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Maclay Murray & Spens
SOLICITORS
EDINBURGH

ROBERTSON HEALTH (GARTNAVEL) LIMITED

and

ROBERTSON FACILITIES MANAGEMENT LIMITED

**re: FM Agreement
for the provision of services at Gartnavel Hospital**

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FM AGREEMENT

between

- (1) **ROBERTSON HEALTH (GARTNAVEL) LIMITED** (Registered Number SC271565) of 10 Perimeter Road, Pinefield Industrial Estate, Elgin, Moray, IV30 6AE (“Project Co”); and
- (2) **ROBERTSON FACILITIES MANAGEMENT LIMITED** (Registered Number SC185956) of 10 Perimeter Road, Pinefield Industrial Estate, Elgin, Moray, IV30 6AE (the “FM Provider”).

Whereas

- (A) Project Co has entered into or is about to enter into an agreement with Greater Glasgow Health Board (“the Board”) pursuant to which Project Co will undertake the financing, design and construction of a new acute psychiatric hospital at Gartnavel Hospital and the provision of services to the said new acute psychiatric hospital (“the Project Agreement”).
- (B) Project Co wishes to appoint the FM Provider to provide services to the new hospital upon and subject to the terms of this Agreement.

NOW IT IS AGREED as follows:

1. CONTRACT DOCUMENTS AND INTERPRETATION

1.1 This Agreement comprises:

- 1.1.1 this Contract comprising Clauses 1 to 69 hereof; and
- 1.1.2 the Appendices hereto.

1.2 This Agreement shall be interpreted in accordance with the provisions of Appendix 1 hereto.

2. EFFECTIVENESS

This Agreement shall become fully effective when the Project Agreement has been executed and delivered unconditionally by Project Co and the Board.

3. PROJECT DOCUMENTS

- 3.1 The FM Provider acknowledges that it has received copies of and familiarised itself with the Project Documents.
- 3.2 The FM Provider acknowledges that it is (and the FM Provider shall be deemed to be) on notice as to the terms of the Project Documents, including the obligations and potential liabilities of

Project Co arising under them. The FM Provider acknowledges that such liabilities are (and such liabilities shall be deemed to be) within the contemplation of the FM Provider.

4. **PROJECT AGREEMENT OBLIGATIONS AND GENERAL STANDARDS**

4.1 Subject to Clause 4.3, the FM Provider shall, save as otherwise expressly provided in this Agreement, perform and assume as part of its obligations under this Agreement Project Co's obligations, risks and liabilities under the Project Agreement and the other Project Documents, insofar as the same relate to the Services (as if the same were expressly referred to herein as obligations, risks and liabilities of the FM Provider *mutatis mutandis*).

4.2 The FM Provider shall ensure that none of the following occur and shall (subject to Clause 4.3) indemnify Project Co against all claims, proceedings, loss, damage, costs and expenses (including legal costs) suffered or incurred in relation to any of the following:

4.2.1 any breach, non-observance or non-performance by the FM Provider of those of its obligations referred to in Clause 4.1;

4.2.2 any act or omission of the FM Provider, a subcontractor of the FM Provider, or their respective servants or agents which causes, contributes or otherwise gives rise to any breach by Project Co of any of its obligations pursuant to, or liability under, the Project Documents or otherwise gives rise to any other liability on the part of Project Co to the Board, the Senior Funders or any Project Participant or pursuant to any Law or Consent;

4.2.3 any negligence or breach of statutory duty on the part of the FM Provider, a subcontractor of the FM Provider, or their respective servants or agents;

4.2.4 any act or omission of the FM Provider, a subcontractor of the FM Provider, or their respective servants or agents which prejudices or leads to the diminution or loss of any rights, entitlements or other benefits of Project Co under the Project Documents or any Law or Consent.

4.3 Where Project Co proposes to agree an amendment with the Board pursuant to Clause 58 of the Project Agreement (which has not arisen as a result of a Variation or a Change in Law), Project Co shall consult the FM Provider with regard to the agreement of such amendment insofar as it affects the rights and obligations of the FM Provider under this Agreement. The resultant amendment to the Project Agreement shall only amend the scope of the FM Provider's obligations under this Agreement if the FM Provider consents thereto, providing that the FM Provider can only withhold such consent if the proposed amendment would materially and

adversely affect the FM Provider with regard to the discharge of its obligations under this Agreement.

General Standards

- 4.4 The FM Provider shall at its own cost be solely responsible for procuring that the Services are at all times performed:
- 4.4.1 in a manner consistent with Project Co's obligations under the Project Agreement in relation to the Services to be provided by Project Co in terms of the Project Agreement;
 - 4.4.2 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;
 - 4.4.3 in a manner that is not likely to be injurious to health or to cause damage to property;
 - 4.4.4 in a manner consistent with the Services Quality Plan;
 - 4.4.5 except to the extent expressly stated to the contrary in the Service Level Specifications, in compliance with all applicable NHS Requirements;
 - 4.4.6 in a manner consistent with the Board discharging its statutory duties and other functions undertaken by it as the same may be notified to the FM Provider from time to time; and
 - 4.4.7 in so far as not in conflict with an express obligation of the FM Provider under this Agreement, or where in relation to a matter there is no express obligation or standard imposed on the FM Provider 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 the FM Provider's obligations under this clause 4.4, the provisions of this clause 4.4 will be given meaning and have effect in descending order of precedence set out in this clause 4.4.

Co-operation

- 4.5 Each Party agrees to co-operate, at its own expense, with the other Party in the fulfilment of the purposes and intent of this Agreement. To avoid doubt, neither Party shall be under any obligation to perform any of the other's obligations under this Agreement.

- 4.6 Without prejudice to the generality of Clause 4.5 (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. DOCUMENTS REQUIRED BY LAW OR UNDER PROJECT DOCUMENTS

- 5.1 Where pursuant to the Project Agreement, other Project Documents, any Law, or any Consent any information, calculations, estimates, invoices or other documents or data in connection with the provision of the Services or the FM Provider's other obligations under this Agreement are required to be submitted by Project Co to the Board or any other person, the FM Provider shall (unless otherwise provided in this Agreement or otherwise instructed by Project Co in writing) submit the same on behalf of Project Co (and at the same time provide a copy to Project Co and such other Project Participants as Project Co may designate) in the manner and within the time (if any) prescribed by the relevant Project Document, Law or Consent.
- 5.2 Where under the Project Agreement or any other Project Document the taking of any step is required first to be notified to, or be subject to the prior consent or approval of, the Board or any other person, then to the extent that such step relates to the Services or the performance of the FM Provider's other obligations under this Agreement, the FM Provider shall not proceed with such step until the relevant notification has been made or consent or approval given (or has been deemed to be made or given for the purposes of the relevant Project Document).
- 5.3 If, having submitted any document or information on Project Co's behalf to the Board's Representative pursuant to Part 10 of the Schedule of the Project Agreement, the FM Provider receives any approval, comment or proposal for a modification of what was submitted, and the FM Provider considers that compliance with the same would amount to a Variation, it shall before complying with the same notify Project Co to that effect and shall also notify the Board's Representative, on behalf of Project Co, pursuant to paragraph 6.2 of Part 10 of the Schedule to the Project Agreement. Any failure by the FM Provider to give notice as required by this Clause 5.3 shall constitute an irrevocable acceptance by the FM Provider that any compliance with the relevant approval, comments or proposals for a modification shall be without cost to Project Co and the Board.
- 5.4 Where the FM Provider serves notice under Clause 5.3 in relation to any approval, comment or proposed modification by the Board's Representative, and it is agreed between Project Co and the Board pursuant to the Project Agreement that compliance with such comment or approval will be a Variation (and if the Board elects to proceed with the same) then the procedures for Variations

under Clause 40 shall apply. If the Board does not so agree then the FM Provider may (subject to and in accordance with Clause 7) seek or require Project Co to seek a determination pursuant to the Project Agreement that such compliance will be a Variation. If the FM Provider succeeds in obtaining such a determination then the procedures for Variations under Clause 40 shall apply. If the FM Provider does not pursue, or does not obtain, such a determination then the FM Provider shall comply with the comments or approval of the Board's Representative without cost to Project Co and the Board.

- 5.5 To the extent that the same relate to the performance of the Services or of the FM Provider's other obligations under this Agreement, Project Co shall promptly pass to the FM Provider all such information and documents of whatever nature which it receives at any time from the Board or any other Project Participant and which it shall be at liberty lawfully to disclose.
- 5.6 To the extent that the same relate to the performance of the Services or of the FM Provider's other obligations under this Agreement, the FM Provider shall promptly pass to Project Co all such information and documents of whatever nature which it receives at any time from the Board or any other Project Participant and which it shall be at liberty lawfully to disclose.
- 5.7 Where, pursuant to the Project Agreement or any other Project Document, Project Co is deemed to have inspected, examined, approved or otherwise satisfied itself as to any matter in connection with or affecting the performance of the Services or the FM Provider's other obligations under this Agreement, the FM Provider shall to the same extent be deemed to have inspected, examined, approved and satisfied itself as to that matter.
- 5.8 Project Co shall render all reasonable assistance (such assistance not to be unreasonably withheld or delayed) to the FM Provider and do all things reasonably necessary to enable the FM Provider to comply with its obligations in relation to the performance of the Services and such assistance shall include (but not be limited to) the prompt supply to the FM Provider of such information as may reasonably be required by the FM Provider for the performance of its duties and which is within the care or control of Project Co but only to the extent that Project Co is not restricted as a matter of law or pursuant to the terms of the Project Agreement or any other Project Document from supplying such information. For the avoidance of doubt Project Co shall not be in breach of its obligations under this Clause 5.8 if, in relation to the provision of information it is required to obtain from the Board, it has used reasonable endeavours to obtain such information but such information has not been forthcoming.

6. PASS-DOWN OF BOARD DERIVED BENEFITS UNDER THE PROJECT AGREEMENT

- 6.1 The following provisions shall apply in each case where, in this Agreement, the entitlement of the FM Provider to receive from Project Co any sum of money, extension of time or other relief or benefit of whatever nature (a "Board Derived Benefit") is stated to be subject to this Clause 6.
- 6.2 The entitlement of the FM Provider to any Board Derived Benefit shall arise only upon satisfaction of the following conditions precedent:
- 6.2.1 it is agreed between Project Co and the Board that Project Co is entitled, under the Project Agreement, to receive from the Board a sum of money, extension of time or other relief or benefit which is attributable to the Board Derived Benefit claimed by the FM Provider under this Agreement; or, in default of such agreement;
 - 6.2.2 it has been determined with binding effect pursuant to the Project Agreement that Project Co is entitled, under the Project Agreement, to receive from the Board a sum of money, extension of time or other relief or benefit which is attributable to the Board Derived Benefit claimed by the FM Provider under this Agreement; and
 - 6.2.3 (whether 6.2.1 or 6.2.2 applies) where the relevant Board Derived Benefit is payment of a sum of money, Project Co's Representative has certified that Project Co has received from the Board a sum of money which is attributable to that Board Derived Benefit (and Project Co shall procure that Project Co's Representative forthwith so certifies where such sum has been received).
- 6.3 Where the FM Provider claims a Board Derived Benefit which is payment of a sum of money, and the conditions precedent set out in Clause 6.2 have been satisfied in respect of that sum, or part of it, then the sum (or that part) shall become due from Project Co to the FM Provider immediately upon satisfaction of the conditions precedent set out in Clause 6.2 and the final date for payment of the amount due shall be 3 Business Days after that amount became due (or, if later, 3 Business Days after the FM Provider has served upon Project Co a valid tax invoice for the same).
- 6.4 Where the FM Provider claims a Board Derived Benefit which is payment of a sum of money, then unless and until the conditions precedent set out in Clause 6.2 have been satisfied in respect of that sum the FM Provider may not recover the same from Project Co by way of set-off, counterclaim or otherwise.

- 6.5 If any or all of the conditions precedent referred to in Clause 6.2 are void or unenforceable by Project Co, and as a result any sum of money becomes due from Project Co to the FM Provider at a date earlier than that on which it would have become due if those conditions precedent were all valid and enforceable, then:
- 6.5.1 the FM Provider shall make an advance (an "Advance") to Project Co of an amount of money equal to any sum so paid or due to be paid by Project Co; and
 - 6.5.2 Project Co may set off the liability of the FM Provider to make such an Advance against any sum due from Project Co to the FM Provider under or pursuant to this Agreement.
- 6.6 If the obligation of the FM Provider to make an Advance as referred to in Clause 6.5.1 and/or the right of Project Co to set off the same as referred to in Clause 35.6 are void or unenforceable then the final date for payment of any sum which has become due from Project Co to the FM Provider at a date earlier than that on which it would have become due if the conditions precedent referred to in Clause 6.2 were all valid and enforceable shall be the earliest of:
- 6.6.1 24 (twenty four) months after that sum became due;
 - 6.6.2 (where the FM Provider makes an Advance to Project Co but Project Co's right to set the same off is void or unenforceable) the date on which Project Co receives the said Advance; and
 - 6.6.3 3 Business Days after the date on which the conditions precedent referred to in Clause 6.2 are satisfied in respect of that sum;
- provided, in each case, that the FM Provider has served upon Project Co a valid tax invoice for the same, and provided further that this Clause 6.6 shall not operate to cause any sum which is a Board Derived Benefit of the kind referred to in Clause 35.6 to become due or payable at a date earlier than is prescribed by Clause 35.
- 6.7 Where in relation to any Board Derived Benefit claimed by the FM Provider it is not explicitly stated:
- 6.7.1 in any relevant agreement between the Board and Project Co (as referred to at Clause 6.2.1); or
 - 6.7.2 in any judgement, order or award by which a relevant entitlement of Project Co was or may have been determined (as referred to in Clause 6.2.2),

whether or to what extent the entitlement of Project Co so agreed or determined is attributable to the Board Derived Benefit claimed by the FM Provider then the entitlement of the FM Provider as against Project Co shall be to such proportion of Project Co's relevant corresponding entitlement against the Board as is fair and reasonable, having regard to the following factors (but not to the exclusion of other relevant evidence):

- (a) whether and to what extent the relevant Board Derived Benefit claimed by the FM Provider formed part of the basis of Project Co's submissions to the Board (or the decision making body responsible for making any judgement, order or award referred to at Clause 6.2.2) from which the relevant Project Co entitlement arose;
- (b) whether and to what extent the conditions for establishing a Project Co entitlement under the Project Agreement attributable to the Board Derived Benefit claimed by the FM Provider were met;
- (c) any available evidence as to whether the Board (or the decision making body responsible for making any judgement, order or award referred to at Clause 6.2.2) in fact recognised that the relevant entitlement of Project Co, or any element of it, was attributable to the Board Derived Benefit claimed by the FM Provider; and
- (d) any other claims, in addition to the claim for a Project Co entitlement attributable to the relevant Board Derived Benefit sought by the FM Provider, which were advanced by Project Co, on its own behalf or on behalf of others, in its submissions to the Board (or the decision making body making any judgement, order or award referred to at Clause 6.2.2) from which the relevant Project Co entitlement arose.

For the avoidance of doubt, a fair and reasonable proportion may be none if the relevant Project Co entitlement as against the Board is not attributable to the Board Derived Benefit claimed by the FM Provider. If the FM Provider and Project Co fail to agree the same, the question of what is a fair and reasonable proportion of Project Co's entitlement shall be determined as between the FM Provider and Project Co in accordance with Clause 56.

6.8 Where in relation to a Board Derived Benefit claimed by the FM Provider it is explicitly stated:

- 6.8.1 in any relevant agreement between the Board and Project Co (as referred to at Clause 6.2.1); or
- 6.8.2 in any judgement, order or award by which a relevant entitlement of Project Co was or may have been determined (as referred to in Clause 6.2.2),

whether or to what extent the entitlement of Project Co so agreed or determined is attributable to the Board Derived Benefit claimed by the FM Provider then the entitlement of the FM Provider as against Project Co shall be to such proportion of Project Co's relevant corresponding entitlement against the Board as is so stated to be agreed or determined to be attributable to the FM Provider's claim.

7. PURSUIT OF PROJECT CO ENTITLEMENTS UNDER THE PROJECT AGREEMENT

7.1 In order that Project Co shall establish all entitlements under the Project Agreement which are necessary:

- 7.1.1 for the FM Provider to become entitled, in turn, to any Board Derived Benefit under this Agreement;
- 7.1.2 in order to challenge any liability of Project Co under the Project Agreement which is asserted by the Board and for which the FM Provider in turn is in substance liable, wholly or in part, to Project Co by virtue of this Agreement (including Deductions from the Service Payment pursuant to the Project Agreement);
- 7.1.3 in order to obtain an approval from the Board's Representative where the FM Provider is, under this Agreement, responsible for obtaining any approval by the Board's Representative of any item submitted by the FM Provider on Project Co's behalf in accordance with Part 10 of the Schedule to the Project Agreement, and such consent has not been forthcoming;
- 7.1.4 in order to resolve any matter where the FM Provider is responsible for obtaining the agreement of the Board or the Board's Representative to the same and such agreement is not forthcoming,

the following provisions of this Clause 7 shall apply.

7.2 The FM Provider may in cases where this Clause 7 applies (as provided in Clause 7.1) operate the following provisions in order to seek to establish the relevant entitlement of Project Co under the Project Agreement.

- 7.2.1 Project Co shall upon written request by the FM Provider submit to the Board an application (prepared by the FM Provider on Project Co's behalf with all necessary supporting particulars) for any such entitlement, unless it would be frivolous or vexatious to do so, and provided that such application as prepared by the FM Provider complies with any requirements as to format, content and timing stipulated by this Agreement and/or relevant provisions of the Project Agreement.
- 7.2.2 Clause 7.2.1 shall not apply in relation to applications for the Board's Representative's approvals under Part 10 of the Schedule to the Project Agreement or where the FM Provider is responsible for obtaining the Board's or the Board's Representative's agreement to any matter (and in such cases the FM Provider shall itself be responsible for making such applications).
- 7.2.3 Project Co shall not without the consent of the FM Provider compromise or waive any entitlement under the Project Agreement where either the FM Provider has asserted in writing to Project Co that such entitlement is attributable, wholly or in part, to a Board Derived Benefit claimed by the FM Provider under this Agreement, or it is reasonably apparent that the FM Provider would object to such compromise or waiver.
- 7.2.4 Where an application to the Board for a Project Co entitlement of the kinds referred to in Clause 7 is unsuccessful, the FM Provider may require the further pursuit of that entitlement in accordance with Clause 7.3 or Clause 7.4. The FM Provider shall be entitled to elect between the application of Clause 7.3 and Clause 7.4, provided that Project Co may require that Clause 7.4 shall apply if:
- (a) the Board objects to the FM Provider having conduct of a claim in the manner provided for in Clause 7.3 (and the FM Provider acknowledges the absence of provisions in the Project Agreement affording the FM Provider a right formally to participate in the Project Agreement's "Dispute Resolution Procedure"); and/or
 - (b) Project Co and/or one or more other Sub-Contractors engaged in providing the Services assert that Project Co's entitlement to be pursued as against the Board is attributable partly to the Board Derived Benefit claimed by the FM Provider and partly to Project Co itself and/or to other Sub-Contractors (provided further that in such a case Project Co shall endeavour to obtain the agreement of the FM Provider, Project Co and the relevant Sub-Contractors as to who should have conduct of the relevant claim, before itself assuming conduct of the claim in accordance with Clause 7.4, and if such agreement is reached the agreed

arrangements for pursuit of Project Co's relevant entitlement shall apply instead of Clauses 7.3 and 7.4).

- 7.3 Where pursuant to the FM Provider's election under Clause 7.2.4 this Clause 7.3 applies, the FM Provider shall (in the name of Project Co) pursue the relevant Project Co entitlement by invoking the Project Agreement's "Dispute Resolution Procedure" and the following provisions shall have effect.
- 7.3.1 The FM Provider shall act in good faith in the operation of this Clause 7.3.
- 7.3.2 Project Co shall in a timely manner afford to the FM Provider such co-operation as may reasonably be requested by the FM Provider to assist the FM Provider in pursuing a Project Co entitlement against the Board under this Clause 7.3. Such co-operation shall include the provision of documents and the making available of witnesses.
- 7.3.3 The FM Provider shall bear and discharge (and shall indemnify Project Co against) all claims, proceedings, loss, damage, costs and expenses (including legal costs, expert witness costs, witness expenses, court, adjudicator's, mediator's, expert's and arbitrators' fees and charges and any expenses incurred by Project Co in affording the co-operation required by Clause 7.3.2) whether incurred by the FM Provider or Project Co (and including costs and expenses of the Board or other persons, where the FM Provider or Project Co become liable to pay the same) arising from the operation of this Clause 7.3 by the FM Provider, save in all cases to the extent arising from any breach of this Agreement by Project Co or Project Co's negligence.
- 7.3.4 The FM Provider shall keep Project Co fully informed as to the progress of the FM Provider's claim and shall if requested by Project Co provide copies of all documentation relating to the same.
- 7.3.5 The FM Provider shall not without the consent of Project Co (such consent not to be unreasonably withheld or delayed) waive or compromise any claim being pursued by it against the Board under this Clause 7.3. Project Co shall grant its consent to the extent that such waiver or compromise relates to an entitlement of Project Co, as against the Board, which is attributable to a Board Derived Benefit claimed by the FM Provider under this Agreement or an application by the FM Provider on Project Co's behalf for a Board Representative's approval.
- 7.4 Where pursuant to Clause 7.2.4 this Clause 7.4 applies, Project Co shall (on behalf of the FM Provider and any other affected Sub-Contractors) pursue the relevant Project Co entitlement by

invoking the Project Agreement's "Dispute Resolution Procedure" and the following provisions shall have effect.

- 7.4.1 Project Co shall act in good faith in the operation of this Clause 7.4.
- 7.4.2 The FM Provider shall in a timely manner afford to Project Co such co-operation as may reasonably be requested by Project Co to assist in pursuing a Project Co entitlement against the Board under this Clause 7.4. Such co-operation shall include the provision of documents and the making available of witnesses.
- 7.4.3 The FM Provider shall bear and discharge (and shall indemnify Project Co against) all claims, proceedings, loss, damage, costs and expenses (including legal costs, expert witness costs, witness expenses and court, adjudicator's, mediator's, expert's and arbitrator's or arbiter's fees and charges) incurred by the FM Provider or Project Co (and including costs and expenses of the Board or other persons, where the FM Provider or Project Co become liable to pay the same) arising from the operation of this Clause 7.4 by Project Co, but excluding any such costs and expenses which arise from Project Co's negligence or breach of this Agreement or which relate to the pursuit of Project Co entitlements under the Project Agreement other than those which the FM Provider has requested Project Co pursue in accordance with this Clause 7.4.
- 7.4.4 Project Co shall keep the FM Provider fully informed as to the progress of Project Co's claim and shall, if requested by the FM Provider and at the FM Provider's expense, provide copies of all documentation relating to the same.

8. INTERFACES WITH THE BOARD AND OTHER PROJECT CO SUBCONTRACTORS

- 8.1 Project Co is not responsible or liable (whether in contract, delict, breach of statutory duty or under any other legal theory), as against the FM Provider, for any breach of contract, act, omission or statement by the Board or any Board Party. The FM Provider's sole remedy under this Agreement in respect of any such breach, act, omission or statement shall be to such Board Derived Benefits as are obtainable pursuant to Clause 6 of this Agreement or as may expressly be provided for in this Agreement (and subject to Clause 6). This Clause 8.1 shall not prejudice any rights or remedies which the FM Provider may possess directly against the Board but the FM Provider acknowledges the terms of Clause 9.2 of the Project Agreement and agrees that the Board shall not be liable to it in delict in respect of any negligent act or omission of the Board or any Board Party and agrees that it shall not bring any claim in respect of the same against the Board.

- 8.2 Where, as a result of a breach by the Board of the Project Agreement, the FM Provider suffers loss or damage, then subject to Clause 6 the FM Provider shall be entitled to receive, as a Board Derived Benefit, compensation in respect of the same to the extent that Project Co is entitled to receive compensation pursuant to the Project Agreement from the Board attributable to the FM Provider's loss or damage.
- 8.3 Project Co is not responsible or liable (whether in contract, delict, breach of statutory duty or under any other legal theory), as against the FM Provider, for any breach of contract, act, omission or statement by the Building Contractor or the Building Contractor's employees, agents or subcontractors. This Clause 8.3 shall not prejudice any rights or remedies which the FM Provider may possess directly against the Building Contractor.
- 8.4 Without prejudice to the foregoing provisions of this Clause 8, the FM Provider hereby irrevocably and unconditionally waives as against Project Co all and any rights to claim any payment or compensation whatsoever (whether pursuant to any term of this Agreement, by way of damages for breach of contract, in delict, for breach of statutory duty or under any other legal theory) where such claim arises out of or is consequent upon:
- 8.4.1 any breach of the Project Agreement or the Licence by the Board or a Board Party or any act, omission or statement of the Board or a Board Party; or
 - 8.4.2 any breach of the Construction Contract by the Building Contractor or any act omission or statement of the Building Contractor or the Building Contractor's employees, agents or subcontractors; or
 - 8.4.3 any breach by Project Co of any Project Documents (excluding this Agreement).
9. **DETAILED DESIGN DEVELOPMENT AND CONSULTATION WITH THE INDEPENDENT TESTER**
- 9.1 During the development of the design for the Facilities pursuant to the Construction Contract, the Parties will make arrangements for representatives of the FM Provider to attend meetings with Project Co and the Building Contractor from time to time to discuss the development of the design for the Facilities.
- 9.2 Subject to any Variation pursuant to Clause 40, the FM Provider accepts that the design for the Facilities will be developed in accordance with the procedures prescribed by the Construction Contract and the Project Agreement, and will perform its obligations under this Agreement in relation to the Facilities as so designed.

