 3;

2.1.3 the effect of indexation to date and forecast inflation as it would affect the Project; and

2.1.4 when any adjustment to the Service Payment takes effect,

so that comparison of the output from the Financial Model before such adjustments and changes in costs and after such adjustments and changes in costs shows that:

(a) the nominal internal rate of return from the expected date of implementation of the Qualifying Variation to the expiry of the Project Term in respect of the equity and subordinated debt originally expected to be invested in the Project (as shown in the Financial Model) shall be unchanged before and after modelling the effects of the Qualifying Variation;

(b) the nominal internal rate of return from the expected date of implementation of the Qualifying Variation to the expiry of the Project Term in respect of any other equity and subordinated debt (which term when used in this Part in connection with further subordinated debt supplied in connection with funding Qualifying Variations shall include other methods used by equity investors to provide capital to companies whether subordinated to senior lenders or not, other than subscribing for equity in those companies) (in addition to that referred to in paragraph (a) above) invested in the Project as a consequence of any other Qualifying Variation (as shown in the Financial Model as adjusted at the time for the investment of such other equity and subordinated debt) shall be unchanged before and after modelling the effects of the Qualifying Variation,

2.3.4 any amendments to the logic or formulae incorporated in the Financial Model shall be fully recorded and shall be such that the manner in which the revised prices are calculated can be readily verified.

2.4 In relation to Qualifying Variations, the adjustments to the Financial Model shall only take place as follows:

2.4.1 when the expenditure or savings in connection with one or more Qualifying Variations in respect of which no adjustment has been made to the Financial Model exceeds (in either case) £250,000 (index linked) in aggregate;

2.4.2 on each anniversary of the date of this Agreement falling prior to the Actual Completion Date;

2.4.3 on the Actual Completion Date; and

2.4.4 at the end of a Contract Year.

3 Financing costs where lump sum payment

If payment is to be made pursuant to paragraph 3 of Part 2 of this Part 22 of the Schedule which fully finances the Qualifying Variation, then no account shall be taken of the need to finance any Capital Expenditure in connection with the Qualifying Variation save to the extent that such financing is actually required between implementation of the Qualifying Variation and the payment of the lump sum.

4 Updating the Financial Model

Following the adjustment to calculate the new prices following a Qualifying Variation the Financial Model as adjusted in accordance with paragraphs 2 of this Part 3 shall be the Financial Model for the purposes of this Agreement.

Part 4: Small Works

- 1 After the Actual Completion Date, Project Co shall carry out Small Works which have been requested by the Board. If there shall be any dispute as to whether an item of work requested by the Board constitutes Small Works either party may refer it for resolution in accordance with Part 26 of the Schedule (Dispute Resolution Procedure).
- 2 Not later than twenty (20) Business Days prior to the commencement of each Contract Year Project Co shall propose a Schedule of Small Works Rates for that Contract Year for the purposes of the same being agreed by the Liaison Committee pursuant to the provisions of Clause 12 (Liaison). The value of any such Small Works shall be calculated as follows:
 - 2.1 the labour element shall be calculated in accordance with the Schedule of Small Works Rates or, where such rates are not applicable, in accordance with analogous rates, failing which rates which are fair and reasonable; and
 - 2.2 the materials element shall be charged at the cost of the materials to Project Co or to the contractor carrying out the work (net of all discounts) plus 7.5%.
- 3 Project Co shall notify the Board's Representative of the estimated duration of any Small Works so that the Board's Representative and Project Co can agree a convenient time for carrying out the same (so as to minimise inconvenience to the Board). Project Co shall take all reasonable steps to minimise the duration of any Small Works.
- 4 Any dispute as to the cost of Small Works shall be referred for resolution in accordance with Part 26 of the Schedule (Dispute Resolution Procedure). In the event of failure on the part of the Liaison Committee to agree in advance of any Contract Year the Schedule of Small Works Rates, the said rates shall be determined in accordance with Part 26 of the Schedule (Dispute Resolution Procedure).