9.3 The FM Provider waives all claims against Project Co for any loss or damage suffered as a result of any non-observance of the procedures in the Construction Contract and/or the Project Agreement governing the development of the design of the Facilities and/or the selection of the Equipment or as a result of any defects or insufficiencies in the design of the Facilities and/or the Equipment (including any non-compliance of the design of the Facilities and/or the Equipment with the requirements of the Project Agreement or Construction Contract) affecting the provision of the Services or the performance of the FM Provider's other obligations under this Agreement, save where such non-observance or defect or deficiency was caused by a breach by Project Co of this Agreement. The FM Provider accepts as conclusive (for the purposes of this Agreement) the decisions of the Board, Project Co and the Building Contractor, pursuant to the Project Agreement and the Construction Contract (or the outcome of any dispute resolution process which occurs pursuant to the Project Agreement or the Construction Contract), in relation to the development of the design for the Facilities and/or the Equipment. This Clause 9.3 shall not prejudice any rights which the FM Provider may possess directly against the Building Contractor, nor any right of the FM Provider to challenge (subject to and in accordance with Clause 7) any decision of the Board relating to the design of the Facilities and/or the Equipment.

9.4 Project Co undertakes to involve the FM Provider in discussions that take place pursuant to Clause 22 of the Project Agreement in relation to the issue of the Completion Certificate. Project Co shall forward to and liaise with the Independent Tester in relation to any comments raised the FM Provider on general completion matters and on the issue of the Certificate of Practical Completion.

10. DISCLOSED DATA

No liability

10.1 Project Co shall not be liable to the FM Provider for and the FM Provider shall not seek to recover from Project Co (or the Board or any Project Co 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, the FM Provider or any subcontractor of FM Provider.

No warranty

10.2 The FM Provider acknowledges the terms of Clause 10.2 of the Project Agreement whereby the Board gives no warranty or undertaking of whatever nature in respect of the Disclosed Data.

11. REPRESENTATIVES, COMMUNICATIONS AND INSTRUCTIONS

- 11.1 At least one month prior to the Actual Completion Date, the FM Provider shall appoint the FM Provider Representative. If the person so appointed ceases to be the FM Provider Representative, the FM Provider shall appoint replacements as necessary so that at all times there is appointed a FM Provider Representative. The FM Provider shall notify Project Co in writing of the FM Provider Representative's identity (and the identity of any replacement) within 7 Business Days of that person being appointed. Save for any limits on his or her authority which the FM Provider may specify by written notice to Project Co, the FM Provider Representative shall be entitled to act generally on behalf of the FM Provider for the purposes of this Agreement.
- 11.2 The FM Provider may appoint competent persons as deputies to the FM Provider Representative from time to time. The identity of such deputies, and the duration of their appointment, shall be notified by the FM Provider to Project Co in writing before their appointment as deputy becomes effective.
- 11.3 The FM Provider shall ensure that the FM Provider Representative, or a deputy duly appointed in accordance with Clause 11.2, is present at the Site or contactable by telephone at all times.
- 11.4 Project Co shall notify the FM Provider of the identity of the person appointed as Project Co's Representative from time to time pursuant to the Project Agreement.
- 11.5 Subject to Clause 57, all notices, consents, approvals, instructions and other communications issued by Project Co in connection with this Agreement shall be deemed to have been issued to the FM Provider if given to the person last notified to Project Co pursuant to Clause 11.1 as being the FM Provider Representative (or his deputy duly appointed in accordance with Clause 11.2).
- 11.6 Project Co's Representative shall:
- 11.6.1 (save for any limits on his or her authority which Project Co may specify by written notice to the FM Provider) be entitled to act generally on behalf of Project Co for the purposes of this Agreement; and
 - 11.6.2 subject to Clause 57 shall on behalf of Project Co give and receive all notices, applications, consents, approvals, instructions and other communications issued in connection with this Agreement.

12. SAFETY

- 12.1 The FM Provider shall, throughout the conduct of the Services and the performance of its other obligations under this Agreement, have full regard for the safety of all persons on the Site (whether lawfully or not).
- 12.2 The FM Provider shall keep the Site and the Facilities in an orderly state, appropriate in accordance with Good Industry Practice, to avoid dangers to the persons referred to in Clause 12.1.
- 12.3 Project Co shall, in relation to all works to be carried out by the FM Provider pursuant to this Agreement to which the CDM Regulations apply, act as "client" (to the exclusion of the Board) for the purposes of the CDM Regulations. Project Co shall appoint the "planning supervisor" for such works, where this is required by the CDM Regulations.
- 12.4 Subject to Clause 12.5, the FM Provider is appointed as the "principal contractor" for the purposes of the CDM Regulations in relation to all works to be carried out by the FM Provider pursuant to this Agreement for which the CDM Regulations require the appointment of a principal contractor. The FM Provider shall perform and exercise in a timely manner the obligations and powers of the "principal contractor" under the CDM Regulations in relation to such works.
- 12.5 The FM Provider shall throughout the Operational Term maintain the competence and resources required for it to perform and exercise the obligations and powers of a "principal contractor" under the CDM Regulations as required by Clause 12.4. If at any time the FM Provider fails to maintain such competence and/or resources, Project Co shall appoint another person as and when required by the CDM Regulations to be the "principal contractor" in relation to any works carried out by the FM Provider. The FM Provider shall indemnify Project Co against all costs incurred in appointing such other persons.

13. DISASTER PLAN

- 13.1 The FM Provider shall comply with the provisions of and its obligations under the Disaster Plan.
- 13.2 Project Co shall involve the FM Provider, as appropriate, in liaison with the Board pursuant to Clause 13.2 of the Project Agreement concerning reviews and updates of the Disaster Plan.

14. CONSENTS AND APPROVALS BY BOARD AND PROJECT CO

- 14.1 No consent, approval, review, inspection, comment (or failure to review, inspect and/or comment) in respect of any matter by or on behalf of Project Co, the Board or any other person shall relieve the FM Provider of any obligation or liability under or pursuant to this Agreement.

15. THE SITE AND RELATED RISKS

- 15.1 The FM Provider shall be deemed to have:

- 15.1.1 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;
- 15.1.2 satisfied itself as to the nature of the Site Conditions, the ground and the subsoil, the form and nature of the Site, the load-bearing and other relevant properties of the Site, the risk of injury or damage to property affecting the Site, the nature of the materials (whether natural or otherwise) to be excavated and the nature of the design, work and materials necessary for the execution of the Works;
- 15.1.3 satisfied itself as to the adequacy of the rights of access to and through the Site and any accommodation it may require for the purposes of fulfilling its obligations under this Agreement (such as additional land or buildings outside the Site);
- 15.1.4 satisfied itself as to the possibility of interference by persons of any description whatsoever (other than Project Co or 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; and
- 15.1.5 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, the FM Provider accepts full responsibility for all matters referred to in Clause 15.1 and the FM Provider shall:

- 15.2.1 not be entitled to make any claim against the Board or Project Co of any nature whatsoever 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; and

15.2.2 be responsible for, and hold the Board and Project Co harmless from, cleaning up and otherwise dealing with:

- (a) any Contamination at the Site which the FM Provider caused; and
- (b) any Contamination at the Site which the FM Provider did not cause but which was discovered on or later than the twelfth anniversary of the Actual Completion Date but before the Expiry Date so that Project Co may comply with its obligations under the Project Agreement. The responsibility of the FM Provider, as aforesaid, shall include (without limitation) complying at its own expense with all Laws and Consents and any orders, notices or directions issued by any regulatory body (whether made against the Board, Project Co or the FM Provider).

15.3 Not used.

15.4 Not used.

15.5 The FM Provider shall indemnify Project Co against:

- 15.5.1 all claims, proceedings, loss, damage, costs and expenses (including legal costs) suffered or incurred by Project Co in relation to any Contamination at the Site for which the FM Provider is responsible under clause 15.2 and the cleaning up of the same; and
- 15.5.2 all losses and liabilities suffered or incurred by Project Co under clause 15.2.2 of the Project Agreement in relation to Contamination at the Site for which the FM Provider is responsible under clause 15.2.

Nature of Land Interests

15.6 After the occurrence of the Actual Completion Date Project Co shall use all reasonable endeavours to procure that the Board shall procure the grant of the Licence from the Scottish Ministers to Project Co and the Project Co Parties (including for the purposes of this Clause 15.6 the FM Provider and sub-contractors of the FM Provider) to enter upon the Site solely for the purposes of:

- 15.6.1 the carrying out of the Project Operations; and
- 15.6.2 exercising the Ancillary Rights

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

- 15.7 The rights referred to in Clause 15.6 shall not operate or be deemed to operate as a lease of the Facilities or the Site or any part of the Facilities or the Site and the FM Provider shall not have or be entitled to exclusive possession or any estate right title or interest in and to the Site or the Facilities but shall occupy the Site as licensee only.
- 15.8 The rights referred to at clauses 15.6 and 15.7 are personal to the FM Provider and the sub-contractors of the FM Provider and are granted only in so far as such rights are capable of being granted by the Scottish Ministers to Project Co whether as a result of any restriction in the Title Deeds or otherwise.
- 15.9 The FM Provider acknowledges that a breach by the Scottish Ministers or the then heritable proprietors of the Site of its obligations under the Licence shall be deemed to constitute a breach by the Board of the Project 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 the Project Agreement by the Board subject to and in accordance with the provisions of the Project Agreement.
- 15.10 The FM Provider shall carry out the Services and its other obligations under this Agreement in a manner which does not breach any provision of the Licence or the Title Deeds.
- 15.11 The FM Provider shall procure that no act or omission of the FM Provider or its employees, agents or subcontractors gives rise to any right for any person to obtain title to the Site or any part of it (save in accordance with the terms of the Project Agreement and of the Licence).
- 15.12 Project Co shall afford to the FM Provider, for the purposes of carrying out the FM Provider's obligations at the Site such rights of access to, and use of, the Site as Project Co itself has been granted under clause 14 of the Project Agreement and under the Licence. Project Co shall have no other obligation to provide the FM Provider with any rights of access to, possession or use of, or egress from the Site and Project Co shall have no liability to the FM Provider in respect of any failure by the Board to afford the rights referred to in this Clause 15.12 (other than as a Board Derived Benefit in terms of Clause 6).
- 15.13 In the event of any failure by the Board to afford the rights referred to at clause 15.6, the FM Provider shall notify Project Co of the same and shall be entitled:
- 15.13.1 (as a Board Derived Benefit, subject to Clause 6) to such further rights of access, use or egress as it may be agreed or determined, as between the Board and Project Co under the Project Agreement, that the Board shall provide; and

15.13.2 to any other Board Derived Benefits arising in accordance with Clauses 6 and 8.2 in relation to such failure.

15.13A The FM Provider acknowledges that in the event that any third party successfully asserts a Property Right which prevents Project Co or any Project Co Party (including for the purposes of this Clause 15.13A the FM Provider and sub-contractors of the FM Provider) obtaining access to the Site by the Agreed Access Route, the Board has undertaken in terms of the Project Agreement to ensure that Project Co and any Project Co Party is provided with a no less adequate alternative access route to enable Project Co and any Project Co Party to perform Project Operations.

Defects

15.14 The FM Provider accepts (as against Project Co and the Board) the risk that any of the Works and/or any Equipment suffer from defects of design, manufacture or workmanship, including defects resulting from any breach by the Building Contractor of its obligations under the Construction Contract. The FM Provider accepts that the Works shall be deemed to have been completed for the purposes of this Agreement on the Actual Completion Date as certified or determined pursuant to the Project Agreement and the Actual Completion Date shall be the date on which the FM Provider shall commence the performance of the relevant Services in accordance with Clause 17. This clause 15.14 shall not prejudice any rights which the FM Provider may possess against the Building Contractor.

15.15 The FM Provider accepts full responsibility for, and all risks associated with, the matters referred to in Clauses 15.1 and 15.14, including any risks that such matters may prevent the FM Provider from performing (or impede the performance by it of) the Services and/or cause the FM Provider to incur additional cost in carrying out the Services and/or cause any events giving rise to Deductions under Part 18 of the Schedule to the Project Agreement or otherwise cause the FM Provider to be in breach of its obligations under this Agreement. The FM Provider shall not be relieved of such responsibility or risks on the basis that it relied on any information provided to it by or on behalf of Project Co or the Board, whether or not such information is incorrect, inaccurate or incomplete and whether or not any such incorrectness, inaccuracy or incompleteness was the result of negligence or negligent misstatement or misrepresentation by Project Co or the Board or any Board Party or any person acting on their behalf.

Project Co shall have no liability to the FM Provider (whether under this Agreement, by way of breach of contract, in delict, for breach of statutory duty or under any other legal theory) in relation to matters referred to in Clauses 15.1 and 15.14 or the consequences thereof, nor in

relation to any such negligence or negligent misstatement or misrepresentation as is referred to in this Clause 15.15.

- 15.16 The FM Provider shall promptly notify Project Co upon discovering any defect in the Facilities. During the Operational Term, the FM Provider shall, upon receiving an instruction to that effect from Project Co, repair or rectify (i) any such defect present in the Facilities whether resulting from a defect or omission in the design or construction of the Facilities or from the FM Provider's failure to comply with its obligations under this Agreement or (ii) repair, rectify or replace any defective items of Equipment. The FM Provider acknowledges and accepts that under the terms of the Construction Contract, Project Co may instruct the Building Contractor to carry out repairs to the Facilities and/or the Equipment. If the Building Contractor is so instructed, the FM Provider accepts the risk of any and all interference to the performance of the Services and its other obligations under this Agreement caused by the carrying out of such repairs including that it may be delayed or unable to perform the Services.

16. **CONSENTS**

- 16.1 The FM Provider shall be responsible for:
- 16.1.1 obtaining all Consents which may be required for the performance of the Services and the FM Provider's other obligations under this Agreement; and
 - 16.1.2 implementing each Consent within the period of its validity in accordance with its terms.
- 16.2 The FM Provider shall bear the risk that the obtaining of (or compliance with) such Consents may prevent or impede the performance of the Services and the FM Provider's other obligations under this Agreement, and/or increase the costs incurred by the FM Provider in performing the same.
- 16.3 The FM Provider shall immediately comply with any request from Project Co for any information, assistance or co-operation required by Project Co in order to comply with its obligations under Clause 16.2 of the Project Agreement provided that nothing in this Clause 16.3 shall diminish the FM Provider's obligations pursuant to Clause 16.1 above.
- 16.4 The FM Provider will use reasonable endeavours to procure that none of the Consents are revoked and that all Consents continue in full force and effect.

17. SERVICES

- 17.1 Throughout the Operational Term the FM Provider shall provide (or procure the provision by its subcontractors of) the Services:
- 17.1.1 in accordance with the terms of this Agreement and so as to perform and comply with Project Co's obligations under the Project Agreement relating to the Services (including, for the avoidance of doubt, Project Co's obligations in terms of Part 14 of the Schedule to the Project Agreement);
 - 17.1.2 in a manner which shall avoid Project Co (i) incurring Deductions from the Service Payments under the Project Agreement and/or (ii) becoming liable to pay sums to the Board under the terms of the Project Agreement;
 - 17.1.3 in accordance with the Method Statements; and
 - 17.1.4 as an obligation independent from, and in addition to, Clause 17.1.3, in such manner as ensures the Service Level Specifications are met.
- 17.2 Subject to the provisions of this Agreement, the FM Provider shall have the sole and exclusive right and obligation to provide the Services at the Site from the Actual Completion Date until the earlier of the Expiry Date or the date of termination of this Agreement.
- 17.3 The FM Provider may at any time submit to Project Co proposals for amendments to or substitution for the Method Statements or any part of them. If Project Co consents to the same then the FM Provider may submit its proposals to the Board's Representative, on Project Co's behalf, pursuant to clause 27.3 of the Project Agreement and in accordance with Part 10 of the Schedule to the Project Agreement. To the extent that the Method Statements as so amended or substituted become the Method Statements for the purposes of the Project Agreement (in accordance with clause 27.3 thereof) then they shall also become the Method Statements for the purposes of this Agreement, subject to any further such amendment or substitution.
- 17.4 To avoid doubt, an amendment to or a substitution for the Method Statements proposed pursuant to Clause 17.3 shall not be a Qualifying Variation or a Project Co Variation entitling the FM Provider to any payment (or other compensation) or to any relief from the performance of its obligations under this Agreement.
- 17.5 The FM Provider 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.

18. INTERFACE AGREEMENT

- 18.1 On or prior to the date of this Agreement, the FM Provider shall deliver to Project Co the Interface Agreement, duly executed by the FM Provider.

19. DIRECT AGREEMENTS

- 19.1 On or prior to the date of this Agreement, the FM Provider shall deliver to Project Co the Service Provider's Collateral Agreement and the Lender FM Direct Agreement, duly executed by the FM Provider.

20. NOT USED

21. EQUIPMENT

- 21.1 The provisions of Appendix 9 (Equipment) shall apply.

22. COMMISSIONING

- 22.1 The FM Provider shall undertake all operations necessary to enable it to commence providing the Services from the date specified in Clause 17.2.
- 22.2 The FM Provider acknowledges that its access rights under Clauses 22.3 and 22.4 are sufficient to enable it to comply with its obligations under Clause 22.1.
- 22.3 Subject to Clause 22.4 Project Co shall allow (or use reasonable endeavours to ensure that the FM Provider is allowed) all reasonable access to and occupation of the Facilities to the FM Provider and its employees, agents and subcontractors at reasonable times and upon receiving reasonable prior notice during the Commissioning Period. The FM Provider acknowledges that it shall not have free and unrestricted access to the Facilities during the Commissioning Period.
- 22.4 The FM Provider shall comply with Project Co's and the Building Contractor's reasonable requirements regarding the manner in which its rights of access under Clause 22.3 are exercised and shall minimise any disruption to the Works caused by the exercise by the FM Provider of its rights under this Clause 22.
- 22.5 The FM Provider shall indemnify Project Co for any costs resulting from damage to the Works, Facilities, other property of Project Co and/ or any damage claims in respect of damage to the property of others (including any costs arising from any delay to the Completion Date as a result of any such damage by the FM Provider), in each case arising as a result of the exercise by the FM Provider of its rights under Clauses 22.2 to 22.4 (inclusive).

22.6 Project Co shall pay the FM Setup Costs to the FM Provider in the amounts and on the dates set out in Appendix 4.

22.7 The FM Provider shall carry out that part of Project Co's Post-Completion Commissioning for which it is responsible under the terms of the Final Commissioning Programme so as to enable Project Co to satisfy its obligations under clause 23.1 of the Project Agreement.

23. **OPERATIONAL MANUALS**

23.1 Throughout the Operational Term the FM Provider shall at all reasonable times make available to Project Co and the Board's Representative all final form operation and maintenance manuals and any other manuals required by Project Co and/or the Board, to allow Project Co to comply with the obligations in Clause 23.5 of the Project Agreement that relate to the Operational Term.

24. **NOT USED**

25. **QUALITY ASSURANCE**

Quality Plans and Systems

25.1 Subject to Clause 25.3, the FM Provider shall procure that all aspects of the Services and the performance of the FM Provider's other obligations under the Agreement are the subject of quality management systems in accordance with the provisions of this Clause 25.

25.2 The quality management systems referred to in Clause 25.1 above shall be reflected in appropriate quality plans, the standard of which shall be consistent with BS EN ISO 9001 or 9002 (as the case may be) or any equivalent standard which is generally recognised as having replaced them (or either of them).

25.3 The FM Provider shall prepare and obtain certification (to the standard set out in Clause 25.2) for a Services Quality Plan, provided that the FM Provider shall not be obliged to apply for certification for the Services Quality Plan (to the standard set out in clause 25.2) until after the Actual Completion Date, provided that the FM Provider obtains such certification within 15 months of the Actual Completion Date. The FM Provider acknowledges the terms of Clause 25.4 of the Project Agreement and agrees that it will obtain certification of the Services Quality Plan on behalf of Project Co in the terms of that clause.

25.4 The FM Provider shall implement the Services Quality Plan agreed with the Board pursuant to the Project Agreement and shall comply with it when carrying out the Services and the FM Provider's other obligations under this Agreement.

- 25.5 The FM Provider shall procure that its subcontractors implement the Services Quality Plan and that its subcontractors carry out those elements of the Services for which they are responsible in accordance with the Service Quality Plan.
- 25.6 The FM Provider shall from time to time submit to the Board's Representative on Project Co's behalf, in accordance with clause 25.7 of, and Part 10 of the Schedule to the Project Agreement, any changes to the Services Quality Plan required for the Service Quality Plan to continue to comply with the requirements set out in Clause 25.2.
- 25.7 In the event that any ambiguity, uncertainty, dispute or discrepancy arises in relation to the nature and scope of the FM Provider'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):
- 25.7.1 the provisions and standards referred to in Clause 25.2;
 - 25.7.2 the Quality Plan referred to in Clause 25.4;
 - 25.7.3 the Board's Construction Requirements and/or the Service Level Specifications (as the case may be);
 - 25.7.4 Project Co's Proposals and/or the Method Statements (as the case may be);
 - 25.7.5 Project Co's and/or the FM Provider's and/or any subcontractors quality manuals and procedures; and
 - 25.7.6 Good Industry Practice.
- 25.8 If there is no objection by the Board's Representative under Part 10 of Schedule to the Project Agreement (Review Procedure) to a change to any Quality Plan proposed pursuant to Clause 25.7, following submission by the FM Provider to him of a proposed change to the Services Quality Plan in accordance with Clause 25.6, the Services Quality Plan shall be amended to incorporate such change. To avoid doubt, no such change to the Service Quality Plan shall entitle the FM Provider to any payment (or other compensation) or to any relief from the performance of its obligations under this Agreement.

Quality Manuals and Procedures

- 25.9 If the Services 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 by the FM Provider, on Project Co's behalf, at the time that the Quality Plan or part of (or change to) a Quality Plan is submitted in accordance with the other provisions of this Clause 25 and Part 10 of the Schedule to the Project Agreement (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 to the Project Agreement (Review Procedure).

Quality Management

- 25.10 The FM Provider shall maintain a quality management system which shall:
- 25.10.1 ensure the effective operation of the quality systems described in this Clause 25;
 - 25.10.2 cause an audit of the quality systems at regular intervals and the findings of such audit will be reported to Project Co and the Board's Representative;
 - 25.10.3 require review of all quality systems at intervals agreed with Project Co and the Board's Representative to ensure their continued suitability and effectiveness;
 - 25.10.4 require liaison with Project Co and the Board's Representative on all matters relating to quality management; and
 - 25.10.5 require production of reports and their delivery to the FM Provider and Project Co.

Quality Monitoring

- 25.11 Project Co and the Board's Representative may carry out audits of the FM Provider's quality management system (including all relevant Quality Plans and any quality manuals and procedures) to establish that compliance with Clauses 25.1 and 25.3 is being maintained by the FM Provider. Project Co and 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 the FM Provider's quality management systems and the other quality systems referred to in this Clause 25. The FM Provider shall co-operate and shall procure that any Sub-Contractor co-operates with Project Co and the Board's Representative including providing them with all information and documentation which they reasonably require in connection with their rights under this Clause 25.

26. NOT USED

27. NOT USED

28. MAINTENANCE

Programmed Maintenance Works

28.1 Without prejudice to the FM Provider's other obligations under this Agreement, the FM Provider shall maintain the Facilities and the Equipment in accordance with the Schedule of Programmed Maintenance which is in force from time to time pursuant to the terms of the Project Agreement. No later than 4 months prior to the Completion Date the FM Provider shall submit to Project Co for its approval, (and provide a copy of the same to the Senior Funders and the Bank's Technical Adviser), a draft of the Schedule of Programmed Maintenance for the period from the Completion Date to the expiry of that Contract Year (as defined in the Project Agreement). No later than 4 months prior to the commencement of each subsequent anniversary of the Completion Date the FM Provider shall submit for Project Co's approval a draft of the Schedule of Programmed Maintenance for the next succeeding Contract Year (as defined in the Project Agreement). Project Co shall approve a draft of the Schedule of Programmed Maintenance submitted as aforesaid if:

28.1.1 it provides for maintenance activities to be carried out at times and to standards which will cause the Facilities and the Equipment to be maintained in the condition required by this Agreement and (to the extent provided in Clause 4.1) the Project Agreement, such that Project Co does not incur Deductions from the Service Payments under the Project Agreement and/or become liable to pay sums to the Board under the Project Agreement;

28.1.2 (without prejudice to sub-Clause 28.1.1) it provides for maintenance activities to be carried out at times and to standards which accord with Good Industry Practice;

28.1.3 it is, in form and substance, such that it can reasonably be expected to meet with the approval of the Board's Representative when submitted in accordance with Clause 28.2 (and includes the particulars required by clause 28.3 of the Project Agreement).

Any dispute concerning Project Co's approval or disapproval of a proposed Schedule of Programmed Maintenance shall be resolved in accordance with Clause 56. The Parties shall collaborate with the objective of ensuring that, on each occasion when Project Co is required to submit a Schedule of Programmed Maintenance pursuant to clauses 28.1 and 28.2 of the Project Agreement, there exists a Schedule of Programmed

Maintenance prepared by the FM Provider and approved by Project Co in accordance with this Clause 28.1.

- 28.2 Forthwith upon Project Co approving the same under Clause 28.1, the FM Provider shall submit its proposed Schedule of Programmed Maintenance to the Board's Representative, on Project Co's behalf, pursuant to clauses 28.1 or 28.2 of the Project Agreement (as applicable) and in accordance with Part 10 of the Schedule to the Project Agreement.
- 28.3 Not later than thirty (30) 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), the FM Provider may, on Project Co's behalf, submit to the Board's Representative, pursuant to clause 28.4 of the Project Agreement and in accordance with paragraph 1.2 of Part 10 of the Schedule to the Project Agreement a revision to the Schedule of Programmed Maintenance which is then current and approved by the Board's Representative for the purposes of the Project Agreement. Where the proposed revisions depart materially from the current Schedule of Programmed Maintenance, the FM Provider shall obtain Project Co's written consent before submitting proposed revisions to the Board's Representative as aforesaid; in all other cases the FM Provider shall provide a copy of its proposed revisions to Project Co and the Senior Funders and the Bank's Technical Adviser at the same time as submitting them to the Board's Representative.
- 28.4 Where the FM Provider has submitted revisions to the Schedule of Programmed Maintenance for the Board's Representative's approval as referred to in Clause 28.3, then to the extent that such revised Schedule of Programmed Maintenance becomes the Schedule of Programmed Maintenance for the purposes of the Project Agreement (in accordance with clause 28.4 thereof), it shall also become the Schedule of Programmed Maintenance for the purposes of this Agreement.
- 28.5 The FM Provider shall be responsible for responding, on Project Co's behalf, to comments of the Board's Representative under clause 28.5 of the Project Agreement, and the FM Provider shall re-schedule and amend the relevant Schedule of Programmed Maintenance accordingly, as required in order for the same to become the Schedule of Programmed Maintenance for the purposes of the Project Agreement (and consequently for the purposes of this Agreement). The FM Provider shall keep Project Co informed as to the progress of any such re-scheduling and amendments and shall provide copies to Project Co and the Senior Funders and the Bank's Technical Adviser of all amended Schedules of Programmed Maintenance.

Programmed and Unprogrammed Maintenance

- 28.6 The FM Provider shall not carry out any Programmed Maintenance or Unprogrammed Maintenance Works (as defined in clause 28.8 of the Project Agreement) save:
- 28.6.1 in accordance with a Schedule of Programmed Maintenance which has become effective for the purposes of the Project Agreement as referred to in clause 28.6.1 thereof;
 - 28.6.2 in accordance with the procedures set out in Clause 28.8; or
 - 28.6.3 in an emergency, in accordance with Clause 28.9.
- 28.6A For the avoidance of doubt, any maintenance works of a de minimis nature (which are treated as such in terms of Clause 28.8 of the Project Agreement) shall not be included in the restrictions on Programmed Maintenance Works or Unprogrammed Maintenance Works in Clause 28.6 of this Agreement.
- 28.7 If the Board's Representative notifies Project Co, as described in Clause 28.7 of the Project Agreement, that he requires the acceleration or deferral of any Programmed Maintenance, Project Co shall forthwith notify the FM Provider (and pass a copy of any such notice to the FM Provider as soon as possible) not less than ten (10) 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. The FM Provider shall notify Project Co 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 three (3) Business Days of receipt of such notice from Project Co. Project Co shall inform the Board of the Estimated Increased Maintenance Costs (together with any costs which Project Co itself, or its other Sub-Contractors, may incur as a result of the Board's request). The FM Provider acknowledges that the Board will either confirm or withdraw its request to accelerate or defer the Schedule of Programmed Maintenance in terms of Clause 28.7 of the Project Agreement, and Project Co will notify the FM Provider accordingly within two (2) Business Days of receipt of the response from the Board. The FM Provider acknowledges that if the Board does not respond within the five (5) Business Day period referred to in clause 28.7 of the Project Agreement, the request shall be deemed to have been confirmed. Project Co shall reimburse the FM Provider as a Board Derived Benefit the direct and reasonable costs actually incurred by FM Provider as a consequence of such acceleration or deferment up to, but not exceeding, the amount of the Estimated Increased Maintenance Costs.

- 28.8 If the need arises for Unprogrammed Maintenance Works (as defined in Clause 28.8 of the Project Agreement), in circumstances other than an emergency, the FM Provider may only carry out any such Unprogrammed Maintenance Work if 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 Clause 28 of the Project Agreement. The FM Provider accepts its Monthly Payments shall be reduced to reflect any Deductions which the Board may make pursuant to Clause 28.8 of the Project Agreement.
- 28.9 If the need for Unprogrammed Maintenance Work arises as a result of an emergency, the FM Provider may carry out such Unprogrammed Maintenance Works provided that FM Provider shall notify Project Co and (on behalf of Project Co pursuant to Clause 28.9 of the Project Agreement) the Board's Representative as soon as possible (and in any event within two (2) Business Days of the occurrence of the emergency) of the extent of the necessary Unprogrammed Maintenance Works and the reasons for them. The FM Provider shall take all reasonable steps to minimise the duration of such Unprogrammed Maintenance Works. The FM Provider accepts that its Monthly Payments shall be reduced to reflect any Deductions which the Board may make pursuant to Clause 28.9 of the Project Agreement during the carrying out of such Unprogrammed Maintenance Works.
- 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, the FM Provider shall not be treated as having failed to perform the Estate 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 the FM Provider 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 The FM Provider shall prepare and update from time to time the 5 Year Maintenance Plan, which shall (so far as it is practicable to specify the same at the time of preparation of the relevant update):

28.11.1 include such information as the 5 Year Maintenance Plan is required by the Project Agreement to contain;

- 28.11.2 provide for maintenance to be carried out at times and to standards which comply with the requirements of Clause 28.1.

The FM Provider shall deliver an up to date copy of the 5 Year Maintenance Plan to Project Co, for Project Co's approval (and also provide a copy to the Senior Funders and the Bank's Technical Adviser) not less than 3 months prior to the commencement of each Contract Year. Project Co shall approve or disapprove of the proposed 5 Year Maintenance Plan on the basis set out in Clauses 28.1.1 to 28.1.3 inclusive *mutatis mutandis*. Any dispute concerning Project Co's approval or disapproval of a proposed 5 Year Maintenance Plan shall be resolved in accordance with Clause 56. The Parties shall collaborate with the objective of ensuring that, on each occasion when Project Co is required to submit a 5 Year Maintenance Plan pursuant to clause 28.11 of the Project Agreement, there exists a 5 Year Maintenance Plan prepared by the FM Provider and approved by Project Co in accordance with this Clause 28.11.

- 28.12 Forthwith upon Project Co approving the same under Clause 28.6, the FM Provider shall submit the up to date 5 Year Maintenance Plan to the Board's Representative, on Project Co's behalf, pursuant to clause 28.11 of the Project Agreement.

- 28.13 None of the following shall constitute a Variation, namely:

- 28.13.1 any approval or comment, or any failure to give or make any approval or comment, whether by Project Co or the Board's Representative, in relation to any Schedule of Programmed Maintenance, 5 Year Maintenance Plan or any revisions to either of the same,

save only where the FM Provider proceeds to invoke Clause 28.14 and thereafter a Variation occurs in accordance with Clause 40.

- 28.14 If, having received any approval, comment or proposal for a modification, or a request for the inclusion of additional or different activities in a Schedule of Programmed Maintenance or 5 Year Maintenance Plan, all as referred to in Clause 28.13, the FM Provider considers that compliance with the same would amount to a Variation, it shall before complying with the same notify Project Co to that effect (and, in the case of comments or approvals by or from the Board's Representative, the FM Provider shall also notify him to that effect, on behalf of Project Co, pursuant to paragraph 6.2 of Part 10 of the Schedule to the Project Agreement). Any failure by the FM Provider to give notice as required by this Clause 28.14 shall constitute an irrevocable acceptance by the FM Provider that any compliance with the relevant comments, approval or proposals for a modification shall be without cost to Project Co and/or the Board.

- 28.15 Where the FM Provider serves notice under Clause 28.14 in relation to any comment or approval by the Board's Representative, and it is agreed between Project Co and the Board pursuant to the Project Agreement that compliance with such comment or approval will be a Variation (and if the Board elects to proceed with the same) then the procedures for Variations under Clause 40 shall apply. If the Board does not so agree then the FM Provider may (subject to and in accordance with Clause 7) seek or require Project Co to seek a determination pursuant to the Project Agreement that such compliance will be a Variation. If the FM Provider succeeds in obtaining such a determination then the procedures for Variations under Clause 40 shall apply. If the FM Provider does not pursue, or does not obtain, such a determination then the FM Provider shall comply with the comments or approval of the Board's Representative without cost to Project Co and/or the Board.
- 28.16 The FM Provider acknowledges that Project Co and 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 and the Service Level Specifications to the extent applicable as at the date of such inspection throughout the Project Term subject to any variations made pursuant to Part 22 of the Schedule to the Project Agreement. The FM Provider acknowledges that the Board may appoint an independent third party for the purposes of carrying out any such inspection and the Board (in terms of Clause 28.12 of the Project Agreement) shall make such findings known to Project Co and Project Co shall thereafter make known such findings to the FM Provider and the Senior 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. The FM Provider 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 Services and performing its other obligations under this Agreement, the FM Provider shall, and shall procure that its subcontractors shall, comply with the provisions of Part 14 of the Schedule of the Project Agreement (Service Level Specifications).
- 29.2 The FM Provider shall be responsible for carrying out monitoring on behalf of Project Co, as required pursuant to Part 14 of the Schedule to the Project Agreement (including, without limitation, the maintaining of all records and the preparation and service on the Board of all reports and notices required by that schedule). The FM Provider shall provide Project Co with

relevant particulars of any aspects of the FM Provider's performance which fail to meet the provisions of this Agreement (unless otherwise notified, in writing, by Project Co). Project Co may (and the FM Provider shall allow the Board) at all reasonable times to observe, inspect and satisfy themselves as to the adequacy of the FM Provider's monitoring procedures (including without limitation carrying out sample checks).

Service Failure Points

- 29.3 ProjectCo may, by notice to the FM Provider, award Service Failure Points in respect of a Service in accordance with Part 14 of the Schedule (Service Level Specifications) to the Project Agreement, depending on the performance of that Service in any month as measured in accordance with Part 14 of the Schedule (Service Level Specifications) to the Project Agreement. 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.

30. EMPLOYMENT MATTERS

- 30.1 Project Co and the FM Provider agree that there are no individuals presently employed by the Board whose contracts of employment will, by virtue of the transfer to the FM Provider of responsibility for provision of any of the Services in accordance with this Agreement and in accordance with the Transfer Regulations, have effect after the Relevant Service Transfer Date (or at any other time) as if originally made between those persons and the FM Provider.

- 30.2 If it is subsequently agreed or determined that there are persons presently employed by the Board whose contracts of employment do have effect after the Relevant Service Transfer Date as if originally made between those persons and the FM Provider ("Transferring Staff") then:

30.2.1 The FM Provider acknowledges that pursuant to Clause 30.2 of the Project Agreement the Board is required within 40 Business Days of the date on which it was so agreed or determined to have the opportunity to offer a position as an employee of the Board to some or all of the Transferring Staff;

30.2.2 The FM Provider shall procure that no person to whom the Board has offered a position in accordance with Clause 30.2.1 of the Project Agreement shall be dismissed by reason of redundancy until the period for acceptance of the Board's offer has expired and the person in question has not accepted the Board's offer;

- 30.3 Subject to Clauses 30.2.1 and 30.2.2, the FM Provider shall be entitled to dismiss any or all of the Transferring Staff by reason of redundancy provided that the FM Provider shall carry out in the required manner any obligation to consult with the Transferring Staff or any of them, or their

respective representatives, and shall use all reasonable endeavours to mitigate the amount of any costs payable in respect of the Transferring Staff or their dismissal.

- 30.4 Project Co shall indemnify the FM Provider against any costs referred to in Clause 30.3 reasonably incurred by the FM Provider as a Board Derived Benefit.

Compliance with legislation and Board Policies

- 30.5 The FM Provider shall comply and shall procure that all persons employed or engaged by it shall comply at all times with the Law on health and safety at work and on anti-discrimination and equal opportunities.
- 30.6 The FM Provider shall take all reasonable steps to procure that all persons including any employed or engaged by the FM 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). The FM Provider also shall take and shall procure that every subcontractor shall take all such steps as the Board and/or Project Co 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.

FM Provider Indemnities

- 30.7 The FM Provider shall indemnify and keep indemnified in full the Project Co and, at the Board's request, each and every service provider who shall provide any service equivalent to any of the Services after expiry or earlier termination of this Agreement against:-
- 30.7.1 claims in respect of all emoluments and all other contractual or statutory payments unpaid by the FM Provider to any person entitled to such payments from the FM Provider who is or has been employed or engaged by the FM Provider in connection with the provision of any of the Services which relate to any period of employment or engagement with the FM Provider on or after the Relevant Service Transfer Date but prior to the date of expiry or termination of this Agreement, and all income tax and pension and national insurance contributions payable thereon; and
- 30.7.2 insofar as Clause 30.7.1 does not apply, all Direct Losses incurred by the Board as a result of any claim against the Board in respect of any liability to any person who is or has been employed or engaged (whether as a consequence of the Transfer Regulations or of the provisions of this Clause 30) by the FM Provider in connection with the

provision of any of the Services, where such claim arises as a result of any act or omission of the FM Provider occurring after the Relevant Service Transfer Date and before the expiry or termination of this Agreement;

BUT the indemnities in Clauses 30.7.1 and 30.7.2 shall not apply to the extent that the claim arises from a wrongful act or omission of the Board and/or Project Co.

- 30.8 Clause 41 of this Agreement shall apply where any claim is made in respect of the indemnities given by the FM Provider under Clause 30.7.

Compliance with legislation and Board Policies

- 30.9 On the expiry or earlier termination of this Agreement, Project Co and the FM Provider 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.

- 30.10 The FM Provider shall not and shall procure that all subcontractors shall not make any material change to the terms and conditions of employment of any person employed in the provision of any Service, shall be precluded from transferring any person employed in the provision of any Service to another part of its business or shall materially increase or decrease the number of such persons:

30.10.1 within the period of twelve months immediately preceding the expiry of this Agreement, or

30.10.2 within the period of twelve months before the termination of this Agreement or, if shorter, during the period of notice of termination

without Project Co's and the Board's consent (which shall not be unreasonably withheld), except such change as may be required by Law.

- 30.11 Project Co shall pay over to the FM Provider within five (5) Business Days of receipt of any amounts received by Project Co under clause 30.11 of the Project Agreement which relate to any Direct Losses suffered by the FM Provider as a result of the Board's breach of clause 30.11 of the Project Agreement and for any costs, claims or liabilities for Redundancy Payments (whether statutory or contractual) less any reasonable costs incurred by Project Co in pursuing recovery of the same on behalf of the FM Provider.

30.12 The FM Provider acknowledges that the Board need not make an offer of employment in accordance with clause 30.11 of the Project Agreement if there has been any change to the terms and conditions of the persons concerned in breach of Clause 30.10.

31. DEDUCTIONS FROM THE SERVICE PAYMENTS, WARNING NOTICES AND STEP-IN

31.1 Deductions from the Service Payments under the Project Agreement accruing against Project Co under Part 18 of the Schedule to the Project Agreement shall be deemed to accrue also against the FM Provider for the purposes of this Agreement.

31.2 Any Warning Notice issued to Project Co by the Board under clause 29.4 of the Project Agreement shall be treated as issued also by Project Co to the FM Provider for the purposes of this Agreement if it is issued by the Board pursuant to clause 29.4 of the Project Agreement.

31.3 Project Co shall promptly forward to the FM Provider a copy of every Warning Notice received by Project Co from the Board (whether or not the same is treated as being issued by Project Co to the FM Provider for the purposes of this Agreement).

31.4 If the Board gives notice to Project Co under clause 29.4 of the Project Agreement, the FM Provider shall issue a plan (a "Rectification Plan") for approval by Project Co within 7 Business Days which shall set out:

31.4.1 the cause(s) of the low level of performance or breach of the Project Agreement and/or this Agreement;

31.4.2 the measures which the FM Provider shall put in place to bring the standard of performance to the standard required by the Project Agreement and/or this Agreement; and

31.4.3 any other material relevant to the measures to be taken to improve the level of performance.

31.5 The FM Provider shall comply with the Rectification Plan agreed with Project Co.

31.6 If the Board gives notice to Project Co under clause 29.5 of the Project Agreement increasing the level of monitoring of Project Co, then:

31.6.1 Project Co shall forward the notice promptly to the FM Provider;

31.6.2 the FM Provider shall supply Project Co with any objections to the Board's proposals in time for Project Co to forward them to the Board within the 2 Business Day period

permitted under clause 29.5.2 of the Project Agreement and (subject to such receipt) Project Co shall do so;

- 31.6.3 the FM Provider shall be (and Project Co shall permit it to be) involved in reaching any agreement with the Board concerning increased monitoring, pursuant to clause 29.5.3 of the Project Agreement;
 - 31.6.4 in default of such agreement, the FM Provider may in accordance with Clause 7 and clause 29.5.3 of the Project Agreement seek to challenge any such increased monitoring; and
 - 31.6.5 the FM Provider shall implement any increased monitoring measures agreed or determined to be required pursuant to clause 29.5.3 of the Project Agreement.
- 31.7 If the Board gives notice to Project Co under clause 29.5 of the Project Agreement increasing the level of monitoring of Project Co then:
- 31.7.1 the FM Provider shall bear its own costs in relation to such increased level of monitoring;
 - 31.7.2 the FM Provider shall indemnify Project Co against all reasonable costs and expenses (if any) incurred by it in relation to such increased level of monitoring, including an appropriate sum in respect of general staff costs and overheads; and
 - 31.7.3 the FM Provider shall indemnify Project Co against Project Co's liability to indemnify the Board under clause 29.5.4 of the Project Agreement.
- 31.8 Where the Warning Notice as a result of which increased monitoring is implemented (as referred to in Clause 31.6) was issued by the Board as a result of any material breach by Project Co of its obligations under the Project Agreement, but which was not in turn, caused by any breach by the FM Provider of the FM Provider's obligations under this Agreement then Project Co shall indemnify the FM Provider against all reasonable costs and expenses (if any) incurred by it in relation to such increased level of monitoring.
- 31.9 The FM Provider acknowledges the rights exercisable by the Board pursuant to clauses 29.6 to 29.12 inclusive of the Project Agreement, and:
- 31.9.1 the FM Provider shall, on Project Co's behalf, take such steps as the Board requires by written notice to Project Co under clause 29.7.1 of the Project Agreement, save only to the extent that the taking of those steps is necessarily personal to Project Co and provided that Project Co has supplied a copy of the notice to the FM Provider;

- 31.9.2 the FM Provider shall be responsible for confirming to the Board, on behalf of Project Co, within the time permitted by clause 29.8.1 of the Project Agreement, its willingness to take any steps required of Project Co by written notice from the Board pursuant to clause 29.7.1 of the Project Agreement, save only to the extent that the taking of those steps is necessarily personal to Project Co and provided that Project Co has promptly provided a copy of the Board's notice to the FM Provider;
 - 31.9.3 the FM Provider shall permit and accommodate any steps taken by the Board to ensure performance of the Services, pursuant to clause 29.7.2 or clause 29.8 of the Project Agreement;
 - 31.9.4 the FM Provider shall permit and accommodate any partial or total suspension, under clause 29.9 of the Project Agreement, of Project Co's right and obligation to provide the Services, and the FM Provider's right and obligation to provide the Services shall to the like extent be suspended for the purposes of this Agreement; and
 - 31.9.5 where Project Co's right and obligation to provide the Services has been suspended, partially or totally, under clause 29.9 of the Project Agreement, the FM Provider shall with all possible speed take steps to satisfy the Board as required under clause 29.9 of the Project Agreement in order that such suspension shall end.
- 31.10 Where the FM Provider is required to comply with Clause 31.9 as a result of the taking by the Board of steps (or the Board requiring Project Co to take steps) in accordance with clause 29 of the Project Agreement, in each case as a result, in turn, of the circumstances referred to in clause 29.6.3 of the Project Agreement, then Project Co shall indemnify the FM Provider (on the basis that such indemnification is a Board Derived Benefit, and subject to Clause 6) at all times from and against all additional direct and 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 the FM Provider's obligations under this Agreement, but only to the extent that Project Co is itself entitled to be indemnified in respect of the same under clause 29.10 of the Project Agreement.
- 31.11 Where:
- 31.11.1 the FM Provider is required to comply with Clause 31.9 as a result of the taking by the Board of steps (or the Board requiring Project Co to take steps) in accordance with clause 29 of the Project Agreement; and

31.11.2 it is agreed or determined for the purposes of clause 29.11 of the Project Agreement that the Board was not reasonable in taking such steps (or requiring Project Co to take such steps), as referred to in clause 29 of the Project Agreement, then

Project Co shall indemnify the FM Provider (on the basis that such indemnification is a Board Derived Benefit, and subject to Clause 6) at all times from and against any costs, losses, expenses or damages (over and above those that would otherwise have been incurred in the proper performance of the FM Provider's obligations under this Agreement) that are directly and reasonably incurred by the FM Provider in complying with those requirements of the Board as are agreed or determined not to be reasonable.

31.12 The FM Provider may, in accordance with Clause 7, seek a determination for the purposes of the Project Agreement that the Board was not reasonable in taking steps (or requiring Project Co to take steps), as referred to in clause 29 of the Project Agreement. However, to avoid doubt, the FM Provider acknowledges that it has no right to require such a determination before complying with Clause 31.9 (and similarly Project Co has no right under the Project Agreement before complying with its obligations under clause 29 thereof); only subsequently may the FM Provider seek such a determination.

31.13 Subject to Clauses 31.10 and 31.11, where the Board takes any steps (or requires Project Co to take any steps) in accordance with clause 29.7 of the Project Agreement:

31.13.1 where as a result the FM Provider is required to comply with Clause 31.9, all costs incurred by the FM Provider in so doing shall be borne by the FM Provider;

31.13.2 the FM Provider shall indemnify Project Co on demand against any costs incurred by Project Co in taking such steps (or in relation to the Board taking such steps);

31.13.3 the FM Provider shall indemnify Project Co against Project Co's liability to reimburse the Board under clause 29.12.2 of the Project Agreement.

31.14 Without prejudice to Clauses 31.2 and 31.12, if at any time the FM Provider is, in the reasonable opinion of Project Co in material or persistent breach of its obligation in relation to the provision of the Services, Project Co may, after notice to the FM Provider, increase the level of monitoring of the Services until such time as the FM Provider shall have demonstrated to the reasonable satisfaction of Project Co's Representative that it is performing and will continue to perform its obligation under this Agreement. The notice to the FM Provider shall specify the additional measures to be taken by Project Co in monitoring the Services as a result of the circumstances which gave rise to such a warning notice being sent. The FM Provider shall pay Project Co

within five Business Days of demand all costs incurred by Project Co as a result of such increased level of monitoring.

32. SITE SECURITY AND PERSONNEL ISSUES

Access

- 32.1 The FM Provider acknowledges the right of the Board to refuse admittance to, or order the removal from, the Facilities of any person employed by (or acting on behalf of) the FM Provider or any of its sub-contractors pursuant to clause 32.1 of the Project Agreement. The FM Provider shall comply and shall procure that its subcontractors comply with any such refusal, and accepts that it shall not thereby be relieved of any of its obligations under this Agreement.
- 32.2 Project Co shall provide the FM Provider with a copy of any written notice from the Board confirming a refusal of admittance, or ordering the removal of a person, in accordance with Clause 32.2 of the Project Agreement.
- 32.3 If and when Project Co receives a direction from the Board under Clause 32.3 of the Project Agreement, the FM Provider shall not later than twelve (12) Business Days of such notification to Project Co by the Board provide to Project Co and (if Project Co so requests) directly to the Board, a list of the names and addresses of all persons the FM Provider expects may require admission in connection with this Agreement, to any premises occupied by the Board and shall give such other particulars as the Board may require under Clause 32.3 of the Project Agreement.
- 32.4 The FM Provider acknowledges that the decision of the Board as to whether any person is to be refused admission shall be final and conclusive.

Board Policies

- 32.5 The FM Provider shall, and shall procure that all of its subcontractors shall, comply at all times with the Board Policies.
- 32.6 Project Co shall notify the FM Provider of any proposed change to the Board Policies as soon as practicable after receiving such information from the Board in accordance with Clause 32.6 of the Project Agreement. Project Co shall involve the FM Provider in any consultation that takes place with the Board pursuant to Clause 32.6 of the Project Agreement and Project Co undertakes to raise any issues that the FM Provider has in a consultation with the Board pursuant to Clause 32.6 of the Project Agreement. Subject to Clause 32.7, any such change shall take effect as a Variation in accordance with Clause 40.

- 32.7 The FM Provider acknowledges that the Board may provide notification in terms of Clause 32.7 of the Project Agreement that Project Co shall not be obliged to comply with any change to any Board Policy in which case such change shall not take effect as a Variation in accordance with Clause 40 and, for the avoidance of doubt, the FM Provider shall not be obliged to comply with any such change.

Resources and training

- 32.8 The FM Provider shall procure that:

32.8.1 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

32.8.2 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.

- 32.9 Not Used

Convictions and disciplinary action

- 32.10 The FM Provider (to the extent permitted by Law and at its own cost) shall procure that all potential staff or persons performing any of the Services 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:

32.10.1 are questioned concerning their Convictions; and

32.10.2 are required to apply for an Enhanced Disclosure Scotland Certificate which shall be countersigned by the FM Provider and Project Co. The FM Provider acknowledges that it must be registered with Disclosure Scotland as the relevant person; and

32.10.3 in all other cases are required to apply for a Standard Disclosure Scotland Certificate which shall be countersigned by the FM Provider and Project Co. The FM Provider acknowledges that it must be registered with Disclosure Scotland as the relevant person.

- 32.11 The FM Provider shall procure that no person who discloses any Convictions, or who is found to have any Convictions following receipt by the FM Provider of the Enhanced Disclosure Scotland Certificate or the Standard Disclosure Scotland Certificate as the case may be, is employed without the Board and Project Co's prior written consent (such consent not to be unreasonably withheld or delayed). The FM Provider acknowledges that the Board's decision in terms of Clause 32.11 of the Project Agreement will be final and conclusive.
- 32.12 The FM Provider shall procure that Project Co and, on Project Co's behalf, the Board (pursuant to Clause 32.12 of the Project Agreement) are kept advised at all times of any person employed or engaged by the FM Provider in the provision of any of the Services who, subsequent to his/her commencement of such employment or engagement as a member of staff, receives a Conviction of which the FM Provider becomes aware or whose previous Convictions become known to the FM Provider.
- 32.13 The FM Provider shall take (or procure the taking of) such disciplinary action as Project Co is required to procure, pursuant to Clause 32.13 of the Project Agreement (or as Project Co may otherwise reasonably require), in relation to any employee of the FM Provider or the FM Provider's subcontractors. The FM Provider shall advise Project Co and the Board in writing of the outcome of such proceedings.
- 32.14 The FM Provider shall set up and maintain personnel policies and procedures in accordance with the requirements of Clause 32.14 of the Project Agreement, and shall procure that its subcontractors do the same covering all relevant matters (including discipline, grievance, equal opportunities and health and safety). The FM Provider 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 Project Co and the Board, on Project Co's behalf.

Management

- 32.15 The FM Provider shall consult with Project Co and the Board, on Project Co's behalf, in relation to the selection procedure for the FM Provider's Hospital Manager and such person shall not be appointed (or replaced) without the prior written consent of Project Co and the Board (such consent not to be unreasonably withheld or delayed). The FM Provider acknowledges that the Board's decision in terms of Clause 32.15 of the Project Agreement will be final and conclusive.
- 32.16 The FM Provider shall, upon request, provide (and procure that its subcontractors provide) Project Co and the Board details of their respective management organisations.

Lists and Records

32.17 The FM Provider shall procure that Project Co and the Board's Representative shall at all reasonable times have access to all material details in respect of all employees of the FM Provider or its subcontractors who are 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:

32.17.1 details of qualifications; and

32.17.2 details of training undertaken by the employee.

Health Requirements

32.18 The FM Provider shall procure that all potential employees or persons who may otherwise perform any of the Services (other than any transferring employees from the Board or employees of sub-contractors to the FM Provider) 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 the FM Provider is not required to procure compliance with an obligation which contravenes the Disability Discrimination Act 1995) and the FM Provider 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 Project Co or the Board as required to ensure that the Board is able to comply with relevant legal obligations in respect of the health of Board staff, patients or visitors to Board premises.

32.19 To the extent permitted by Law records of all screenings, examinations or treatments referred to in this Clause 32 shall be held by the FM Provider on behalf of and as agent for Project Co and the Board and produced (subject to requirements under the Law) for inspection upon request by Project Co or the Board's Representative provided that no such inspection shall take place unless each Staff member has given his or her written consent to such inspection.

32.20 The FM Provider shall (to the extent permitted by Law) procure that Project Co and, on Project Co's behalf, the Board shall be informed upon reasonable request by the Board or Project Co of the outcome of each and every medical screening examination or treatment referred to in Clause 32.18 with reference to the purpose of the screening, examination or treatment concerned and shall receive all such other information referred to in Clause 32.18 subject to requirements under the Law.

- 32.21 The FM Provider acknowledges that Project Co or 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 or Project Co shall not relieve FM Provider 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 The FM Provider shall ensure that the goods, equipment, consumables and materials used by it or by any of its subcontractors in connection with the provision of any of the Services (each as a distinct and separate obligation) are:
- 33.2.1 maintained in a safe, serviceable and clean condition in accordance with Good Industry Practice;
 - 33.2.2 of the type specified in the Service Level Specifications and/or the Method Statements (where appropriate); and
 - 33.2.3 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 Project Co and/or the Board's Representative, supply to the requesting party evidence to demonstrate its compliance with this Clause 33.2.

- 33.3 The FM Provider 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 The FM Provider 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):
- 33.4.1 material damage to the Facilities;

33.4.2 dust, noise or vibration constituting a nuisance to the owners and/or occupiers of any property adjoining or near to the Facilities; or

33.4.3 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, the FM Provider 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 (notified to the FM Provider by Project Co) and unless the FM Provider has complied with all relevant Law.

33.6 Without prejudice to the generality of its obligations, the FM Provider shall:

33.6.1 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

33.6.2 use all practicable and reasonable means to:

- (a) prevent or counteract the unlawful emission of any hazardous substance to the satisfaction of the Board's Representative for the purposes of Clause 33.6.2.1 of the Project Agreement;
- (b) avoid the unlawful discharge into any conducting media serving the Facilities of any hazardous substance;
- (c) prevent the unlawful generation, accumulation or migration of any hazardous substance at or from the Facilities; and
- (d) 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 the FM Provider pursuant to this Agreement.

34. ENERGY

34.1 Responsibility for Supply of Energy

The FM Provider shall with effect from the Payment Commencement Date:-

- 34.1.1 be responsible as principal in any contract for the agreement of the terms and conditions of supply of gas and electricity; and
- 34.1.2 be liable for and subject to Clause 34.3 pay for all consumption of gas and electricity after receipt of an invoice or demand from the relevant supplier.

34.2 Measurement of Annual Targets

- 34.2.1 During the Base Year Period the FM Provider shall collect the data required to determine the total consumption in respect of the Facilities for both gas and electricity during the Base Year Period.
- 34.2.2 Following expiry of the Base Year Period the FM Provider shall determine the total consumption of gas and electricity by volume during the Base Year Period and shall calculate its estimate of the Annual Gas Target and the Annual Electricity Target (together “the Annual Targets”). Project Co and the Board shall be entitled to review in accordance with Clause 34.2.3 below (and in accordance with the terms of Part 3 of Part 18 of the Schedule to the Project Agreement) all relevant records and documents of the FM Provider or any sub-contractor of the FM Provider used for the purpose of establishing such estimate.
- 34.2.3 The FM Provider shall as soon as practicable following the expiry of the Base Year Period provide Project Co with its estimate of the Annual Targets together with copies of all supporting documents. The FM Provider shall provide Project Co and the Board with details of the methods employed for the collection of data and calculations used to determine its estimate of the Annual Targets.
- 34.2.4 The Annual Targets shall be agreed or determined in accordance with paragraph 1.2.4 of Part 3 of Part 18 of the Schedule to the Project Agreement and Project Co will advise the FM Provider of the Annual Targets within two Business Days of agreement or determination being reached in accordance with the Project Agreement. Project Co shall involve the FM Provider in discussions with the Board in relation to calculation of the Annual Targets.

34.3 **Reimbursement of Utility Costs**

34.3.1 In respect of the period from the Payment Commencement Date to the end of the Contract Month in which agreement (or determination under the Dispute Resolution Procedure pursuant to the Project Agreement) of the Annual Target is achieved, the full cost of gas and electricity consumed in each Contract Month at the Facilities shall be reimbursed by Project Co in full as a Board Derived Benefit in the next Monthly Payment immediately following such Contract Month.

34.3.2 In respect of each Contract Month immediately following the agreement (or its determination under the Dispute Resolution Procedure pursuant to the Project Agreement) of the Annual Targets, Project Co shall pay to the FM Provider as a Board Derived Benefit by way of adjustment to the Monthly Payment the amount calculated in accordance with paragraph 1.3.2 of Part 18 of the Schedule to the Project Agreement.

34.4 At the end of each Contract Year following agreement or determination of the Annual Targets the actual consumption of gas for that Contract Year ("the Annual Gas Consumed") shall be compared to the Annual Gas Target and the actual consumption of electricity ("the Annual Electricity Consumed") for that Contract Year shall be compared to the Annual Electricity Target. Adjustments to the Monthly Payment will be made as a Board Derived Benefit in accordance with paragraph 1.4 of Part 18 of the Schedule to the Project Agreement. For the purposes of this Clause 34, "Contract Year" shall bear the meaning ascribed to that term in the Project Agreement.

34.5 **Establishment of Utility Tariff**

In respect of gas and electricity the relevant Utility Tariff for each Contract Year shall be agreed by the FM Provider with a relevant supplier no later than one month prior to the commencement of the relevant Contract Year in accordance with the following provisions of this Clause 34.5:-

34.5.1 The FM Provider shall be responsible, at its own cost, for entering into such agreements as are necessary to purchase gas and electricity ("the Purchase Agreements") provided that:-

- (a) the Purchase Agreements shall not be of more than 36 months in duration unless the consent of the Board and Project Co is obtained in writing for a longer duration; and

- (b) The FM Provider in entering into the Purchase Agreements shall do so under contracts entered into on an arms length basis and the FM Provider shall endeavour to obtain best value to Project Co and the Board; and
- (c) the FM Provider acknowledges that in terms of the Project Agreement, where Project Co considers that it will represent best value to the Board, the Board shall use its reasonable endeavours to assist the entering into of Purchase Agreements by Project Co through the Board's purchasing arrangements.

34.5.2 Prior to entering into a Purchase Agreement the FM Provider shall carry out a market test of the price of gas and electricity.

34.5.3 The FM Provider shall carry out such market test:-

- (a) at its own cost;
- (b) in a manner which ensures that the market test is completed at least one Contract Month prior to the renewal date of any Purchasing Agreement;
- (c) on an open book basis; and
- (d) with a view to entering into Purchasing Agreements following the market test which represent best value to Project Co and the Board.

34.5.4 Following the market test the FM Provider shall enter into those Purchasing Agreements which it, in its reasonable opinion and as agreed with Project Co, considers represents best value to the Board. Project Co and the Board shall have the right to audit any prices obtained by the FM Provider as part of the market test and the Purchasing Agreements to be entered into by the FM Provider following the market test.

34.6 Changes to Annual Targets

34.6.1 The FM Provider acknowledges that where the number of Functional Units is increased or decreased pursuant to a Board Variation Enquiry, the Board Variation Enquiry shall include any proposal for adjusting the Annual Targets applicable for future Contract Years (if relevant).

34.6.2 Where the Clinical Use of the Facilities has a demonstrably material impact on total consumption of gas and electricity in any Contract Year then the FM Provider acknowledges that the Parties shall discuss and seek to agree any appropriate

adjustment to the Annual Targets for future Contract Years (and that any such adjustment shall be made in accordance with paragraph 1.6 of Part 3 of Part 18 of the Schedule to the Project Agreement).

34.7 Benchmarking

- 34.7.1 During the Benchmarking Review Period the FM Provider shall collect the data required to determine the total consumption of gas and electricity during each Contract Year during the Benchmarking Review Period.
- 34.7.2 Following expiry of the Benchmarking Review Period the FM Provider shall determine the total consumption of gas and electricity by volume during the Benchmarking Review Period and shall calculate its estimate of the revised Annual Gas Target or Annual Electricity Target (as the case may be).
- 34.7.3 The FM Provider shall, as soon as practicable following the expiry of the Benchmarking Review Period, provide Project Co with its estimate of the revised Annual Targets, together with copies of all supporting documents. The FM Provider shall provide Project Co with details of the methods employed for the collection of data and calculations used to determine its estimate of the revised Annual Targets.
- 34.7.4 The FM Provider acknowledges that Project Co and the Board shall agree the revised Annual Targets within 30 Business Days of Project Co providing the Board with its estimate and supporting documentation. In the event that agreement is not reached within 30 Business Days the matter shall be referred to the Dispute Resolution Procedure under the Project Agreement. Project Co shall involve the FM Provider in discussions with the Board in relation to calculation of the revised Annual Targets.

34.8 Other Utilities

The FM Provider acknowledges that the Board shall meet the full cost of all additional utilities services other than gas and electricity from the Payment Commencement Date. In the event that the FM Provider is invoiced in respect of any such utilities services and makes payment to the utilities provider, Project Co shall reimburse the FM Provider in respect thereof on receipt of the same from the Board in accordance with Part 3 of Part 18 of the Schedule to the Project Agreement as a Board Derived Benefit.

35. PAYMENT

35.1 The FM Provider shall not be entitled to receive any Monthly Payments until the Payment Commencement Date. Subject to the provisions of this Agreement, Project Co shall pay the FM Provider the Monthly Payments in respect of each Contract Month following the Payment Commencement Date in accordance with the provisions of this Clause 35.

35.2 No payment shall be made unless the FM Provider has supplied a valid VAT invoice in the agreed form (and as modified from time to time by written agreement between the Parties hereto).

35.3 The FM Provider shall submit invoices and calculation schedules to Project Co showing the information required pursuant to Clauses 35.2.1.1 to 35.2.1.11 inclusive of the Project Agreement as follows:

35.3.1 an invoice for the first Contract Month so as to enable Project Co to submit the same to the Board in accordance with Clause 35.2.1 of the Project Agreement;

35.3.2 a draft invoice and calculation schedule for each subsequent Contract Month shall be submitted no earlier than the tenth day of the Contract Month;

35.3.3 a final invoice and calculation schedule shall be submitted no earlier than the twelfth day of the relevant Contract Month; and

35.3.4 in respect of the first Contract Month after the Payment Commencement Date, the FM Provider shall invoice Project Co no earlier than the twelfth day of the Contract Month (in accordance with the terms of this Clause 35.3) on the basis that no Deductions will apply to this first Monthly Payment.

35.3.5 in respect of the final Contract Month during the Operational Term, Project Co shall be entitled to invoice the FM Provider for the Deductions in such period on the day which is one month and six days after expiry of the Operational Term. The FM Provider shall pay the amounts included in such invoice on or before the twentieth day following receipt by the FM Provider of the invoice from Project Co.

It shall be a breach of this Agreement for the FM Provider to fail to comply with this Clause 35.3.

35.4 Project Co shall be entitled to make adjustments to any invoices and/or calculation schedules prepared by the FM Provider under Clause 35.3 which are necessary in order to comply with the

Project Agreement or to add reference to any entitlement of Project Co to a payment which is not already referred to.

- 35.5 Subject to Clause 35.6 and provided that it has received a valid VAT invoice in respect of the same in accordance with Clause 35.3, Project Co shall pay to the FM Provider (as a Board Derived Benefit, and subject to Clause 6) the Monthly Payment. Such payment shall become due and payable by the later to occur of (i) the eighth day of the Contract Month following the issue of the invoice pursuant to Clause 35.3 and (ii) the date falling twenty six (26) days after receipt by Project Co of the invoice issued pursuant to Clause 35.3 (the "Date for Payment"). The final date for payment shall be the date falling seven days after the Date for Payment.
- 35.6 On or before the Date for Payment, Project Co shall give written notice to the FM Provider of any Disputed Amount in an invoice submitted pursuant to Clause 35.3 which notice shall also specify (a) the grounds for withholding payment of such Disputed Amount, or if there is more than one ground each ground and the amount attributable to it and (b) the amount (if any) of the Monthly Payment which Project Co proposes to pay and the basis for calculation of that payment. Project Co shall be entitled, on the grounds that the FM Provider failed properly to take into account such amounts when submitting the relevant invoice pursuant to Clause 35.3 to withhold the Disputed Amount pending agreement between the Parties of the amount payable to the FM Provider or the determination of such amount pursuant to the Dispute Resolution Procedure.
- 35.6.1 For the avoidance of doubt, Project Co may not withhold a Disputed Amount or refuse to pay any part of an invoice unless it has properly served a notice on the FM Provider in accordance with this Clause 35.6.
- 35.6.2 If the FM Provider disagrees that Project Co is entitled to withhold a Disputed Amount the Parties shall negotiate, in good faith, in an attempt to resolve such disagreement but if within 10 Business Days of the date of the relevant invoice the Parties have not resolved the disagreement either Party may refer the disagreement for resolution under the Dispute Resolution Procedure.
- 35.6.3 Where any dispute arises between Project Co and the Board in relation to any invoice submitted by Project Co to the Board under clause 35 of the Project Agreement, the FM Provider shall be entitled to make representations to Project Co in relation to Project Co's negotiations with the Board in relation to such invoice. Where such dispute has not been resolved within the 10 Business Day period set out in clause 35.4 of the Project Agreement, the FM Provider may request Project Co to refer such matter to the Dispute Resolution Procedure under the Project Agreement. Project Co shall

(unless such request is frivolous, vexatious or unreasonable) so refer such matter to the Dispute Resolution Procedure and shall take account of representations made by the FM Provider in its conduct of such dispute. The decision of the adjudicator under the Dispute Resolution Procedure in the Project Agreement shall be binding on the Parties under this Agreement. The FM Provider shall be responsible for all costs and expenses incurred by Project Co in relation to such referral. Nothing in this Clause 35.6 shall preclude Project Co from referring any dispute under clause 35.4 of the Project Agreement to the Dispute Resolution Procedure under the Project Agreement in the absence of such request from the FM Provider.

- 35.7 Each Party shall be entitled, without prejudice to any other right or remedy, to receive interest on any payment not duly made pursuant to this Agreement by the final date prescribed for its payment; provided that if a non-payment of a Monthly Payment was due to reasons for which Project Co was not responsible, the FM Provider shall only be entitled to receive interest as a Board Derived Benefit, and subject to Clause 6. Such interest shall be calculated from day to day at a rate per annum equal to the FM Default Interest Rate, from the day after the final date for payment of the relevant sum up to and including the date of payment.
- 35.8 The Parties shall comply with the provisions of Appendix 5.
- 35.9 The FM Provider shall prepare and submit to Project Co an invoice for all Small Works it carries out which have been requested by the Board pursuant to Part 4 of Part 22 of the Schedule and which have been carried out pursuant to Clause 40.1.2. Such invoice shall be calculated using the rates agreed with Project Co in terms of Clause 40.18 applicable in that Contract Year. Project Co shall submit the same to the Board in accordance with the Project Agreement. Project Co shall pay to the FM Provider (as a Board Derived Benefit, and subject to Clause 6) the amounts invoiced for by the FM Provider under this clause within 25 Business Days of the date of invoice therefor.
- 35.9A The FM Provider shall prepare and submit to Project Co an invoice in respect of any other sums payable by Project Co arising under this Agreement (whether pursuant to an indemnity or otherwise). The FM Provider shall issue any applicable invoice to Project Co no earlier than the date when the amount has been agreed with Project Co or determined under the Dispute Resolution Procedure. Project Co shall pay the amounts invoiced for by the FM Provider under this clause within 20 Business Days of the date of invoice therefor.

Manner of payment

- 35.10 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.

35A. LIABILITY CAPS AND EXCLUSIONS

- 35A.1 Other than on termination of this Agreement (in which case Clause 35A.3 shall apply) the maximum aggregate liability of the FM Provider to Project Co howsoever arising (whether in delict or contract or under any Law or otherwise) out of or in connection with the performance or failure to perform of the FM Provider's obligations under this Agreement shall not in any Contract Year exceed an amount equal to the Annual Services Fee for that Contract Year. For the avoidance of doubt this Clause shall not apply to or operate so as to limit the FM Provider's liability under Clause 41.1, Clause 41.2, Clause 36.10, Clause 36.11 or paragraph 6.6.1 of Appendix 4.

- 35A.2 For the purposes of Clause 35A, in calculating the maximum aggregate liability of the FM Provider:

35A.2.1 the liability arising from any one act or omission or series of acts or omissions giving rise to a claim shall in all circumstances be allocated only to the Contract Year in which the act or omission or series of acts or omissions first occurred; and

35A.2.2 if this Agreement is terminated, then any losses incurred by Project Co which arise or accrue on or after termination (which are properly payable by the FM Provider in accordance with the terms of this Agreement) shall, notwithstanding that the act or omission or series of acts or omissions giving rise to a liability incurred prior to termination, be counted only towards the maximum aggregate liability under Clause 35A.3.

- 35A.3 On termination of this Agreement by Project Co, the maximum aggregate liability of the FM Provider, including any accrued or existing liabilities shall not exceed the amount calculated by multiplying the Annual Services Fee for the Contract Year in which the Termination Date falls by two.

- 35A.4 If, and to the extent that, insurance proceeds are paid to the FM Provider (or would have been so paid but for any act or omission of the FM Provider), in respect of:

35A.4.1 any deductions which caused the FM Provider to suffer a liability which counts towards the FM Provider's maximum liability under Clause 35A; and/or

35A.4.2 any liability of the FM Provider which counts towards the FM Provider's maximum liability under Clause 35A

then the aggregate value of such insurance proceeds shall be deducted from the total of the liabilities which the FM Provider is treated as having incurred for the purposes of calculating the FM Provider's maximum liability under Clause 35A.1 or 35A.3, as the case may be.

35A.5 Save to the extent included in:

35A.5.1 any deduction from or adjustment to or variation of any element of the Monthly Payment expressly permitted or required by this Agreement; or

35A.5.2 any payment to be made by the FM Provider to Project Co pursuant to Clause 48; or

35A.5.3 any payment which one Party (whether by indemnity or otherwise) is by the express terms of this Agreement made liable to pay or make good

neither Party shall be liable to the other for any loss of profit, loss of revenue, loss of use, loss of contract, loss of goodwill or any other economic loss.

35A.6 Nothing in this Agreement shall exclude or limit the liability of one Party to the other for death or personal injury resulting from the negligence of that Party or any of its officers, employees or agents.

35B. PAYMENT ADJUSTMENT AND SET-OFF

35B.1 Neither Party shall be entitled to make any set-off, withholding or abatement against or from or to any payment due to the other Party under this Agreement unless:

35B.1.1 the amount in question has been agreed in writing by the other Party; or

35B.1.2 the relevant Party shall first have obtained an award of an Adjudicator (in accordance with Clause 56) or a judgement or order of a court of competent jurisdiction, in each case requiring payment of the amount in question by the other Party; or

35B.1.3 the set-off, withholding or abatement is permitted by any other express provision of this Agreement, including Clause 35.6 and Clause 35B.2.

35B.2 Project Co may set off or withhold any sum due from the FM Provider to Project Co under this Agreement against or from any sum due from Project Co to the FM Provider under or pursuant to this Agreement.

- 35B.3 Project Co must give the FM Provider written notice of the making of any set-off or withholding against or from any sum due from Project Co to the FM Provider under or pursuant to this Agreement, not later than 3 Business Days before the final date for payment of the sum due.

36. **INSURANCE**

- 36.1 The FM Provider shall with effect from the Actual Completion Date effect and maintain the following policies of insurance:

36.1.1 employer's liability insurance with the minimum indemnity limit required by Law to cover personal injury to or illness of or the death of any person under a contract of service or apprenticeship with the FM Provider, and arising out of and in the course of such person's employment in connection with the performance of the Services. Such insurance shall comply with Law; and

36.1.2 any other insurance which the FM Provider may be required by Law to provide at any time during the Project Term (including, without limitation, motor vehicle liability insurance).

The FM Provider acknowledges and accepts that the limits of indemnity set out above are Project Co's minimum requirements only. The FM Provider shall be solely responsible for determining the levels of indemnity required to protect its interests.

- 36.2 Each policy referred to in Clause 36.1 shall include a provision to the effect that the insurer shall waive all rights of subrogation against Project Co and its subcontractors, servants, agents and employees.

- 36.3 The obligation contained in Clause 36.1 to maintain insurance shall continue throughout the duration of the Project Term (but the FM Provider shall not be obliged to maintain any such insurance to the extent and during any period of time for which it is not generally available on the worldwide insurance market at reasonable commercial rates).

- 36.4 The insurances referred to in Clause 36.1 shall be effected and maintained with a well established insurance office or underwriter of repute, and on terms and conditions to be approved by Project Co (such approval not to be unreasonably withheld). Upon the request of Project Co (and provided that such disclosure shall not in whole or in part jeopardise or negate or nullify any such insurance) the FM Provider shall produce for inspection a letter from the FM Provider's insurers (or insurance broker) confirming the FM Provider's insurance and their receipt of payment of the premium for the current period of insurance, together with the cover note or the policy of insurance (as appropriate) and such evidence as Project Co may reasonably require that

the insurers have not repudiated or withdrawn cover. The FM Provider must promptly notify Project Co of any claim which is made under the FM Provider's insurance policies which relate to the Services.

Project Co Insurances

- 36.5 Subject to the provisions of Clause 36 of the Project Agreement, Project Co hereby agrees to effect and maintain all insurances required by Part 2 of Part 21 of the Schedule to the Project Agreement. Upon the request of the FM Provider (and provided that such disclosure shall not in whole or in part jeopardise or negate or nullify any such insurance) Project Co shall produce for inspection a letter from Project Co's insurers confirming Project Co's insurance and their receipt of payment of the premium for the current period of insurance, together with the cover note or the policy of insurance (as appropriate) and such evidence as the FM Provider may reasonably require that the insurers have not repudiated or withdrawn cover.
- 36.6 If Project Co fails to take out and maintain the insurances referred to in Clause 36.5, then where an event occurs which would have been insured if Project Co had not failed as aforesaid, and as a result of that event the FM Provider incurs any liability to Project Co under this Agreement, the FM Provider's liability shall be no greater than it would have been if Project Co had not failed to take out and maintain the relevant insurance.
- 36.7 The FM Provider shall (at all times until the expiry of the relevant insurances) disclose to Project Co in a timely manner all information which is material in relation to those insurances maintained by Project Co as referred to in Clause 36.5 on which the FM Provider is named as an insured.
- 36.8 The FM Provider undertakes to comply (and to procure compliance by its subcontractors) with the terms and conditions of all insurance policies effected by Project Co in connection with the Project and/or the Services and further undertakes that it will not by any act or omission cause any such insurance policies to become void or voidable or suspended, impaired or defeated in whole or in part.
- 36.9 Subject to the rights of the Senior Funders under the Funders' Direct Agreement and the Funding Agreements, Project Co agrees to pay to the FM Provider any amounts which Project Co has a legally enforceable right to recover under the insurances referred to in Clause 36.5 insofar as they relate to losses suffered by the FM Provider in consequence of the insured event to which such losses relate.
- 36.10 Where the Facilities and/or the Equipment suffer loss or damage then:

- 36.10.1 (save for any liability arising by way of indemnity pursuant to Clause 41 and subject to the terms of Clause 36.10.3) the FM Provider shall not be responsible for reinstatement of the loss or damage to the Facilities and/or the Equipment;
- 36.10.2 where, as a result of such loss or damage, Deductions are made from the Service Payment received by Project Co under the Project Agreement then the FM Provider acknowledges and accepts that deductions shall also be made from payments by Project Co to the FM Provider under this Agreement;
- 36.10.3 in circumstances other than where Clause 36.20 (Reinstatement Plan) of the Project Agreement applies, the FM Provider shall take action to repair the damage that has occurred to the Facilities and/or the Equipment and Project Co shall make payment to the FM Provider of all relevant insurance proceeds in accordance with the terms of this Agreement. For the avoidance of doubt, Project Co will be liable for payment of all deductibles that arise from claim under insurance policies in this regard, in accordance with the provisions of Clause 36.12; and
- 36.10.4 Clause 36.9 shall apply where and to the extent that insurance proceeds are recovered by Project Co in respect of losses suffered by the FM Provider in consequence of such loss and damage to the Facilities and/or the Equipment (including losses by way of deductions from payment as referred to in Clause 36.10.2).
- 36.11 The FM Provider shall pay to Project Co, on demand, an amount equal to the amount by which the premium of the relevant insurance effected by Project Co as required by Part 2 of Part 21 of the Schedule to the Project Agreement has increased as a consequence of any claim being made under such insurances as a result of any act or omission of the FM Provider or those for whom the FM Provider is responsible. For the avoidance of doubt, the FM Provider shall be liable for and shall pay on demand any deductible which becomes payable as a result of Project Co or the FM Provider claiming under any of the insurances effected by Project Co as required by Part 2 of Part 21 of the Schedule to the Project Agreement as a result of any act or omission of the FM Provider or those for whom the FM Provider is responsible.
- 36.12 Project Co shall be liable for any deductible which becomes payable as a result of Project Co or the FM Provider claiming under any of the insurances effected by Project Co as required by Part 2 of the Part 21 of the Schedule to the Project Agreement as a result of any act or omission of Project Co.

37. **NOT USED**

38. **INFORMATION AND AUDIT ACCESS**

- 38.1 The FM Provider shall provide Project Co and/or the Board's Representative all information, documents, records and the like in the possession of, or available to, the FM Provider as may be reasonably requested by Project Co or the Board's Representative for any purpose in connection with this Agreement or the Project Agreement.
- 38.2 The FM Provider shall provide the Auditor General for Scotland with access to documents which are owned, held or otherwise within the control of the FM Provider and which Project Co is required, by Clause 38.2 of the Project Agreement, to exhibit.
- 38.3 The FM Provider shall provide and shall procure that its subcontractors shall provide such information as the Board may reasonably require from time to time pursuant to Clause 38.3 of the Project Agreement 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 Patient Rights and Responsibilities or any document replacing it and information reasonably required under any other mandatory NHS requirements for the provision of information relating to achievement of customer service targets.

39. **CHANGES IN LAW**

General

- 39.1 The FM Provider shall take all steps necessary to ensure that the Services and the FM Provider's other obligations under this Agreement continue to be performed in accordance with the terms of this Agreement (including, without limitation, Clause 4.4.2 (Compliance with applicable law)) following any Change in Law.
- 39.2 Where a Change in Law occurs, with which the FM Provider is obliged to comply in accordance with Clause 39.1, then upon the Board's Representative issuing a Variation Enquiry in respect of the same under the Project Agreement, the procedures of Clauses 40.2 to 40.11 (inclusive) shall apply, subject to the modifications set out in Clauses 39.2.1 to 39.2.5 below.
- 39.2.1 The FM Provider may give notice to Project Co objecting to the Variation Enquiry only on the ground that the implementation of the Variation proposed by the Board as described therein would not give effect to or comply with the relevant Change in Law.

39.2.2 The FM Provider will be obliged to obtain any Consent as may be required following any Change in Law.

39.2.3 Where the Change in Law is a Relevant Change in Law, the FM Provider shall (without prejudice to its general obligation to comply with the terms of this Agreement):

- (a) 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 Change in Law; and
- (b) 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.

39.2.4 Subject to Clause 39.2.3, where the Change in Law is a Relevant Change in Law, the FM Provider shall be entitled, in respect of the implementation of the resulting Variation initiated by the Board under the Project Agreement (on the basis of a Board Derived Benefit, and subject to Clause 6) to additional payment of such amounts as Project Co recovers from the Board in respect of that Variation, which are attributable to the valuation of that Variation under this Agreement (and for the avoidance of doubt excluding any sums which Project Co recovers from the Board in respect of that Variation which are attributable to entitlements of Project Co itself under the Project Agreement, or to the valuation of that Variation for the purposes of the Construction Contract). The FM Provider shall likewise be subject to a reduction in payment in respect of any such Variation equal to that part of any reduction in payment to which Project Co is subject, under the Project Agreement, in respect of implementing that Variation, which is attributable to the valuation of that Variation under this Agreement. The FM Provider acknowledges, specifically, the provisions of clauses 39.3, 39.6 and 39.7 of the Project Agreement and the arrangements thereunder whereby Project Co may receive only partial (or no) reimbursement from the Board for the costs of compliance with certain Relevant Changes in Law.

39.2.5

- (a) In respect of a Relevant Change of Law, the FM Provider shall be entitled to receive from Project Co (on the basis that it is a Board Derived Benefit and subject therefore to the provisions of Clause 6) such amounts as Project Co is entitled to recover under the Project Agreement from the Board in respect of the

implementation of the Relevant Change of Law which are attributable to the costs of the FM Provider in implementing the Relevant Change of Law.

- (b) Where the Change in Law is not a Relevant Change of Law, Project Co shall (as between it and the FM Provider) bear and be responsible for all Capital Expenditure required to implement that Change of Law. For the avoidance of doubt, with regard to a Change of Law which is not a Relevant Change of Law, the FM Provider will be liable for all expenditure which is not Capital Expenditure.
- (c) Where the FM Provider becomes aware of the occurrence of a Change of Law which will require the operation of this Clause 39.2, the FM Provider shall as soon as possible notify Project Co of this.

40. VARIATION PROCEDURE

Board Variations

40.1 The FM Provider shall be under a duty to implement and carry out:

- 40.1.1 all Variations to the Services which Project Co is obliged to implement pursuant to paragraph 1 of Part 1 of Part 22 of the Schedule to the Project Agreement; and
- 40.1.2 all Small Works which Project Co is obliged to carry out pursuant to Part 4 of Part 22 of the Schedule to the Project Agreement,

in each case on the terms set out in the relevant Variation Confirmation issued or deemed to issued by the Board pursuant to Part 22 of the Schedule to the Project Agreement (subject to the following provisions of this Clause 40). The FM Provider shall not be obliged to carry out any works comprised in Board Additional Works Items or Board Works Variations but shall be obliged to carry out and implement any variations to the Services resulting from or associated with the same.

- 40.2 Project Co shall promptly copy to the FM Provider any Variation Enquiry it receives from the Board's Representative.
- 40.3 Where Project Co reasonably so requires, the FM Provider shall before the date by which Project Co must respond to the Board pursuant to paragraph 3.1.1 of Part 1 of Part 22 of the Schedule to the Project Agreement provide Project Co with its good faith, preliminary, non-binding indication of the estimated cost of implementing a Variation and any other information reasonably requested by Project Co.

40.4 Not later than 5 Business Days before the date on which Project Co must respond to the Board pursuant to paragraph 3.2.1 of Part 1 of Part 22 of the Schedule to the Project Agreement, the FM Provider shall in relation to any Variation proposed by the Board either:

40.4.1 give notice to Project Co objecting to the proposed Variation, provided that the FM Provider may only so object on one of the grounds stated in paragraph 3.2.1.1 of Part 1 of Part 22 of the Schedule to the Project Agreement (and excluding the ground set out at paragraph 3.2.1.1.4 thereof); or

40.4.2 give notice to Project Co stating:

- (a) the steps which the FM Provider proposes to take and any other information necessary to implement the Variation giving such level of detail as is reasonable and appropriate in all the circumstances;
- (b) any cost, or saving in cost, which will be incurred or enjoyed by the FM Provider as a result of implementing the Variation, including the following particulars:
 - (i) any costs (by line item) incurred or to be incurred by the FM Provider under Clause 40.7;
 - (ii) any Capital Expenditure or other lump sum expenditure likely to be incurred by the FM Provider in the course of the implementation of the Variation;
 - (iii) the costs to the FM Provider of providing the Service to which the Variation relates for the period from and including the proposed date of implementation of the Variation to the Expiry Date, together with the FM Provider's computation of the Variation in its costs resulting from the Variation, taking into account the factors referred to at paragraph 6.3 of Part 1 of Part 22 of the Schedule to the Project Agreement;
 - (iv) if the Variation will result in any employees of the FM Provider becoming redundant, the costs of redundancy payments which will be required to be paid to each such employee under the Employment Rights Act 1996 and the terms and conditions of their employment;
- (c) any Consent which must be obtained or amended for the Variation to be implemented and the latest date by which the FM Provider must receive from

Project Co a copy of the Board's Representative's Variation Confirmation and any such Consent must be obtained or modified for the matters set out in (a) and (b) above to remain valid, such date being a reasonable period of time after service of the notice by the FM Provider under this Clause 40.4.2 to allow the Board's Representative the time for consideration required by paragraph 4.1.3 of Part 1 of Part 22 of the Schedule to the Project Agreement;

- (d) whether the FM Provider considers that as a consequence of the Variation in question, a Services Variation (which for the purpose of this Clause (d) shall include a change in the cost to the FM Provider of performing periodic or lifecycle maintenance) will be required to be instructed by the Board pursuant to the Project Agreement and, if so, stating the matters specified in this Clause 40.4.2 in respect of such Service Variation;
- (e) such amendments to the provisions of the Payment Mechanism and other associated provisions of the Project Agreement, as are necessary as a consequence of the Variation, the objective of such amendments being to ensure that (save for the obligation of the Board and Project Co respectively to make payments or altered payments in respect of the Variation or any other adverse consequences for the Board arising from the Variation itself), the Board and the Parties are in no better and no worse position in relation to the Project than they would have been in if such Variation had not been implemented; and
- (f) whether, in the view of the FM Provider, implementing the Variation would cause any incidents giving rise to Deductions under Part 18 of the Schedule to the Project Agreement, giving an estimate of the relief required to put the Board and the Parties in no worse position in relation to the Project than they would have been in if such Variation had not been implemented.

40.5 The additional or reduced payment to be made under this Agreement by Project Co to the FM Provider in respect of implementing a Variation instructed by the Board under the Project Agreement, or a Project Co Variation, shall be calculated (without prejudice to Clause 40.9 and 40.10 but subject to Clause 6):

- 40.5.1 by reference to the actual variation in costs which the FM Provider will incur in order to implement the Variation or Project Co Variation;
- 40.5.2 so that any margin charged by the FM Provider on its costs will be preserved but not increased; and

- 40.5.3 taking into account the factors referred to at paragraph 6.3 of Part 1 of Part 22 of the Schedule to the Project Agreement.
- 40.6 Where the FM Provider has objected, in accordance with Clause 40.4.1, to a Variation proposed by the Board, the FM Provider may invoke Clause 7 in order that the corresponding objection shall be raised with the Board under the Project Agreement. Where the objection is resolved in favour of the Board as referred to in paragraph 4.1.1 of Part 1 of Part 22 of the Schedule to the Project Agreement, the FM Provider shall forthwith give the notice referred to at Clause 40.4.2 and thereafter implement the relevant Variation upon and subject to the provisions of this Clause 40.
- 40.7 If it shall be necessary to obtain or amend any Consent in respect of any Variation proposed by the Board, or a Project Co Variation, then the FM Provider shall use all reasonable endeavours to obtain such Consent. Project Co shall (where its co-operation is required) use all reasonable endeavours to assist and co-operate in obtaining such Consent, and (where the co-operation and assistance of the Board is required) Project Co shall use all reasonable endeavours to obtain such co-operation and assistance. The provisions of Clause 16 shall apply in relation to Planning Permissions, save that the time taken to obtain such Consent shall be taken into account (without prejudice to Clause 40.9) for the purposes of determining any amounts payable to the FM Provider under this Clause 40.
- 40.8 Where a Variation Enquiry is withdrawn by the Board's Representative (including a deemed withdrawal due to delays in obtaining a Consent, as referred to in paragraph 5.2 of Part 1 of Part 22 of the Schedule to the Project Agreement) then that Variation Enquiry shall be deemed to be withdrawn for the purposes of this Agreement also. The FM Provider shall be entitled (as a Board Derived Benefit, and subject to Clause 6) to such of its out-of-pocket expenses reasonably incurred in connection with that Variation Enquiry as are recovered by Project Co from the Board pursuant to paragraph 7 of Part 1 of Part 22 of the Schedule to the Project Agreement.
- 40.9 Project Co shall involve the FM Provider in any discussion with the Board, pursuant to paragraphs 4.2 and/or 4.3 of Part 1 of Part 22 of the Schedule to the Project Agreement, concerning any Variation (or the terms thereof). The FM Provider may, subject to and in accordance with Clause 7, participate in any dispute under paragraphs 4.2 and/or 4.3 of Part 1 of Schedule 22 to the Project Agreement concerning any such Variation.
- 40.10 Where a Variation proposed by the Board is implemented, the FM Provider shall be entitled, in respect thereof (on the basis of a Board Derived Benefit, and subject to Clause 6) to additional payment of such amounts as Project Co recovers from the Board in respect of that Variation, which are attributable to the valuation of that Variation under this Agreement (and for the

avoidance of doubt excluding any sums which Project Co recovers from the Board in respect of that Variation which are attributable to entitlements of Project Co itself under the Project Agreement, or to the valuation of the Variation for the purposes of the Construction Contract). The FM Provider shall likewise be subject to a reduction in payment in respect of any Variation equal to that part of any reduction in payment to which Project Co is subject, under the Project Agreement, in respect of implementing that Variation, which is attributable to the valuation of that Variation under this Agreement.

- 40.11 For the purposes of Clause 40.9 and Clause 6, where Project Co provides funding for any Capital Expenditure or other lump sum costs incurred in connection with a Variation proposed by the Board, instead of receiving lump sum payment for the same from the Board (as contemplated by paragraph 2.1.2 of Part 1 of Part 22 of the Schedule to the Project Agreement), then Project Co shall be deemed to have recovered from the Board such lump sum (in respect of that Capital Expenditure or those costs) as is used as the basis for calculating Project Co's funding requirement for that Variation and the resulting adjustments (if any) to the Service Payment.

Deemed Board Variations

- 40.12 Where there is a change of use or occupancy of, or operational hours or activities (excluding cleaning) carried on within the whole or any part of the Facilities by the Board or any Board Party), the FM Provider or Project Co may notify the other Party in writing that it considers that a Service Variation has arisen or will arise by operation of the change. Any notice so served shall describe in as much detail as reasonably practicable the nature of the Service Variation which the Party serving the notice considers is likely to be required, pursuant to the Project Agreement, as a result of the change, and the date by which that Service Variation should be implemented. Project Co shall promptly forward any such notice received from the FM Provider to the Board pursuant to paragraph 9.1 of Part 1 of Part 22 of the Schedule to the Project Agreement, provided that the FM Provider has notified Project Co in time for Project Co to apply to the Board within the 3 month period referred to in that paragraph.
- 40.13 Project Co shall promptly copy to the FM Provider any notice received from the Board under paragraph 9.2 of Part 1 of Part 22 of the Schedule to the Project Agreement, to the effect that the Board considers a Service Variation has arisen. Within 10 Business Days of receiving a copy of such a notice, the FM Provider shall notify Project Co in writing of the FM Provider's response to the matters set out in the Board's notice.
- 40.14 In the event that Project Co serves a notice on the FM Provider pursuant to Clause 40.12, the FM Provider shall within ten (10) Business Days of receipt of the notice set out its response to the

matters set out in such notice. On receipt of this response, Project Co shall promptly forward same to the Board.

- 40.15 Project Co shall involve the FM Provider in any discussion with the Board concerning any Service Variation (or the terms thereof) to be implemented pursuant to paragraph 9 of Part 1 of Part 22 of the Schedule to the Project Agreement. The FM Provider may, subject to and in accordance with Clause 7, participate in any dispute under the Project Agreement concerning any such Service Variation.

Small Works

- 40.16 The FM Provider shall carry out Small Works which Project Co is required by the Board to carry out pursuant to Part 4 of Part 22 of the Schedule to the Project Agreement.
- 40.17 The FM Provider may invoke Clause 7 in order to seek a determination, pursuant to the Project Agreement, as to whether works requested by the Board are Small Works (as contemplated by paragraph 1 of Part 4 of Part 22 of the Schedule to the Project Agreement).
- 40.18 Not later than 30 Business Days prior to the commencement of each Contract Year, the FM Provider shall propose to Project Co a schedule of Small Works Rates for that Contract Year. Project Co shall (after adding any margin or other adjustments of its own) submit this to the Board and the Liaison Committee pursuant to paragraph 2 of Part 4 of Part 22 of the Schedule to the Project Agreement. Project Co shall involve the FM Provider in negotiations over the Small Works Rates, and the FM Provider may participate (subject to and in accordance with Clause 7) in any dispute under the Project Agreement as to the fixing of the Schedule of Small Works Rates for the purposes of the Project Agreement. For the avoidance of doubt, the schedule of rates relating to Small Works which shall apply for the purposes of Clause 35.9 of this Agreement in any Contract Year shall be the Schedule of Small Works Rates agreed pursuant to the Project Agreement, less any margin or adjustment added by Project Co in terms of this Clause and for the purposes of this Clause 40, the "Contract Year" shall have the meaning ascribed to it in the Project Agreement.

- 40.19 The FM Provider shall be paid for carrying out Small Works in accordance with Clause 35.9.

Project Co Variations

- 40.20 Project Co may, at its discretion and of its own volition, instruct the FM Provider to vary the Service or the performance of the FM Provider's obligations under this Agreement, including:

40.20.1 the addition, omission or substitution of any work or services;

40.20.2 the alteration of the kind or standard of any of the design, materials or goods to be provided in the course of the Services; or

40.20.3 the alteration of the manner or standards of performance of the Services or the times or frequency of performance

(in each case, a "Project Co Variation") and no Project Co Variation instructed by Project Co shall vitiate this Agreement. For the avoidance of doubt, Project Co will not be entitled to instruct any Project Co Variation that would result in any breach of or non compliance with the Project Agreement.

40.21 Where Project Co issues an instruction which is not expressed to propose a Project Co Variation but the implementation of which the FM Provider reasonably considers should constitute a Project Co Variation, the FM Provider shall submit to Project Co within 5 Business Days after the date of the relevant instruction and (in any event) before putting into effect such instruction a notice that it considers a Project Co Variation to have been proposed. Project Co shall within a further 5 Business Days revoke or confirm the instruction and, where Project Co confirms the instruction, Project Co shall either confirm that it is instructing a Project Co Variation or state that in Project Co's opinion its instruction should not be treated as a Project Co Variation. Where Project Co confirms that it is instructing a Project Co Variation, the relevant provisions of this Clause 40 shall apply thereto. Where Project Co states that in its opinion its instruction should not be treated as a Project Co Variation, the FM Provider shall promptly comply with such confirmed instruction, and any dispute as to whether the instruction should be treated as a Project Co Variation shall be determined in accordance with Clause 56.

40.22 The FM Provider may, by written notice to Project Co served within 5 Business Days of receiving an instruction for a Project Co Variation, object to the same on grounds equivalent to those set out in paragraphs 3.2.1.1.1, 3.2.1.1.2, 3.2.1.1.5 and 3.2.1.1.7(d) of Part 1 of Part 22 of the Schedule to the Project Agreement, or on the ground that Project Co's instruction is inadequate to enable the FM Provider to respond to it. Any dispute concerning the validity of such objection shall be determined in accordance with Clause 56.

40.23 Unless the FM Provider has objected to a proposed Project Co Variation in accordance with Clause 40.22, the FM Provider shall, within 5 Business Days of receiving Project Co's instruction for the Project Co Variation, respond to Project Co with a written notice setting out the like particulars as are required (in relation to a Variation proposed by the Board) under Clause 40.4.2. If the Parties agree upon the matters stated in the FM Provider's notice as aforesaid (including any agreed modifications thereto) then the Project Co Variation shall be implemented by the FM Provider on that basis and Project Co shall make such payments as are agreed.

- 40.24 If the Parties fail to agree upon any of the matters stated in the FM Provider's notice given, in respect of a Project Co Variation, under Clause 40.22, Project Co may nevertheless instruct the FM Provider to proceed with implementing that Project Co Variation. The FM Provider shall forthwith comply with such instruction and the matters not agreed shall be determined in accordance with Clause 56.
- 40.25 Project Co may withdraw an instruction for a Project Co Variation upon receiving the FM Provider's notice in respect thereof, given under Clause 40.22, or at any time while a Consent or amendment to a Consent is awaited which is necessary in order for the Project Co Variation to be implemented. If Project Co withdraws an instruction for a Project Co Variation in accordance with this clause, Project Co shall reimburse the FM Provider in respect of its reasonable expenses properly incurred in preparing the notice under Clause 40.22.

41. **INDEMNITIES**

- 41.1 Without prejudice to Clauses 41.2 and 41.3, the FM Provider shall indemnify and keep indemnified Project Co at all times from and against any liability incurred by Project Co or any liability incurred by Project Co (to the extent not already covered by virtue of the operation of Clause 41.2.1) towards the Board under clause 8.1 of the Project Agreement, in consequence of:
- 41.1.1 any claim for, or in respect of, the death and/or personal injury of any employee of, or person engaged by, the FM Provider or any of its subcontractors notwithstanding any act or omission of the Board or any Board Party or Project Co or any Project Co Party (other than the FM Provider);
- 41.1.2 any claim for, or in respect of, the death and/or personal injury of any person (other than a person referred to in Clause 41.1.1) arising out of, or in the course of, the performance by the FM Provider of the Services or its other obligations under this Agreement, save in each case to the extent caused (or contributed to) by any breach by Project Co of this Agreement or the negligence of Project Co, its employees, agents or subcontractors (excluding the FM Provider, the Building Contractor and their respective subcontractors) or any deliberate act or omission of Project Co provided that the consent or agreement of Project Co to the admission to the Facilities of any Unscreened Personnel shall not be considered to be a deliberate act or omission of Project Co;
- 41.1.3 any physical loss of or damage to the Board Assets arising by reason of any act or omission of the FM Provider or its employees, agents or subcontractors, save to the extent caused (or contributed to) by any breach by Project Co of this Agreement or the

negligence of Project Co, its employees, agents or subcontractors (excluding the FM Provider, the Building Contractor and their respective subcontractors);

41.1.4 any loss of or damage to property or assets of any third party arising by reason of any act or omission of the FM Provider or its employees, agents or subcontractors, save to the extent caused (or contributed to) by any breach by Project Co of this Agreement or the negligence of Project Co, its employees, agents or subcontractors (excluding the FM Provider, the Building Contractor and their respective subcontractors).

41.2 The FM Provider shall indemnify and keep Project Co indemnified at all times from and against all loss, damage, liabilities, claims, proceedings, costs and expenses suffered or incurred in respect of or in connection with:

41.2.1 any damage to property, real or personal; or

41.2.2 any injury to, or the death of, any person

where such damage, injury or death arises from any breach by the FM Provider of this Agreement or any other Project Document to which the FM Provider is a party, or from any negligence or other act, omission or default on the part of the FM Provider or any of its employees, agents or subcontractors, in each case save to the extent that any such damage, injury or death was due to any act, default or omission of Project Co, its employees, agents or subcontractors (excluding the FM Provider, the Building Contractor and their respective subcontractors).

41.3 Subject to Clause 6 Project Co shall indemnify and keep the FM Provider indemnified at all times from and against all loss, damage, liabilities, claims, proceedings, costs and expenses suffered or incurred in respect of or in connection with:

41.3.1 any damage to property, real or personal; or

41.3.2 any injury to, or the death of, any person

where such damage, injury or death arises from any breach by Project Co of this Agreement or from any negligence on the part of Project Co or any of its employees, agents or subcontractors (excluding the FM Provider, the Building Contractor and their respective subcontractors), in each case save to the extent that any such damage, injury or death was due to any act, default or omission of the FM Provider, its employees, agents or subcontractors.

- 41.4 Where the FM Provider suffers any loss in consequence of the matters referred to at clauses 8.2.1 to 8.2.4 inclusive of the Project Agreement, then (on the basis of a Board Derived Benefit, and subject to Clause 6), to the extent that Project Co is entitled to recover any sum from the Board in respect of the FM Provider's loss it shall pay that sum to the FM Provider.
- 41.5 The Parties agree to comply with (and the FM Provider undertakes to facilitate compliance by Project Co with) any requirements contained in the insurance policies referred to in Clause 36, and in clause 8.3 of the Project Agreement, concerning the conduct and management of defences to claims and other proceedings. Subject as aforesaid:
- 41.5.1 if either Party (the "Indemnified Party") receives any notice, demand, letter or other document concerning any claim from which it appears that it is or may reasonably be expected to be entitled to indemnification pursuant to this Agreement, it shall give notice in writing of such notice, demand, letter or other document to the other Party (the "Indemnifying Party") and any insurers of such claim as soon as reasonably practicable.
- 41.5.2 On the giving of a notice pursuant to Clause 41.5.1, the Indemnifying Party shall:
- (a) provided that it admits the Indemnified Party's entitlement as aforesaid, be entitled to resist the claim in the name of the Indemnified Party at the Indemnifying Party's own expense and to agree, dispute, compromise or appeal the claim and carry out any incidental or other negotiations relative thereto; and
 - (b) at the request of the Indemnified Party, use reasonable endeavours to enforce the terms of any relevant contract in order to recover the Indemnified Party's losses and the Indemnified Party shall give the Indemnifying Party all reasonable co-operation, access and assistance for the purposes of considering and resisting such claim.
- 41.5.3 If the Indemnifying Party fails within 28 days of receipt of a notice given under Clause 41.5.1 to confirm in writing its intention to apply Clause 41.5.2, or its acceptance of the Indemnified Party's entitlement as referred to in Clause 41.5.2(a), or thereafter fails to comply with Clause 41.5.2(b), the Indemnified Party shall be free to pay or settle the claim on such terms as it may in its absolute discretion see fit.
- 41.6 To avoid doubt the provisions of Clause 67 (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 Indemnified Party complying with the provisions of such Clause.

Taxation

- 41.7 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. The Party making the payment shall pay such additional amount within ten (10) Business Days of receipt of such demand.

42. FORCE MAJEURE AND RELIEF EVENTS

- 42.1 Subject to Clause 42.8, where, because of the occurrence of a Relief Event, there is any failure by the FM Provider to perform its obligations under this Agreement, then on the basis of Board Derived Benefit (and subject to Clause 6) no right of termination shall arise under this Agreement by reason of such failure, to the extent that Project Co receives equivalent relief from termination under the Project Agreement.
- 42.2 Subject to Clause 42.8, where, because of the occurrence of a Relief Event, there is any failure by Project Co to perform its obligations under this Agreement, no right of termination shall arise under this Agreement by reason of such failure. Project Co shall only be so relieved in relation to a failure to perform any payment obligation if the Relief Event in question prevents Project Co from transmitting payment to the FM Provider, and then only for as long as such Relief Event prevents Project Co from transmitting payment to the FM Provider.
- 42.3 Save for the relief from termination referred to in Clauses 42.1 and 42.2, all other rights and obligations of the Parties under this Agreement shall be unaffected by the occurrence of a Relief Event. To avoid doubt, the occurrence of a Relief Event shall not entitle the FM Provider to any compensation. The FM Provider acknowledges the provisions of clause 42.9 of the Project Agreement and agrees that Deductions from payments by the Board to Project Co, resulting from the occurrence of a Relief Event, shall (subject to Clause 42.13) result in deductions also from payments by Project Co to the FM Provider under this Contract.
- 42.4 Subject to clause 42.8, the FM Provider shall be relieved from liability under this Agreement, on the basis of a Board Derived Benefit (and subject to Clause 6) to the extent that:
- 42.4.1 by reason of Force Majeure it is not able to perform its obligations under this Agreement; and
- 42.4.2 Project Co receives equivalent relief from liability under the Project Agreement.

- 42.5 Subject to Clause 42.8, Project Co shall be relieved from liability under this Agreement to the extent that by reason of Force Majeure it is not able to perform its obligations under this Agreement. Project Co shall only be so relieved in relation to a failure to perform any payment obligation if the event of Force Majeure in question prevents Project Co from transmitting payment to the FM Provider, and then only for as long as such event of Force Majeure prevents Project Co from transmitting payment to the FM Provider.
- 42.6 The occurrence of an event of Force Majeure shall not entitle the FM Provider to any compensation, save in the circumstances referred to in Clause 46. The FM Provider acknowledges the provisions of clause 43.9 of the Project Agreement and agrees that Deductions from payments made by the Board to Project Co, resulting from an event of Force Majeure, shall (subject to Clause 42.13) result in deductions also from payments by Project Co to the FM Provider under this Agreement.
- 42.7 Project Co shall involve the FM Provider in any discussions between Project Co and the Board pursuant to clause 43.12 of the Project Agreement and shall not agree any modifications to the Project Agreement which could adversely affect the FM Provider without the consent of the FM Provider. In parallel to any such discussions, the Parties shall endeavour to agree any appropriate related modifications to this Agreement. Clause 56 shall not apply to any failure by the Parties to reach agreement pursuant to this Clause 42.6.
- 42.8 Where a Party is (or claims to be) affected by a Relief Event or an event of Force Majeure:
- 42.8.1 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 or event of Force Majeure as soon as practicable and use all reasonable endeavours to remedy its failure to perform; and
- 42.8.2 it shall not be entitled to rely upon the relief afforded to it pursuant to this Clause 42 to the extent that it is not able to perform, or has not in fact performed, its obligations under this Contract due to its failure (if any) to comply with its obligations under Clause 42.8.1.
- 42.9 The Party claiming relief shall serve written notice on the other Party within 3 Business Days of it becoming aware of the relevant Relief Event or event of Force Majeure. Such initial notice shall give sufficient details to identify the particular event claimed to be a Relief Event or event of Force Majeure. Project Co shall promptly forward to the Board, pursuant to clause 42.5 or 43.5 or 41.5 (as applicable) of the Project Agreement, any such notice issued by the FM Provider.

- 42.10 A subsequent written notice shall be served by the Party claiming relief on the other Party within a further 5 Business Days of the notice referred to in Clause 42.9. Such notice 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 or event of Force Majeure on the ability of the Party to perform, the action being taken in accordance with Clause 42.1, the date of the occurrence of the Relief Event or event of Force Majeure and an estimate of the period of time required to overcome it (and/or its effects). Project Co shall promptly forward to the Board, pursuant to clause 42.6 or 43.6 (as applicable) of the Project Agreement, any such notice issued by the FM Provider.
- 42.11 The Party claiming relief shall notify the other as soon as the consequences of the Relief Event or event of Force Majeure have ceased and of when performance of its affected obligations can be resumed.
- 42.12 If, following the issuing of any notice referred to in Clause 42.10, the Party claiming relief receives or becomes aware of any further information relating to the Relief Event or 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.
- 42.13 If under the provisions of the Project Agreement Project Co incurs in any Contract Month Deductions from the Service Payment as a consequence of the occurrence of Relief Events and/or an event of Force Majeure and the amount of those Deductions exceed the amount of the Monthly Payment for that Contract Month, the maximum deduction to which the FM Provider shall be subjected under Clause 42.3 and/or Clause 42.6 shall be the amount of the Monthly Payment for that Contract Month.
- 42.14 For the avoidance of doubt, deductions to the Monthly Payment made under Clauses 42.3 and/or 42.6 shall not be taken into consideration when calculating whether the FM Event of Default Thresholds in Clause 44.1.1A have been breached.

43. **EXCUSING CAUSES**

- 43.1 If an Excusing Cause interferes adversely with, or causes a failure of, the performance of the Services or the FM Provider's other obligations under this Agreement, the FM Provider shall notify Project Co of this within 5 Business Days of the date on which the FM Provider became aware (or ought reasonably to have become aware) of the occurrence of the Excusing Cause. Project Co shall promptly forward any such notice to the Board.

43.2 Provided that the FM Provider has notified Project Co in the manner and within the time required by Clause 43.1, then (on the basis of a Board Derived Benefit, and subject to Clause 6) to the extent that:

43.2.1 an Excusing Cause interferes adversely with, or causes a failure of, the performance of the Services or the FM Provider's other obligations under this Agreement; and

43.2.2 as a result of the same there is a corresponding adverse interference with, or failure of the performance of, the Project Operations by Project Co for the purposes of the Project Agreement; and

43.2.3 by the operation of clause 8.6.1 of the Project Agreement, Project Co's failure to perform, or poor performance of, the Services does not constitute a breach of the Project Agreement by Project Co; and

43.2.4 by the operation of clause 8.6.2 of the Project Agreement, such interference is taken account of in measuring the performance of any affected Services in accordance with Part 14 of the Schedule (Service Level Specification) to the Project Agreement and the same is operated as though the relevant Services had been performed free from such adverse interference, then

the relevant failure by the FM Provider to perform, and any poor performance of, the Services shall not constitute a breach of this Agreement by the FM Provider, and the FM Provider shall be entitled to payment as if there had been no such interference with the Services.

43.3 The FM Provider shall take all reasonable steps to mitigate the consequences of an Excusing Cause on its ability to perform its obligations under this Agreement.

44. **FM PROVIDER EVENT OF DEFAULT**

44.1 Each and any of the following events (otherwise than to the extent that such event occurs by reason of default on the part of Project Co, which default was not caused by the FM Provider) shall constitute a breach of this Agreement and an FM Event of Default entitling Project Co if it so elects (but without obligation to do so) to terminate this Agreement by written notice to the FM Provider.

44.1.1 The FM Provider being awarded a total of 3,150 or more Service Failure Points in any six month rolling period.

- 44.1.1A The FM Provider suffering total Deductions for any period of six Contract Months amounting to more than 15% of the Monthly Payment for that six Contract Month period.
- 44.1.2 Project Co being required by the Board to terminate this Contract pursuant to clause 44.6 of the Project Agreement.
- 44.1.3 The FM Provider committing a material breach of its obligations under this Agreement which has or is likely to have a material and adverse effect on the delivery of the Services or the delivery by the Board of the Clinical Services or any other services at the Facilities for which Project Co is not responsible under the Project Agreement (otherwise than as a consequence of a breach by the Board of its obligations under the Project Agreement).
- 44.1.4 Any material breach by the FM Provider of its obligations under this Contract which either:
 - (a) renders practically impossible the performance of this Agreement, or affects the performance of this Agreement to an extent and for such a period of time that it has a significant effect on the rights or obligations of Project Co under the Project Agreement or any other Project Document or which causes Project Co to be in breach or to be in default under the Project Agreement or any other Project Document; or
 - (b) amounts to an abandonment or repudiation by the FM Provider of this Agreement.
- 44.1.5 The FM Provider ceasing to provide all or a substantial part of the Services in accordance with this Agreement (other than as a consequence of breach by Project Co of its obligations under this Agreement or as a consequence of a breach by the Board of its obligations under the Project Agreement).
- 44.1.6 At any time after the Actual Completion Date, the FM Provider committing a material breach of its obligations under this Agreement (other than in consequence of a breach by the Board of its obligations under the Project Agreement) which results in the criminal investigation, prosecution and conviction of Project Co, the FM Provider or any Project Co Party (other than the FM Provider) under the Health and Safety Regime (an "H&S Conviction").
- 44.1.7 Project Co becoming entitled to terminate this Agreement pursuant to Clause 54.

44.1.8 If at the expiration of 15 Business Days after the failure by the FM Provider to pay any sum or sums due to Project Co pursuant to the terms of this Agreement (including sums payable under Clause 6.5) which, in the aggregate, amount at any time to a total in excess of £10,000 Index Linked, such sum or sums or part thereof remains outstanding.

44.1.9 The occurrence of any of the following events in respect of the FM Provider or the Guarantor, namely:

- (a) 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 the FM Provider or the Guarantor;
- (b) a receiver, administrator, administrative receiver or other heritable creditor taking possession of or being appointed over, or any distress, execution or other process being levied or enforced (and not being lifted or discharged within ten (10) Business Days) upon, the whole or any material part of the assets of the FM Provider or the Guarantor;
- (c) the FM Provider or the Guarantor ceasing to carry on business;
- (d) 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 the FM Provider or the Guarantor; or
- (e) if the FM Provider or the Guarantor shall suffer any event analogous to the events set out in paragraphs (a)-(d) in any jurisdiction in which it is incorporated or resident;

44.1.10 The service by the Board of a notice of termination of the Project Agreement consequent upon a breach or default of the FM Provider.

44.1.11 The Performance Guarantee provided by the Guarantor in favour of Project Co and dated the same or around the same date as this Agreement ceasing to be in full force and effect.

44.2 The FM Provider shall notify Project Co immediately if it has knowledge of any event which constitutes an FM Event of Default or any event which with the giving of notice and/or the lapse of time and/or the making of any determination would constitute an FM Event of Default.

- 44.3 Any notice to terminate this Agreement, given by Project Co pursuant to Clause 44, shall be effective immediately or at such other time as is stated in the notice. Such a notice may not state a date for termination of this Agreement which is later than 90 days after the date of the notice.

45. **PROJECT CO EVENT OF DEFAULT**

- 45.1 Each and every one of the following events (otherwise than such event occurring by reason of default of the FM Provider or its subcontractors, which default was not caused by Project Co) shall constitute a breach of this Agreement and an Event of Project Co Default entitling the FM Provider if it so elects (but without obligation to do so) to terminate this Agreement by 10 days written notice to Project Co.

- 45.1.1 The non-payment by Project Co of sums properly due to the FM Provider (and not disputed in good faith by Project Co) pursuant to Clause 35 which in the aggregate amount to a total in excess of £40,000 Index Linked, and which are outstanding for a period of:

- (a) 25 Business Days; plus
- (b) a further 5 Business Days after receipt by Project Co of a written notice from the FM Provider stating that such sums are outstanding, which notice may not be served until the expiry of the aforesaid 5 Business Days

For the avoidance of doubt:

- (a) any sum due from Project Co to the FM Provider under this Agreement, but in respect of which an Advance is due from the FM Provider to Project Co pursuant to Clause 6.5, shall not be counted as unpaid by Project Co for the purposes of this Clause 45.1; and
- (b) where any failure by Project Co to pay any sum due to the FM Provider under this Agreement is caused by a failure by the Board to pay a sum due under the Project Agreement, such sum shall not be counted as unpaid by Project Co for the purposes of this Clause 45.1 and
- (c) where any sum has been withheld by Project Co as permitted in accordance with this Agreement such sum shall not be counted as unpaid by Project Co for the purposes of this Clause 45.1.1.

- 45.1.2 the occurrence of any of the following events in respect of Project Co, namely:

- (a) 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;
- (b) a receiver, administrator, administrative receiver or other heritable creditor taking possession of or being appointed over, or any distress, execution or other process being levied or enforced (and not being lifted or discharged within ten (10) Business Days) upon, the whole or any material part of the assets of Project Co;
- (c) Project Co ceasing to carry on business;
- (d) 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
- (e) if Project Co shall suffer any event analogous to the events set out in paragraphs (a)-(d) in any jurisdiction in which it is incorporated or resident;

45.1.3 Any material breach by Project Co of its obligations under this Agreement (other than relating to payment) which:

- (a) renders practically impossible the performance of the Services or affects the performance of the Services to an extent and for such a period of time that it has a significant effect on the rights or obligations of the FM Provider under this Agreement; or
- (b) amounts to the abandonment or repudiation by Project Co of this Agreement otherwise than as a result of an event of Force Majeure, a Relief Event, an Uninsurable Risk (or the effects thereof), a breach of the Project Agreement by the Board or a neglect, default or wrongful act or omission by the Board, a Board Party or a patient at the Facilities.

45.1.4 The FM Provider shall have no right to terminate this Agreement by reason of any default by Project Co performing its obligations under this Agreement except as provided in this Clause 45.

46. TERMINATION BY PROJECT CO OR FM PROVIDER

Force Majeure

- 46.1 Where an event of Force Majeure prevents the performance by the FM Provider of the whole or a substantial part of its obligations under this Agreement for a period of 6 months or more after the date when the FM Provider first notified Project Co in writing that it was affected by that event of Force Majeure, either Party shall have the right to terminate this Agreement, by notice in writing to the other Party, with immediate effect provided always that the effects of the relevant event of Force Majeure continue to prevent either Party from performing any material obligation under this Agreement.
- 46.2 Where the Project Agreement terminates, this Agreement shall (subject to the clause 47.4.3 of the Project Agreement) terminate automatically.
- 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, the FM Provider shall not be entitled to any compensation for termination of this Agreement on expiry of the Project Term.
- 46.4 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 following the expiry of the Project Agreement (as referred to in clause 47.8 of the Project Agreement), the FM Provider shall co-operate fully with Project Co and the Board in such competition process including (without limitation) by:
- 46.4.1 providing any information which the Board requires pursuant to clause 47.8.1 of the Project Agreement; and
 - 46.4.2 assisting the Board by providing all (or any) participants in such competition process with access to the Site and the Facilities.

The FM Provider may invoke the provisions of Clause 7 if necessary in order to challenge any request by the Board, pursuant to clause 47.8.1 of the Project Agreement, for the disclosure of information to which the FM Provider considers the Board is not entitled by virtue of that clause.

47. STEPS TO BE TAKEN UPON TERMINATION

Termination

- 47.1 The Parties shall continue to perform their obligations under this Agreement, notwithstanding the service by either Party of a notice of default or notice of termination until such time as such termination becomes effective (if later than the time of service of such notice).

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 Not used.

Transfer to Project Co of Assets, Contracts etc.

- 47.4 On the service of a notice of termination in accordance with this Agreement for any reason:

47.4.1 the FM Provider shall hand over to (and shall procure that all of its subcontractors hand over to), and there shall vest in, Project Co (or as Project Co may direct), free from all encumbrances, the Facilities and all Group 1 Equipment (which in the case of the termination of this Agreement in accordance with Clause 46.3 (Non-Default Termination - Expiry) shall be in the state required in accordance with Appendix 2);

47.4.2 the FM Provider shall offer to sell (and shall procure that its subcontractors offer to sell) to Project Co (or, where required by Clause 47.4.4 of the Project Agreement, directly 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 Clause 56 or Part 26 of the Schedule to the Project Agreement (Dispute Resolution Procedure), as the case may be), free from any security interest with full title guarantee all or any part of the stocks of material and other assets, road vehicles, spare parts and other moveable property owned by the FM Provider or any of its subcontractors and reasonably required by the Board or Project Co in connection with the operation of the Facilities or the provision of the Services. Where the Board purchases such items, and

their fair value for the purposes of Clause 47.4.4 of the Project Agreement is not agreed by the FM Provider (or its subcontractors) with the Board, the FM Provider may invoke the provisions of Clause 7 in order to seek a determination, pursuant to the Project Agreement, of such fair value;

47.4.3 the FM Provider shall deliver to Project Co (as far as not already delivered to Project Co) one complete set of:

(a) “as built drawings” showing all alterations made to the Facilities since the commencement of operation of the Facilities; and

(b) maintenance, operation and training manuals for the Facilities;

47.4.4 the FM Provider shall use all reasonable endeavours to procure that the benefit of all manufacturer’s warranties in respect of mechanical and electrical plant and equipment used or made available by the FM Provider under this Agreement and included in the Facilities are assigned, or otherwise transferred, to Project Co or (if Project Co requires) directly to the Board with full title guarantee; and

47.4.5 the FM Provider shall deliver to Project Co or (if Project Co requires) directly to the Board the records referred to in Clause 55 (Records and Reports) except where such documents are required by Law to be retained by the FM Provider or any of its subcontractors (in which case complete copies shall be delivered to Project Co or (if Project Co requires) directly to the Board).

47.5 Not used

47.6 Not used

Transitional arrangements

47.7 On the termination of this Agreement for any reason, for a reasonable period both before and after any such termination, the FM Provider shall have the following duties:

47.7.1 the FM Provider shall co-operate fully with the Project Co, the Board and any successor providing to Project Co and/or 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 Project Co and/or 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 Project Co and of the Board and members of the public;

- 47.7.2 Subject to the operation of clause 47.4.3 of the Project Agreement, the FM Provider shall as soon as practicable remove from the Site all property belonging to it or its subcontractors which is not required to remain at the Site pursuant to the preceding provisions of this Clause 47. The FM Provider acknowledges and accepts the provisions of clause 47.7.2 of the Project Agreement pursuant to which the Board may sell property not so removed following a written notice from the Board. Project Co shall promptly forward to the FM Provider any notice served by the Board under the said clause, relating to property which Project Co is aware belongs to the FM Provider or its subcontractors. If any such property is sold, then (on the basis of a Board Derived Benefit, and subject to Clause 6) to the extent that Project Co is entitled to recover from, or receive a credit from, the Board in respect of a sum representing the proceeds of sale of such property, Project Co shall pay or credit to the FM Provider the same sum;
- 47.7.3 the FM Provider shall forthwith deliver to Project Co or (where required by Project Co) directly to the Board's Representative:
- (a) any keys to the Facilities; and
 - (b) without prejudice to Clause 51 (Intellectual Property), any copyright licences for any computer programmes (or licences to use the same) necessary for the operation of the Facilities (but excluding computer programmes, which have been developed or acquired by a Service Provider for its own use and not solely for the purposes of provision of any of the Services at the Facilities or the assignation or transfer of which is otherwise restricted); and
- 47.7.4 the FM Provider shall as soon as practicable vacate the Site and (without prejudice to Appendix 2) shall leave the Site and the Facilities in a safe, clean and orderly condition.
- 47.8 Save as otherwise expressly provided in this Agreement:
- 47.8.1 termination of this Agreement shall be without prejudice to any accrued rights and obligations under this Agreement as at the date of termination;
 - 47.8.2 termination of this Agreement shall not affect the continuing rights and obligations of the Parties under any Clause which is required to give effect to such termination or the consequences of such termination; and

47.8.3 save as provided in Clause 47.8.1 and 47.8.2, all rights and obligations of the Parties under this Agreement shall cease and be of no further effect upon termination of this Agreement.

48. **PAYMENTS FOLLOWING TERMINATION**

48.1 If Project Co terminates this Agreement in accordance with Clause 44, the FM Provider shall indemnify and keep Project Co fully indemnified against:

48.1.1 all loss, damage and liabilities suffered or incurred by Project Co associated with the termination; and

48.1.2 (without prejudice to the generality of Clause 48.1.1) where the Project Agreement does not also terminate, the costs reasonably incurred by Project Co in providing, or procuring a replacement Sub-Contractor to provide, the Services (including the costs of appointment, mobilisation and installation of any such replacement Sub-Contractor, any difference in price payable to such replacement Sub-Contractor and any reasonable administrative costs directly incurred by Project Co in connection with the foregoing). Any such replacement Sub-Contractor shall be engaged on terms not materially more onerous than those in this Agreement.

The FM Provider shall pay all amounts due to Project Co under this Clause on demand.

48.2 If this Agreement is terminated pursuant to Clause 45, the FM Provider shall (on the basis of a Board Derived Benefit, and subject to Clause 6) be entitled to be paid any direct loss and/or expense caused to the FM Provider as a direct result of the termination of this Agreement (for the avoidance of doubt, excluding any loss of profit, loss of revenue, loss of use, loss of contract, loss of goodwill arising from the fact that the FM Provider will cease to perform and be paid for the Services).

48.3 If this Agreement is terminated pursuant to Clause 46 then (provided the Project Agreement has also been terminated) Project Co shall (on the basis of a Board Derived Benefit, and subject to Clause 6) pay to the FM Provider such amount (if any) as Project Co may receive from the Board pursuant to the Project Agreement in respect of the FM Provider's direct loss and/or expense (for the avoidance of doubt, excluding any loss of profit, loss of revenue, loss of use, loss of contract, loss of goodwill arising from the fact that the FM Provider will cease to perform and be paid for the Services) suffered as a direct result of the termination of this Agreement. Save as aforesaid, Project Co shall have no liability to pay any sum (by way of compensation, damages or

otherwise) to the FM Provider in respect of a termination of this Agreement pursuant to Clause 46.

49. **HANDBACK PROCEDURE**

The provisions of Appendix 2 shall apply to the handback of the Facilities to Project Co and/or the Board on expiry of this Agreement.

50. **ASSIGNATION, SUB-CONTRACTING AND CHANGES IN CONTROL**

Assignment

- 50.1 Project Co may assign by way of security the benefit of this Agreement to the Senior Funders or any agent or trustee for the Senior Funders without the consent of the FM Provider. This Agreement may be further assigned or novated as provided in the Funders' Direct Agreement and/or Clause 47.4.3 of the Project Agreement. The FM Provider will not assign this Agreement without the consent of Project Co.

Sub-contractors

- 50.2 The FM Provider shall not be relieved or excused of any responsibility, liability or obligation under this Agreement by the appointment of any subcontractor. The FM Provider shall, as between itself and Project Co, be responsible for the selection, pricing, performance, acts, defaults, omissions, breaches and negligence of all of the FM Provider's subcontractors. All references in this Agreement to any act, default, omission, breach or negligence of the FM Provider shall be construed accordingly to include any such act, default, omission, breach or negligence of one of its subcontractors.
- 50.3 The FM Provider must obtain the approval of Project Co before subcontracting any significant part of the Services. Project Co's approval may be withheld if the corresponding approval required from the Board under clause 50.5 of the Project Agreement is withheld, otherwise Project Co's approval shall not be unreasonably withheld or delayed.

51. **INTELLECTUAL PROPERTY**

Project Data

- 51.1 The FM Provider shall make available to the Project Co (and the Board) free of charge (and hereby irrevocably licences Project Co and the Board to use) all Project Data that might reasonably be required by Project Co and the Board and the FM Provider shall ensure that it

obtains all necessary licences, permissions and consents to ensure that it can make Project Data available to Project Co and/or the Board on these terms, for the purposes of:

- 51.1.1 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
- 51.1.2 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 The FM Provider:

- 51.2.1 hereby grants to Project Co and 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 the FM Provider; and
- 51.2.2 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 51.2.1 above to Project Co and/or the Board,

in both cases, solely for the Approved Purposes.

- 51.3 The FM Provider 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 the FM Provider shall enter into appropriate agreements with any of its subcontractors (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, the FM Provider shall:

- 51.4.1 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 in terms complying with Clause 51.4 of the Project Agreement. As an alternative, the FM Provider 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;
 - 51.4.2 allow Project Co and the Board to have access (on a read-only basis) to such data pursuant to the Board's rights to monitor Project Co's performance of its obligations under the Project Agreement and Project Co's rights to monitor the FM Provider's performance of its obligations under this Agreement; and
 - 51.4.3 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 The FM Provider shall ensure the back-up and storage in safe custody of the data, materials and documents referred to in Clause 51.4 in accordance with Good Industry Practice. Without prejudice to this obligation, the FM Provider shall submit to Project Co for approval its proposals for the back-up and storage in safe custody of such data, materials and documents. Project Co shall be entitled to object if they are not in accordance with Good Industry Practice or if they are objected to by the Board pursuant to Clause 51.5 of the Project Agreement. The FM Provider shall comply, and shall cause all of its subcontractors to comply, with all such approved proposals. The FM Provider may vary its procedures for such back-up and storage subject to submitting its proposals for change to Project Co, 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 Project Co and/or 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 Services or the performance of the FM Provider's obligations hereunder 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 Project Co and/or the Board otherwise than in accordance with the terms of this Agreement, the FM Provider shall indemnify Project Co and/or the Board at all times from and against:-
- 51.6.1 all loss, liability, damage, costs and expenses (including legal expenses) suffered or incurred by Project Co in relation to such claims:

- 51.6.2 all losses and liabilities suffered or incurred by Project Co in relation to such claims arising from Project Co's obligation to indemnify the Board pursuant to Clause 51.6 of the Project Agreement.

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 The FM Provider undertakes to Project Co and 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, the FM Provider:
- 51.8.1 warrants that it has, or will have at all material times, (and it shall use its best endeavours to procure that all of its subcontractors 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 performance of the FM Provider's obligations under this Agreement;
- 51.8.2 undertakes that it will act (and that its subcontractors and agents shall act) only on the instructions of the Board, pursuant to Clause 51.8.2 of the Project Agreement, as relayed by Project Co to the FM Provider, in relation to the processing of any personal data made available by or on behalf of the Board as part of the performance of the FM Provider's obligations under this Agreement;
- 51.8.3 undertakes that it and its subcontractors and agents 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 4.1 (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
- 51.8.4 undertakes to allow the Board access (and to procure that its subcontractors and agents allow the Board access) to any relevant premises on reasonable notice to inspect its procedures described at 51.8.1 above.

52. **CONFIDENTIALITY**

Confidential Information

52.1 “FM Contract Confidential Information” means

- 52.1.1 information relating to and comprised in this Agreement and the Project Documents and information relating to the Project and the Parties, howsoever obtained; and
- 52.1.2 all information which is “Confidential Information” as between Project Co and the Board for the purposes of Clause 52 of the Project Agreement which may come into the possession of the FM Provider.

Use and disclosure of Confidential Information

52.2 Each Party shall hold in confidence any FM Contract Confidential Information, provided that:

- 52.2.1 each Party may pass information to its professional advisers and insurers to the extent necessary to enable it to perform (or to cause to be performed) or to enforce its rights or obligations under this Agreement;
- 52.2.2 Project Co may, subject to obtaining appropriate confidentiality restrictions, pass to the Senior Funders such documents and information as are reasonably required by the Senior Funders in connection with the raising of finance for the Project or which Project Co is obliged to supply to them by the terms of the Funding Agreements;
- 52.2.3 Project Co may pass to the Board documents and information to the extent that Project Co is required to do so under the Project Agreement and to the extent required in order for Project Co to perform its obligations under, and enjoy and enforce its rights under, the Project Agreement;
- 52.2.4 Project Co may pass to the Auditor General for Scotland information and documents to the extent Project Co is required to do so pursuant to clause 38.2 of the Project Agreement;
- 52.2.5 the FM Provider acknowledges the Board’s rights of disclosure to the Scottish Executive and/or HM Treasury under clause 52.5 of the Project Agreement, and the Board’s rights of disclosure pursuant to clause 52.3.4 of the Project Agreement, and consents to the exercise of each of the same in respect of FM Contract Confidential Information;

- 52.2.6 Project Co may, subject to obtaining appropriate confidentiality restrictions, pass to other Sub-Contractors documents and information which are necessary for those Sub-Contractors' performance of their obligations under their Sub-Contracts;
- 52.2.7 the FM Provider may, subject to obtaining appropriate confidentiality restrictions, pass to its subcontractors documents and information which are necessary for the FM Provider's performance of this Agreement.

Exceptions

- 52.3 The obligation to maintain the confidentiality of the Confidential Information does not apply to Confidential Information:
 - 52.3.1 of the kind referred to in Clause 52.1.1, where the other Party confirms in writing is not required to be treated as Confidential Information;
 - 52.3.2 of the kind referred to in Clause 52.1.1 which is or comes into the public domain otherwise than through any disclosure prohibited by this Agreement;
 - 52.3.3 to the extent any person is required to disclose such FM Contract Confidential Information by Law or any regulatory or government authority (but only to that extent) or in order to facilitate or conduct the hearing of a dispute under the Dispute Resolution Procedure;
 - 52.3.4 to the extent required to be disclosed pursuant to Clause 38.2 (Information and Audit Access); or
 - 52.3.5 responding to a request for information under the Freedom of Information (Scotland) Act 2002 declaring that no term of this Agreement, whether express or implied, shall preclude the Board from making public under such Act and any legislation with which the Board is obliged to comply from time to time relating to access to Project Co information, details of all matters relating to this Agreement, the Project Documents to which the Project Co is a party and other Project Documents the contents of which the Parties agree may be disclosed in response to a request for information under the Freedom of Information (Scotland) Act 2002 unless such details constitute a trade secret or the disclosure thereof would or would be likely to prejudice substantially the commercial interests of FM Provider or the Project Co.

Announcements

- 52.4 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 FM Contract Confidential Information or in the case of the FM Provider of its (or any of its subcontractors) interest in the Project or, in any such case, any matters relating thereto, without the prior written consent of the other Party (which may be withheld by Project Co if it is required to obtain the consent of the Board to such announcement or disclosure pursuant to Clause 52.4 of the Project Agreement and such consent is not forthcoming, but otherwise shall not be unreasonably withheld or delayed).

53. **TAXATION**

VAT

- 53.1 All amounts stated to be payable by either Party under this Agreement shall be exclusive of any VAT properly chargeable on any amount.
- 53.2 Each Party shall pay to the other Party any VAT properly chargeable on any supply made to it under this Agreement provided that it shall first have received from the other Party a valid tax invoice in respect of that supply which complies with the requirements of Part III VAT Regulations 1995.
- 53.3 If either Party (referred to in this Clause as the “First Party”) shall consider that any VAT which the other Party (referred to in this Clause as the “Second Party”) claims to be properly chargeable to the First Party in connection with this Agreement is not in fact properly so chargeable, the First Party shall be entitled to require the Second Party to obtain a ruling from the Commissioners for Customs and Excise (or, if relevant, such other body as is charged at the time with the collection and management of VAT) (referred to in this Clause as the “Commissioners”) as to the VAT (if any) properly so chargeable. The Second Party shall forthwith request the Commissioners for such a ruling.
- 53.4 The following further provisions shall apply in respect of the application for a ruling in accordance with Clause 53.3:
- 53.4.1 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;

- 53.4.2 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
- 53.4.3 the Second Party shall use all reasonable endeavours (including without limitation the provision of such additional information as the Commissioners may require) to obtain such a ruling as soon as reasonably practicable following the initial request.
- 53.5 If a ruling is required by the First Party under Clause 53.3, the First Party shall not be obliged to pay the VAT so claimed by the Second Party unless and until a ruling is received from the Commissioners which states that a sum of VAT (the "VAT Sum") is properly so chargeable or the Commissioners state that they are not prepared to give any ruling on the matter. In this case, then subject to Clauses 53.6 and 53.7 and provided that the First Party shall first have received a valid tax invoice which complies with the requirements of Part III VAT Regulations 1995 and which states the VAT Sum to be the amount of VAT chargeable to the First Party, the First Party shall pay the VAT Sum (and any interest or penalties attributable to the VAT Sum) to the Second Party.
- 53.6 If the First Party disagrees with any ruling obtained pursuant to Clause 53.3 by the Second Party from the Commissioners, then the Second Party (provided that it is indemnified to its reasonable satisfaction against all costs and expenses including interest and penalties which it may incur in relation thereto) shall take such action and give such information and assistance to the First Party as the First Party may require to challenge such ruling or otherwise to resist or avoid the imposition of VAT on the relevant supply.
- 53.7 The following further provisions shall apply if the First Party shall exercise its rights under Clause 53.6:
- 53.7.1 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;
- 53.7.2 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;

- 53.7.3 save as specifically provided in Clause 53.5, the First Party shall not be obliged to pay to the Second Party any sum in respect of the VAT in dispute to the Second Party or in respect of VAT on any further supplies made by the Second Party to the First Party which are of the same type and raise the same issues as the supplies which are the subject of the relevant dispute unless and until the final outcome of the relevant dispute is that it is either determined or agreed that VAT is properly chargeable on the relevant supply or supplies; and
- 53.7.4 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 53.7.2 which is repayable to the Second Party and for any interest to which the Second Party is entitled in respect of such sums.

Changes in recoverability of VAT

- 53.8 Subject to Clause 53.9, if, following a Change in Law, the FM Provider becomes unable to recover VAT attributable to supplies to be made to Project Co by the FM Provider pursuant to this Agreement, Project Co shall (as a Board Derived Benefit) ensure that the FM Provider 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 this Agreement as the FM Provider and Project Co shall agree acting reasonably), provided that the FM Provider shall use all reasonable endeavours to mitigate the adverse effects of any such Change in Law.
- 53.9 The provisions of Clause 53.8 shall apply only if (and to the extent that) the Change in Law was not reasonably foreseeable at the date of this Agreement by an experienced contractor performing operations similar to the relevant Services 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:
- 53.9.1 prior to the date of this Agreement; and
- 53.9.2 in substantially the same form as the Change in Law.
- 53.10 Not Used

Construction Industry Tax Deduction Scheme

- 53.11 This Clause relates to the Construction Industry Tax Deduction Scheme:
- 53.11.1 In this Clause (but not otherwise):

- (a) “the Act” means the Income and Corporation Taxes Act 1988;
- (b) “the Regulations” means the Income Tax (Sub-Contractors in the Construction Industry) Regulations 1993 (SI 1993/743);
- (c) “contractor” means a person who is a contractor for the purposes of the Act and the Regulations;
- (d) “evidence” means such evidence as is required by the Regulations to be produced to a contractor for the verification of a sub-contractor’s tax certificate;
- (e) “statutory deduction” means the deduction referred to in Section 559(4) of the Act or such other deduction as may require to be made at the relevant time;
- (f) “sub-contractor” means a person who is a sub-contractor for the purposes of the Act and the Regulations; and
- (g) “tax certificate” is a certificate issued under Section 561 of the Act;

53.11.2 not later than ten (10) Business Days before the first payment under this Agreement is due to be made to the FM Provider or after this Clause applies for the first time and on each occasion when this Clause applies following a period when it has not so applied, the FM Provider shall either:

- (a) provide Project Co with the evidence that the FM Provider is entitled to be paid without the statutory deduction; or
- (b) inform Project Co in writing that it is not entitled to be paid without the statutory deduction;

53.11.3 if Project Co is not satisfied with the validity of the evidence submitted in accordance with Clause 53.11.2, it shall within eleven (11) Business Days of the FM Provider submitting such evidence notify the FM Provider in writing that it intends to make the statutory deduction from payments due under this Agreement to the FM Provider and give its reasons for that decision, and thereupon Clause 53.11.7 below shall apply;

53.11.4 where Clause 53.11.2(b) applies, the FM Provider shall immediately inform Project Co if it obtains a tax certificate and thereupon Clause 53.11.3 above will apply;

53.11.5 if the period for which the tax certificate has been issued to the FM Provider expires before the final payment is made to the FM Provider under this Agreement and

provided that this Clause applies at that time, the FM Provider shall not later than twenty one (21) Business Days before the date of expiry either:

- (a) provide Project Co with evidence that the FM Provider, from the said date of expiry, is entitled to be paid for a further period without the statutory deduction, in which case the provisions of this Clause shall apply if Project Co is not satisfied with the evidence; or
- (b) inform Project Co in writing that it will not be entitled to be paid without the statutory deduction after the said date of expiry;

53.11.6 the FM Provider shall immediately inform Project Co in writing if its current tax certificate is cancelled and give the date of such cancellation, and thereupon Clause 53.11.8 below will apply;

53.11.7 Project Co shall, as a “contractor” in accordance with the Regulations, send promptly to the Inland Revenue any voucher which, in compliance with the obligations of FM Provider as a “sub-contractor” under the Regulations, the FM Provider gives to the Project Co;

53.11.8 Project Co shall be entitled to make a deduction at the rate specified in Section 559(4) of the Act or at such other rate as may be in force from time to time from the whole of any payment to the FM Provider (and not just that part of such payment which does not represent the direct cost to the FM Provider or any other person of materials used or to be used in carrying out the construction operations to which the relevant payment relates) unless prior to making such payment Project Co shall have received written confirmation from the Inland Revenue (obtained by and at the expense of the FM Provider) in a form which is reasonably satisfactory to Project Co directing Project Co to make the deduction against only a specified amount or proportion of any such payment to the FM Provider;

53.11.9 where any error or omission has occurred in calculating or making the statutory deduction then:

- (a) in the case of an over deduction, Project Co and the FM Provider shall do everything reasonably necessary to recover any amount overpaid from the Inland Revenue and shall forthwith pay any amount recovered from the Inland Revenue to the FM Provider; and

- (b) in the case of an under deduction, the FM Provider shall correct that error or omission by repayment of the sum under deducted to Project Co plus an amount equal to any interest or penalty required to be paid to the Inland Revenue as a result of such deduction;

53.11.10 The FM Provider shall at the request of Project Co produce to Project Co the original of any current tax certificate which it holds and shall permit Project Co to make a copy of such tax certificate and/or to record such details in respect of such tax certificate as Project Co may consider appropriate; and

53.11.11 if compliance with this Clause involves Project Co or the FM Provider in not complying with any other of the terms of this Agreement, then the provisions of this Clause shall prevail.

54. **CORRUPT GIFTS AND PAYMENTS**

Prohibition on corruption

54.1 The FM Provider warrants that, in connection with Project Co's entering into the Project Agreement and its entering into this Agreement, neither it nor any person employed by it or acting on behalf of the FM Provider or its subcontractors has committed any Prohibited Act.

Remedies

54.2 If the FM Provider or any person employed by or acting on behalf of the FM Provider commits any Prohibited Act, then Project Co shall be entitled to act in accordance with Clauses 54.2.1 to 54.2.4 below:

- 54.2.1 if a Prohibited Act is committed by the FM Provider or by an employee not acting independently of the FM Provider, then Project Co may terminate the Agreement with immediate effect by giving written notice to the FM Provider;
- 54.2.2 if the Prohibited Act is committed by an employee of the FM Provider acting independently of the FM Provider, then Project Co may give written notice to the FM Provider of termination and this Agreement will terminate, unless within the twenty (20) Business Day period prescribed by Clause 54.3.4 of the Project Agreement the FM Provider has procured the termination of that employee's performance and (if necessary) has procured the performance of that employee's functions by another person;

54.2.3 if the Prohibited Act is committed by a subcontractor of the FM Provider, or by an employee of such a subcontractor (whether or not acting independently of that subcontractor), Project Co may give notice in writing to the FM Provider of termination and this Agreement will terminate, unless within the 20 Business Day period prescribed by clause 54.3.5 of the Project Agreement the FM Provider has procured the termination of the relevant subcontract and (if necessary) has procured the performance of that subcontractor's functions by another person.

54.2.4 any notice of termination under this Clause shall specify:

- (a) the nature of the Prohibited Act;
- (b) the identity of the party who Project Co believes has committed the Prohibited Act; and
- (c) the date on which the Agreement will terminate in accordance with the applicable provisions of this Clause.

54.3 Provided that such particulars shall be deemed conclusively to have been provided if Project Co serves with its notice a copy of any notice which Project Co has received from the Board in respect of the same Prohibited Act, pursuant to Clause 54.3.6 of the Project Agreement. Without prejudice to its other rights or remedies under this Clause, Project Co shall be entitled to recover from the FM Provider:

54.3.1 the amount or value of any such gift, consideration or commission; and

54.3.2 any other loss sustained in consequence of any breach of this Clause.

54.3.3 any sum which Project Co is liable to pay to the Board pursuant to Clause 54.4.2 of the Project Agreement in consequence of any breach of this Clause 54.

Permitted payments

54.4 Nothing contained in this Clause shall prevent the FM Provider from paying any proper commission or bonus to its employees within the agreed terms of their employment.

Notification

54.5 The FM Provider shall notify Project Co of the occurrence (and details) of any Prohibited Act promptly on the FM Provider becoming aware of its occurrence.

- 54.6 To avoid doubt the FM Provider shall have no right to claim any payment or compensation whatsoever arising out of the termination of this Agreement pursuant to this Clause 54.

55. **RECORDS AND REPORTS**

The provisions of Part 25 of the Schedule to the Project Agreement (Record Provisions) of the Project Agreement shall apply to the keeping of records and the making of reports in accordance with the terms of this Agreement.

56. **DISPUTE RESOLUTION PROCEDURE**

- 56.1 If at any time any Dispute shall arise between the Parties arising out of or relating to this Agreement then either Party may give written notice to the other Party requiring the Dispute to be referred to adjudication for determination.

- 56.2 Any notice given by either Party under clause 56.1 above or clause 56.5 below shall comprise a maximum of 25 sides of A4 text (set out in 11 point font at 1½ line spacing) plus 100 sides of supporting documentation, and any submissions made by the other Party in reply shall likewise be so limited.

- 56.3 The adjudication shall be carried out in accordance with the Adjudication Rules; provided that in the event of any conflict between this clause 56 and the Adjudication Rules, the provisions of this clause shall prevail.

- 56.4 If the adjudicator fails to give his decision in accordance with the Adjudication Rules or if he is unable or refuses to act, the Dispute shall be referred to adjudication by another person to be appointed upon the application of either Party by the Chairman (as defined in the Adjudication Rules).

- 56.5 If any Dispute raises issues which in the opinion of Project Co relates to a dispute or difference ("the Related Dispute") arising under, out of, or in connection with the Project Agreement, the Construction Contract, the Independent Tester Contract or any other contract between Project Co and a third party (such other contract being referred to as the "the Related Contract") which Related Contract contains a dispute resolution procedure ("the Related Procedure") then Project Co shall if it so decides adopt the procedures laid out in clauses 56.5.1 and/or 56.5.2.

- 56.5.1 If (a) an Adjudicator has been appointed under this Agreement in relation to a Dispute, and (b) no adjudicator has been appointed in relation to a Related Dispute under the Related Contract or any such adjudicator ("the Related Adjudicator") has resigned pursuant to the Related Procedure, then Project Co may appoint that Adjudicator as

Related Adjudicator under the Related Procedure, so that the same person shall act as Adjudicator and shall hear the Dispute under this Agreement and shall separately act as the Related Adjudicator and shall hear the Related Dispute under the Related Contract, provided the Adjudicator agrees to accept the appointment as Related Adjudicator under the Related Contract in addition to his appointment as Adjudicator under this Agreement, provided that the Adjudicator shall be appointed to determine the matter using the same reasoning and to reach the same conclusions on the same facts considered in connection with both the Related Dispute and the Dispute.

56.5.2 If (a) an Adjudicator has not been appointed under this Agreement in relation to a Dispute, and (b) a Related Adjudicator has been appointed in respect of a Related Dispute under the Related Contract, which appointment shall be confirmed in writing by Project Co to the FM Provider within 4 days of the appointment of the Related Adjudicator under the Related Contract together with the name, address, telephone and fax numbers and professional qualifications of the Related Adjudicator, then the Parties hereby agree to appoint that Related Adjudicator to act as Adjudicator to determine the Dispute under this Agreement in accordance with this clause 56, so that the same person shall act as Related Adjudicator and shall hear the Related Dispute under the Related Contract and shall separately act as the Adjudicator and shall hear the Dispute under this Agreement, provided that the Adjudicator shall be appointed to determine the matter using the same reasoning and to reach the same conclusions on the same facts considered in connection with both the Related Dispute and the Dispute.

56.6 After the Adjudicator has given his decision on a Dispute, either Party may refer the Dispute to the Court of Session for final determination. In determining that Dispute, the Court of Session shall not be bound in any way by the decision or any of the findings of the Adjudicator and will have jurisdiction to rule on any issues which were not decided upon by, or referred to, the Adjudicator and to determine all matters in dispute.

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 the FM Provider	S Barron Robertson Facilities Management Limited New Craigs Leachkin Road Inverness IV3 8NP
-----------------------	---

Fax No: 01463 713421

If to Project Co
c/o the Finance Director
Robertson Capital Projects Limited
Lomond Court
Castle Business Park
Stirling
FK8 4JU

Fax No: 01786 432620

57.2 Either Party to this Agreement may change its nominated address or facsimile number by prior notice to the other Party.

57.3 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:

57.3.1 within two (2) hours after sending, if sent on a Business Day between the hours of 9am and 4pm; or

57.3.2 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 Project Co and the FM Provider.

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

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

61. **ENTIRE AGREEMENT**

61.1 Except where expressly provided otherwise in this Agreement, this Agreement and the Interface 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:

61.2.1 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

61.2.2 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. **NOT USED**

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. **NOT USED**

65. **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.

66. **THIRD PARTY RIGHTS**

Save to the extent expressly provided in this Agreement, and, to avoid doubt, without prejudice to the terms of the Lender FM Direct Agreement or the rights of any permitted successor to the rights of FM Provider 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 Project Co and the FM Provider 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.

67. **MITIGATION**

Each of Project Co and the FM Provider 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.

68. **GOVERNING LAW AND JURISDICTION**

68.1 This Agreement shall be considered as a contract made in Scotland and shall be subject to the laws of Scotland.

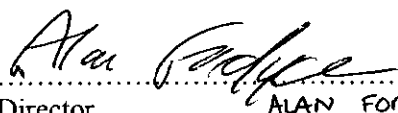
68.2 Subject to the provisions of the Dispute Resolution Procedure, both Parties agree that the courts of Scotland shall have exclusive jurisdiction to hear and settle any action, suit, proceeding or dispute in connection with this Agreement and irrevocably submit to the jurisdiction of those courts.

69. **FURTHER ASSURANCE**

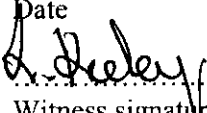
Each Party shall do all things and execute all further documents necessary to give full effect to this Agreement.

IN WITNESS WHEREOF this Agreement consisting of this and the preceding 100 pages together with the 9 Appendices annexed hereto are executed as follows:

SIGNED on behalf of
ROBERTSON HEALTH (GARTNAVEL)
LIMITED

by 
Director ALAN FORDYCE

on 25TH NOVEMBER 2005
Date

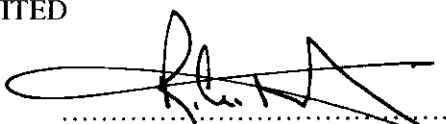
before 
Witness signature

LORNA KEELEY
Witness name

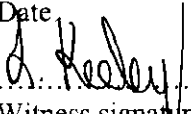
3 GLENFINLAS STREET
Witness address

EDINBURGH
.....

SIGNED on behalf of
ROBERTSON FACILITIES MANAGEMENT
LIMITED

by 
Director ROBERT MURCH
ROBIN

on 25TH NOVEMBER 2005
Date

before 
Witness signature

LORNA KEELEY
Witness name

3 GLENFINLAS STREET
Witness address

EDINBURGH
.....



MCCLURE NAISMITH

Solicitors

FUNDERS DIRECT AGREEMENT

among

GREATER GLASGOW HEALTH BOARD

and

THE GOVERNOR AND COMPANY OF THE BANK OF SCOTLAND

and

ROBERTSON HEALTH (GARTNAVEL) LIMITED

**Re: The Development of the Gartnavel Royal Hospital
and related provision of services**

292 St Vincent Street
Glasgow
G2 5TQ
DX: GW64

Tel: 0141 204 2700
Fax: 0141 248 3998

E-mail: glasgow@McClureNaismith.com

49 Queen Street
Edinburgh
EH2 3NH
DX: ED135

Tel: 0131 220 1002
Fax: 0131 220 1003

E-mail: edinburgh@McClureNaismith.com

Pountney Hill House
6 Laurence Pountney Hill
London EC4R 0BL
DX: 764 CDE

Tel: 020 7623 9155
Fax: 020 7623 9154

E-mail: london@McClureNaismith.com

THIS AGREEMENT is made

AMONG:

- 1 **GREATER GLASGOW HEALTH BOARD** of Gartnavel Royal Hospital, 1055 Great Western Road, Glasgow (the "Board")
- 2 **THE GOVERNOR AND COMPANY OF THE BANK OF SCOTLAND** acting through its office at New Ueberior House, 11 Earl Grey Street, Edinburgh EH3 9BN (the "Agent" for the Senior Funders) on behalf of itself and the Senior Funders; and
- 3 **ROBERTSON HEALTH (GARTNAVEL) LIMITED** a company incorporated in Scotland under the Companies Act (registered number SC271565) and having its registered office at 10 Perimeter Road, Pinefield Industrial Estate, Elgin IV30 6AE ("Project Co")

IT IS AGREED AS FOLLOWS:

1 **INTERPRETATIONS**

1.1 **Definitions**

In this Agreement, unless the context otherwise requires:

"Affiliates"	in relation to any body corporate means another body corporate in the same group in each case as the first body corporate, and group shall have the meaning set out in section 53(1) of the Companies Act 1989;
"Appointed Representative"	means a Representative that has been notified to the Board pursuant to a Step-In Notice;
"Bank Compensation Sum"	means any amount of compensation calculated by the Board to be payable in terms of Part K and/or Part 23 of the Schedule to the Project Agreement in respect of the Senior Debt as a result of the occurrence of the Termination Date;
"Board Project Documents"	means the Project Agreement and all other documents to which the Board and Project Co are parties pursuant to the Project Agreement;
"Collateral Agreement Counterparty"	means the parties to a Collateral Agreement (other than the Board and Project Co);
"Enforcement Event"	means following the occurrence of an Event of Default any enforcement action taken by the Agent pursuant to clause 13.2 of the loan agreement forming one of the Senior Funders Agreements;
"Enforcement Event Notice"	has the meaning given to that term in Clause 3.3;

"Event of Default"	is as defined in the loan agreement forming one of the Senior Funders Agreements;
"Final Payment Date"	means the Senior Debt Discharge Date as defined in the loan agreement forming one of the Senior Funders Agreements;
"Loan Life Cover Ratio"	has the meaning given to it in the loan agreement forming one of the Senior Funders Agreements;
"Project Agreement"	means an agreement dated on or about the date hereof between Project Co and the Board relating to the development of the Site and the provision of Services;
"Representative"	means: <ul style="list-style-type: none">(a) the Agent, any Senior Funder and/or any of their Affiliates;(b) an administrative receiver, receiver or receiver and manager of Project Co appointed under the Security Documents;(c) an administrator of Project Co;(d) a person directly or indirectly owned or controlled by the Agent and/or any Senior Funders; or(e) any other person approved by the Board (such approval not to be unreasonably withheld or delayed);
"Required Period"	means the period starting on the date of a Termination Notice or an Enforcement Event Notice and: <ul style="list-style-type: none">(a) prior to the Payment Commencement Date, ending eighty (80) Business Days later; and(b) following the Payment Commencement Date, ending sixty (60) Business Days later;
"Security Documents"	has the meaning given to that term in the loan agreement forming one of the Senior Funders Agreements;
"Step-In Date"	means the date on which the Agent gives the Board a Step-In Notice;
"Step-In Notice"	means the notice given by the Agent to the Board pursuant to Clause 6 stating that the Agent is exercising the step-in rights under this Agreement and identifying the Appointed Representative;
"Step-In Period"	means the period from the Step-In Date up to and including the earlier of: <ul style="list-style-type: none">(a) the Step-Out Date;(b) the date of any transfer under Clause 9;(c) the date of any termination for breach under Clause 7; and(d) the date of expiry of the Project Agreement;

"Step-Out Date"	means the date falling twenty (20) Business Days after the date of a Step-Out Notice;
"Step-Out Notice"	means a notice from the Agent or Appointed Representative to the Board pursuant to Clause 8.1 (Step Out);
"Suitable Substitute Contractor"	means a person approved by the Board (such approval not to be unreasonably withheld or delayed) as: <ul style="list-style-type: none">(a) having the legal capacity, power and authority to become a party to and perform the obligations of Project Co under the Board Project Documents; and(b) employing persons having the appropriate qualifications, experience and technical competence and having the resources available to it (including committed financial resources and sub-contracts) which are sufficient to enable it to perform the obligations of Project Co under the Board Project Documents;
"Termination Notice"	means a notice given by the Board to the Agent under Clause 3.1.

1.2 Interpretation

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

1.2.3.6 words in this Agreement importing the singular meaning, include the plural meaning and vice versa.

2 CONSENT TO SECURITY AND PAYMENT INSTRUCTION

- 2.1 The Board acknowledges notice of, and consents to, the security interest granted over Project Co's rights under the Board Project Documents and the Insurances effected by Project Co in favour of the Senior Funders under the Security Documents.
- 2.2 The Board confirms that it has not received notice of any other security interest granted over Project Co's rights under the Board Project Documents or the Insurances.
- 2.3 Except as specifically provided for in this Agreement the Board has no obligations (whether express, implied, collateral or otherwise) to the Agent and/or the Senior Funders in connection with this Agreement or the Board Project Documents or the Project.
- 2.4 The Board acknowledges notice of and consents to the security interest granted by HoldCo in favour of the Agent over the entire issued share capital of Project Co.
- 2.5 For the purposes of Clause 35.3 of the Project Agreement, Project Co and the Agent hereby authorise and instruct the Board (and the Board agrees) to pay all sums payable to Project Co under the Board Project Documents to the account of Project Co entitled "Proceeds Account" numbered 06200250, sort code 80-26-43 or to such other account or accounts as the Agent may by not less than 14 days' prior written notice to the Board designate from time to time, except for those sums payable in accordance with Clauses 2.6, 2.7 and 2.8 below.
- 2.6 All other amounts received by the Board and/or Project Co in respect of any insurance policy (other than as referred to at Clause 36.18 of the Project Agreement) maintained by or on behalf of Project Co pursuant to the Project Agreement shall be paid to the credit of the account of Project Co entitled "Insurance Account" numbered 06200293, sort code 80-26-43.
- 2.7 Any sums payable by the Board pursuant to Part K and/or Part 23 of the Schedule to the Project Agreement shall be paid directly to the credit of the account of Project Co entitled "Compensation Account" numbered 06200306, sort code 80-26-43, or to such other account as the Agent may from time to time designate by not less than 14 days prior written notice to the Board of the same. Project Co agrees that payments to the Compensation Account in accordance with this Clause 2.7 shall constitute a good discharge of the Board's obligations to Project Co in respect of such payments.
- 2.8 The Board shall not be obliged to make any enquiry as to the authority of the Agent in doing any act or entering into any document or making any agreement under of in connection with this Agreement and the Board shall be entitled to assume that the Agent is duly authorised by each of the Senior Funders to assume the obligations expressed to be assumed by it under this Agreement and to undertake on behalf of each Senior Funder in the terms of this Agreement so as to bind each Senior Funder as if it were a party hereto.
- 2.9 The rights of the Agent under this Agreement shall be extinguished upon the Final Payment Date.

3 NO TERMINATION WITHOUT NOTICE

- 3.1 Subject only to Clause 3.2, the Board may serve notice terminating the Project Agreement at any time if it is entitled to do so under the terms of the Project Agreement.
- 3.2 The Board shall not terminate or serve notice terminating the Project Agreement in respect of a Project Co Event of Default without giving to the Agent:
 - 3.2.1 at least the Required Period of prior written notice (a "Termination Notice") stating:
 - 3.2.1.1 that a Project Co Event of Default has occurred and the proposed Termination Date; and
 - 3.2.1.2 the grounds for termination in reasonable detail, and
 - 3.2.2 not later than the date falling 20 Business Days after the date of a Termination Notice or an Enforcement Event Notice a notice containing details of any amount owed by Project Co to the Board, and any other liabilities or obligations of Project Co of which the Board is aware (having made proper enquiry) which are:
 - 3.2.2.1 accrued and outstanding at the time of the Termination Notice; and/or
 - 3.2.2.2 which will fall due on or prior to the end of the Required Period, under the Project Agreement; and/or
 - 3.2.2.3 which involve disputes between the Board and Project Co and which have been submitted to but not determined in accordance with the Dispute Resolution Procedure.
- 3.3 On becoming aware of an Enforcement Event the Agent shall give notice thereof (an "Enforcement Event Notice") to the Board stating that an Enforcement Event has occurred and giving reasonable details thereof whereupon the provisions of Clause 3.2.2 shall apply as if references therein to a Termination Notice were to an Enforcement Event Notice provided that the Board shall first be entitled to receive its reasonable estimated costs and expenses which it may incur in complying with this Clause 3.3. All reasonable costs and expenses additional to those estimated shall be reimbursed on demand and on an indemnity basis by ProjectCo.

4 NO LIQUID MARKET

- 4.1 At any time during the Required Period the Agent may issue a written notice (the "No Liquid Market Notice") to the Board setting out the reasons why the Agent does not believe that a Liquid Market exists.
- 4.2 On or before the date falling fourteen (14) days after the date on which a No Liquid Market Notice is received by the Board, the Board shall notify the Agent of its opinion as to whether or not a Liquid Market exists. Where the Board believes that a Liquid Market does exist, such notice shall set out the reasons for the Board's belief. If the parties do not agree whether or not a Liquid Market exists, then either party may refer the dispute to be determined in accordance with Clause 16 (Dispute Resolution).
- 4.3 If the parties agree or it is determined in accordance with Clause 16 (Dispute Resolution) that no Liquid Market exists, the Project Agreement shall automatically terminate and the provisions of paragraph 4 of Part B of Part 23 of the Schedule to the Project Agreement (*No Retendering Procedure*) shall apply.
- 4.4 If any dispute relating to this Clause 4 is determined under Clause 16 (Dispute Resolution Procedure), the Required Period shall be extended by the period of time spent determining such dispute under Clause 16 (Dispute Resolution).

5 ECONOMIC REINSTATEMENT TEST

- 5.1 If all the Facilities are destroyed or substantially destroyed in a single event and the insurance proceeds (when taken together with any other funds available to Project Co) are equal to or greater than the amount required to repair or reinstate the Facilities, then Project Co shall calculate the Loan Life Cover Ratio (on the assumption that the Facilities are repaired or reinstated in accordance with Clause 36.19 of the Project Agreement (Application of Proceeds)).
- 5.2 If the calculation referred to in Clause 5.1 above shows that the minimum Loan Life Cover Ratio is greater than or equal to 1.10:1 then Project Co shall be subject to the procedure set out in Clauses 36.19 to 36.21 of the Project Agreement (Application of Proceeds).
- 5.3 If the calculation referred to in Clause 5.1 above shows that the minimum Loan Life Cover Ratio is less than 1.10:1 then an amount equal to the lesser of:
- 5.3.1 the insurance proceeds; and
- 5.3.2 the Base Senior Debt Termination Amount or the Revised Senior Debt Termination Amount (whichever is the greater);
- shall be released from the Insurance Proceeds Account to Project Co.
- 5.4 The Agent on behalf of the Senior Funders confirms that it will release monies from the Insurance Proceeds Account, to allow Clause 36.19A of the Project Agreement to be complied with.

6 REPRESENTATIVE

- 6.1 Subject to Clause 6.2 and without prejudice to the Agent's rights under the Security Documents, the Agent may give the Board a Step-In Notice at any time:
- 6.1.1 during which a Project Co Event of Default or an Event of Default is subsisting (whether or not a Termination Notice has been served); or
 - 6.1.2 during the Required Period.
- 6.2 The Agent shall give the Board not less than 5 Business Days prior notice of:
- 6.2.1 its intention to issue a Step-In Notice; and
 - 6.2.2 the identity of the proposed Appointed Representative.
- 6.3 On the issue of the Step-In Notice, the Appointed Representative shall assume jointly with Project Co the rights of Project Co under the Board Project Documents and thereafter, until the end of the Step-In Period the Board shall deal with the Appointed Representative and not Project Co.

7 STEP-IN PERIOD

- 7.1 Notwithstanding Clause 3, the Board may terminate the Project Agreement if:
- 7.1.1 any amount referred to in Clause 3.2.2.1 above has not been paid to the Board on or before the Step-In Date; or
 - 7.1.2 any amount referred to in Clause 3.2.2.2 has not been paid on or before the last day of the Required Period; or
 - 7.1.3 amounts, of which the Board was not aware (having made proper enquiry) at the time of the Termination Notice, subsequently become payable and are not discharged on or before the date falling 20 Business Days after the date on which the liability of Project Co for these amounts is notified to the Agent or if later the Step-In Date; or
 - 7.1.4 grounds arise after the Step-In Date in accordance with the terms of the Project Agreement provided that Service Failure Points and/or Warning Notices that arose pursuant to Part 18 of the Schedule to the Project Agreement prior to the Step-In Date shall not be taken into account during the Step-In Period but such Service Failure Points and/or Warning Notices (to the extent applicable under the terms of the Project Agreement) shall be taken into account after the Step-Out Date.
- 7.2 The Board shall not terminate the Project Agreement during the Step-In Period on grounds:
- 7.2.1 that the Agent has served a Step-In Notice or enforced any Security Document; or
 - 7.2.2 arising prior to the Step-In Date of which the Board was aware (having made proper enquiry) and whether or not continuing at the Step-In Date unless:
 - 7.2.2.1 the grounds arose prior to the Actual Completion Date, and the Actual Completion Date does not occur on or before the date 12 months after the date on which the

Board would have been entitled to terminate the Project Agreement for non-completion of the Works under Clause 44.1.2 of the Project Agreement; or

7.2.2.2 the grounds arose after the Actual Completion Date, and neither the Appointed Representative nor Project Co is using all reasonable endeavours (including implementation of any remedial programme) to remedy any breach of the Project Agreement that:

7.2.2.2.1 arose prior to the Step-In Date; and

7.2.2.2.2 which is continuing (and capable of remedy); and

7.2.2.2.3 which would have entitled the Board to terminate the Project Agreement;
or

7.2.2.3 the grounds (whenever they first arose) did not give rise to any right to terminate until after the Step-In Notice; or

7.2.3 arising solely in relation to Project Co.

8 STEP-OUT

8.1 The Appointed Representative may at any time during the Step-In Period deliver to the Board a Step-Out Notice which shall specify the Step-Out Date.

8.2 On expiry of the Step-Out Period (which is on the Step-Out Date):

8.2.1 the Appointed Representative will be released from all of its obligations and liabilities to the Board under the Board Project Documents arising prior to the Step Out Date and rights of the Appointed Representative against the Board will be cancelled; and

8.2.2 the Board shall no longer deal with the Appointed Representative and shall deal with Project Co in connection with the Board Project Documents.

8.3 Project Co shall continue to be bound by the terms of the Project Agreement, notwithstanding the occurrence of a Step-In Notice, a Step-In Period, a Step-Out Notice, Step-Out Date, any action by the Agent or Appointed Representative or the Senior Funders and/or any provision of this Agreement.

9 NOVATION

9.1 Subject to Clause 9.2, at any time:

9.1.1 after an Enforcement Event has occurred; or

9.1.2 during the Step-In Period,

the Agent may, subject to Clause 9.2, on not less than 20 Business Days' prior notice to the Board and any Appointed Representative, procure the transfer of Project Co's rights and liabilities under the Board Project Documents to a Suitable Substitute Contractor in accordance with the provisions of Clause 9.4.

- 9.2 The Board shall notify the Agent as to whether any person to whom the Agent proposes to transfer Project Co's rights and liabilities under the Project Documents is a Suitable Substitute Contractor, on or before the date falling 20 Business Days after the date of receipt from the Agent of all information reasonably required by the Board to decide whether the proposed transferee is a Suitable Substitute Contractor.
- 9.3 The Board shall not unreasonably withhold or delay its decision on whether the proposed transferee is a Suitable Substitute Contractor and it shall, without limitation, be reasonable for the Board to withhold its consent if there are unremedied breaches under the Project Documents and there is no rectification plan reasonably acceptable to the Board in respect of the breaches.
- 9.4 Upon the transfer referred to in Clause 9.1 becoming effective:
- 9.4.1 Project Co and the Board will be released from their obligations under the Board Project Documents to each other (the "discharged obligations");
- 9.4.2 the Suitable Substitute Contractor and the Board will assume obligations towards each other which differ from the discharged obligations only insofar as they are owed to or assumed by the Suitable Substitute Contractor instead of Project Co;
- 9.4.3 the rights of Project Co against the Board under the Board Project Documents and vice versa (the "discharged rights") will be cancelled;
- 9.4.4 the Suitable Substitute Contractor and the Board will acquire rights against each other which differ from the discharged rights only insofar as they are exercisable by or against the Suitable Substitute Contractor instead of Project Co;
- 9.4.5 any then subsisting ground for termination of the Project Agreement by the Board shall be deemed to have no effect and any subsisting Termination Notice shall be automatically revoked;
- 9.4.6 the Board shall enter into a direct agreement with the Suitable Substitute Contractor and a representative of Senior Funders lending to the Suitable Substitute Contractor on substantially the same terms as this Agreement; and
- 9.4.7 any Service Failure Points and/or Warning Notices or Deductions that arose pursuant to Part 18 of the Schedule to the Project Agreement prior to that time shall not be taken into account in determining whether a Project Co Event of Default has occurred.

10 MISCELLANEOUS

- 10.1 The Board shall at Project Co's expense, take whatever action the Agent, an Appointed Representative or a Suitable Substitute Contractor taking a transfer in accordance with Clause 9.1 may require for perfecting any transfer or release under Clause 6 (Representative), Clause 8 (Step-Out) and Clause 9 (Novation) including the execution of any transfer or assignment, and the giving of any notice, order or direction and the making of any registration which, in each case, the Agent or Appointed Representative or Suitable Substitute Contractor reasonably requires.
- 10.2 The Board shall not take any action to wind up, appoint an administrator or sanction a voluntary arrangement (or similar) in relation to Project Co.
- 10.3 This Agreement shall remain in effect until the earlier of:

- 10.3.1 the date on which all amounts which may be or become owing by Project Co to the Senior Funders under the Financing Agreements have been irrevocably paid in full; or
 - 10.3.2 the date of termination of the Project Agreement; or
 - 10.3.3 the date of transfer of Project Co's rights and liabilities under the Project Documents to a Suitable Substitute Contractor pursuant to Clause 9.1.
- 10.4 The Agent in respect of clauses 10.4.1, 10.4.2 and 10.4.3 below and Project Co in respect of clause 10.4.4 below shall promptly notify the Board of:
- 10.4.1 any Event of Default and any action taken in connection with any Event of Default of which the Agent becomes aware or ought to have been aware of (having made reasonable enquiry in accordance with the terms of the Senior Funders Agreements) and any decisions to accelerate the maturity of any amounts owing by Project Co to the Senior Funders under the Senior Funders Agreements and/or any decisions to demand repayment;
 - 10.4.2 the date referred to in Clause 10.3.1 above on or before the date falling 20 Business Days after its occurrence;
 - 10.4.3 the details and amount of any proposed Additional Permitted Borrowing including:
 - 10.4.3.1 the circumstances giving rise to it and reasons for it; and
 - 10.4.3.2 the terms on which it will be borrowed;
 - 10.4.4 on the first Business Day of each calendar month during which any Additional Permitted Borrowing is, or may be, subsisting, the amount outstanding under the Senior Funders Agreements and, to the extent it is aware (having made reasonable and proper enquiry):
 - 10.4.4.1 the amount of any Distribution made by Project Co; and
 - 10.4.4.2 the amount of any credit balance on any account of Project Co.
- 10.5 Project Co joins in this Agreement to acknowledge and consent to the arrangements set out and agrees not knowingly to do or omit to do anything that may prevent any party from enforcing its rights under this Agreement.
- 10.6 For the avoidance of doubt, and notwithstanding the terms of Clause 62 of the Project Agreement, the parties hereto hereby agree that if there is any conflict or inconsistency between the provisions of this Agreement and the Project Agreement, the provisions of this Agreement shall prevail.
- 10.7 Without prejudice to Clause 10.8, the Board shall not prior to the Final Payment Date:
- 10.7.1 claim, recover, retain or receive (or seek to claim, recover, retain or receive) any amount under the Collateral Agreements (and/or the Construction Contract and/or the Service Contracts) from any Collateral Agreement Counterparty;

- 10.7.2 petition for or otherwise be a party to any proceedings for winding-up any Collateral Agreement Counterparty or any other insolvency proceedings in respect of any Collateral Agreement Counterparty; or
 - 10.7.3 compete with the Agent's rights on a winding up or other insolvency of any Collateral Agreement Counterparty nor claim to be subrogated to any rights of the Agent or any Senior Funder.
- 10.8 The Board agrees and undertakes that if it receives any amount in contravention of the provisions of Clause 10.7 it will immediately turn the same over to the Agent for the account of the Agent and the Senior Funders and pending such payment hold the same on trust for the Agent and the Senior Funders provided that such trust shall not create any registerable security interest over such amount.
- 10.9 Notwithstanding any provision in the Collateral Agreements, the Board hereby undertakes that it will not, and it will procure that no permitted successor or assignor of it will exercise any rights it may have under or arising out of any of the Collateral Agreements, except as provided in Clause 10.9.1 to Clause 10.9.3 inclusive:
 - 10.9.1 Following termination of the Project Agreement in accordance with this Agreement, the Board shall from such date (the "Exercise Date") be entitled to exercise its rights under the Collateral Agreements to step in to and/or novate the Construction Contract(s), and/or the Services Contracts in accordance with the Collateral Agreements.
 - 10.9.2 Until the Final Payment Date, but following the Exercise Date, the Board shall not do anything to prejudice the rights which are not transferred to it pursuant to the Collateral Agreements.
 - 10.9.3 Notwithstanding the terms of the Collateral Agreements and any other provisions of this Clause 10.9, each of the Contractor and the Service Providers (and any guarantors thereof) shall remain responsible, and be liable, to Project Co in respect of all costs, claims, damages, losses and liabilities which shall have arisen out of or in connection with the Construction Contract(s) and/or the Services Contracts in respect of the period prior to the Exercise Date in relation to which the Agent acting on behalf of Project Co or the Senior Funders shall retain the benefit of all and any rights to all such costs, claims, damage, losses and liabilities.

11 ASSIGNATION

- 11.1 No party to this Agreement may assign or transfer any part of its rights or obligations under this Agreement save as provided in this Clause 11.
- 11.2 The Agent may assign or transfer its rights and obligations under this Agreement and in respect of the Security Documents to a successor Agent in accordance with the Funding Agreements without the consent of the Board and any such assignation novation or transfer shall not constitute a Change of Control for the purposes of Clause 50.8 of the Project Agreement. Without prejudice to Clause 50.10 of the Project Agreement, the Board also agrees that any enforcement by the Agent of the security referred to in Clause 2.4 of this Agreement (and any subsequent transfer of share capital in Project Co) following an Event of Default shall not constitute a Project Co Event of Default under Clause 44.1.5 or 44.1.6 of the Project Agreement.

- 11.3 Any Senior Funder may assign or transfer its rights under the Senior Funders Agreements in accordance with the terms of the Senior Funders Agreements.
- 11.4 The Board may transfer its rights and obligations under this Agreement to any permitted assignee of its interest in the Project Agreement and the Agent and the Senior Funders shall co-operate with the Board in completing the formalities of any transfer or assignation including by executing any additional documents as may be required by the Board.
- 11.5 If Clause 11.2 applies in relation to the Agent, the Board shall enter into a new direct Agreement with the new Agent on substantially the same terms as this Agreement.

12 ENTIRE AGREEMENT

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

13 WAIVER

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

14 SEVERABILITY

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

15 CONFIDENTIALITY

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

16 DISPUTE RESOLUTION

In relation to any dispute between the parties in respect of this Agreement which is not resolved within 21 days or (where specified) such other period for resolution of agreement provided in this Agreement, the matter in dispute shall be determined by reference to the dispute resolution procedure set out in Clause 56 (Dispute Resolution Procedure) of the Project Agreement as if the same were incorporated in this Agreement, with references to the Project Co being treated as references to the Agent.

17 NOTICES CONSENTS AND APPROVALS

- 17.1 All notices under this Agreement shall be in writing and shall be served by sending the same by first class post or by hand, delivering the same to the address shown at clause 17.2 or 17.3 below.
- 17.2 Any notice to be given to the Board should be marked for the attention of Anthony Curran or such other person as notified in writing to the Agent and delivered to Board Headquarters, Gartnavel Royal Hospital, 1055 Great Western Road, Glasgow, G12 0XH or such other address as notified in writing to the Agent by the Board.
- 17.3 Any notice to be given to the Agent should be marked for the attention of Chris Solley or such other person as notified in writing to the Board and delivered to New Uberior House, 11, Earl Grey Street, Edinburgh EH3 9BN (Fax No: 0131 659 0591) or such other address as notified in writing to the Board by the Agent.
- 17.4 Any consent or approval under this Agreement is required to be obtained before the act or event to which it applies is carried out or done and is to be treated as effective only if the consent or approval is given in writing.
- 17.5 Any notification required pursuant to this Agreement is to be treated as effective only if given in writing.

18 SURVIVORSHIP

Notwithstanding any other terms of this Agreement, Clauses 2.7, 10.6 to 10.9 (inclusive), 11.2, 11.3 and 11.5 of this Agreement together with any other clauses necessary to give effect to the same shall survive termination of this Agreement.

19 GOVERNING LAW

- 19.1 This Agreement is governed by the laws of Scotland. The parties agree that the Court of Session in Scotland shall have exclusive jurisdiction to hear and settle any action, suit, proceeding or dispute in connection with this Agreement and irrevocably submit to the jurisdiction of that court.

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

Executed for and on behalf of
GREATER GLASGOW HEALTH BOARD

at

on the day of

by

Authorised Signatory

Authorised Signatory

DOUGLAS GRIFFIN

Signatory Full Name

ROSSLIN CROCKET

Signatory Full Name

EXECUTED for and on behalf
of **ROBERTSON HEALTH (GARTNAVEL) LIMITED**

at

on the day of

by

Director/Secretary

in the presence of this witness

Witness

ADAM FORDYCE

Full Name

VICTORIA KATE SALMON

Witness Full Name

SALTIRE COURT, 20 CASTLE TERRACE

EDINBURGH

Witness Address

EXECUTED for and on behalf
of **THE GOVERNOR AND COMPANY OF THE BANK OF SCOTLAND**
as Agent and Security Trustee

at

on the day of

by

Authorised Signatory

in the presence of this witness

Witness

DEREK DORR ANDERSON

Full Name

CAROL CLAGHLEY

Witness Full Name

SALTIRE COURT, 20 CASTLE TERRACE

EDINBURGH

Witness Address