



**MCCLURE NAISMITH**

**Solicitors**

GLASGOW EDINBURGH LONDON

**PROJECT AGREEMENT**

between

**GREATER GLASGOW HEALTH BOARD**

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](mailto:glasgow@McClureNaismith.com)

49 Queen Street  
Edinburgh  
EH2 3NH  
DX: ED135

Tel: 0131 220 1002  
Fax: 0131 220 1003

E-mail: [edinburgh@McClureNaismith.com](mailto: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](mailto:london@McClureNaismith.com)

## Table of Contents

Clause	Page
<b>PART A: PRELIMINARY</b>	<b>2</b>
1. INTERPRETATION	2
2. EXECUTION AND DELIVERY OF DOCUMENTS	2
3. COMMENCEMENT AND DURATION	2
4. PROJECT DOCUMENTS	2
5. THE PROJECT OPERATIONS	3
<b>PART B: GENERAL PROVISIONS</b>	<b>6</b>
6. GENERAL OBLIGATIONS AND RESPONSIBILITIES OF PROJECT CO	6
7. WARRANTIES	6
8. INDEMNITIES AND LIABILITY	8
9. LIMITS ON LIABILITY	13
10. BOARD'S DATA	14
11. REPRESENTATIVES	15
12. LIAISON	16
13. DISASTER PLAN	18
<b>PART C: LAND ISSUES</b>	<b>19</b>
14. NATURE OF LAND INTERESTS	19
15. THE SITE	20
16. CONSENTS AND PLANNING APPROVAL	21
<b>PART D: DESIGN AND CONSTRUCTION</b>	<b>23</b>
17. THE DESIGN, CONSTRUCTION AND COMMISSIONING PROCESS	23
18. RIGHT OF ACCESS OF BOARD'S REPRESENTATIVE	26
19. PROGRAMME AND DATES FOR COMPLETION	27
20. INDEPENDENT TESTER	28
21. EQUIPMENT	29
22. PRE-COMPLETION COMMISSIONING AND COMPLETION	29
23. POST COMPLETION COMMISSIONING	32
24. FOSSILS AND ANTIQUITIES	33
<b>PART E: QUALITY ASSURANCE</b>	<b>35</b>
25. QUALITY ASSURANCE	35
<b>PART F: INFORMATION TECHNOLOGY</b>	<b>38</b>
26. NOT USED	38

<b>PART G: SERVICES</b>	<b>39</b>
27. THE SERVICES	39
28. MAINTENANCE	39
29. MONITORING OF PERFORMANCE	42
30. EMPLOYMENT MATTERS	45
31. NOT USED	47
32. SITE SECURITY AND PERSONNEL ISSUES	48
33. STOCKS, CONSUMABLES, MATERIALS AND EQUIPMENT	51
34. NOT USED	52
<b>PART H: PAYMENT AND FINANCIAL MATTERS</b>	<b>53</b>
35. PAYMENT	53
36. INSURANCE	55
37. CUSTODY OF FINANCIAL MODEL	64
38. INFORMATION AND AUDIT ACCESS	64
<b>PART I: CHANGES IN LAW AND VARIATIONS</b>	<b>66</b>
39. CHANGES IN LAW	66
40. VARIATION PROCEDURE	71
<b>PART J: DELAY EVENTS, RELIEF EVENTS AND FORCE MAJEURE</b>	<b>72</b>
41. DELAY EVENTS	72
42. RELIEF EVENTS	76
43. FORCE MAJEURE	77
<b>PART K: TERMINATION</b>	<b>80</b>
44. PROJECT CO EVENT OF DEFAULT	80
45. BOARD EVENT OF DEFAULT	84
46. NON-DEFAULT TERMINATION	85
47. EFFECT OF TERMINATION	86
48. COMPENSATION ON TERMINATION	89
49. HANDBACK PROCEDURE	91
<b>PART L: MISCELLANEOUS</b>	<b>92</b>
50. ASSIGNATION, SUB-CONTRACTING AND CHANGES IN CONTROL	92
51. INTELLECTUAL PROPERTY	93
52. CONFIDENTIALITY	96
53. TAXATION	98
54. CORRUPT GIFTS AND PAYMENTS	102
55. RECORDS AND REPORTS	104
56. DISPUTE RESOLUTION PROCEDURE	104

57.	NOTICES	104
58.	AMENDMENTS	106
59.	WAIVER	106
60.	NO AGENCY	106
61.	ENTIRE AGREEMENT	106
62.	CONFLICTS OF AGREEMENTS	107
63.	SEVERABILITY	107
64.	NOT USED	107
65.	COSTS AND EXPENSES	107
66.	THIRD PARTY RIGHTS	107
67.	MITIGATION	107
68.	GOVERNING LAW AND JURISDICTION	107
69.	FURTHER ASSURANCE	108

#### The Schedule

Part 1	Definitions and Interpretation
Part 2	Completion Documents
Part 3	Not Used
Part 4	Key Works Personnel
Part 5	Not Used
Part 6	Funders' Direct Agreement
Part 7	Licence
Part 8	Construction Matters
Part 9	The Programme
Part 10	Review Procedure
Part 11	Collateral Agreements
Part 12	Outline Commissioning Programme
Part 13	Equipment
Part 14	Service Level Specifications
Part 15	Independent Tester Contract
Part 16	Not Used
Part 17	Not Used
Part 18	Payment Mechanism
Part 19	Financial Model
Part 20	Not Used
Part 21	Insurance
Part 22	Variation Procedure
Part 23	Compensation on Termination
Part 24	Handback Procedure
Part 25	Record Provisions
Part 26	Dispute Resolution Procedure
Part 27	Project Co Information
Part 28	Certificates
Part 29	Refinancing

Part 30	Ancillary Rights
Part 31	Not Used
Part 32	Not Used
Part 33	Not Used
Part 34	Insurance Proceeds Account Agreement

**PROJECT AGREEMENT**

**BETWEEN:**

- 1 **GREATER GLASGOW HEALTH BOARD** of Gartnavel Royal Hospital, 1055 Great Western Road, Glasgow G12 0XH (the "Board"); and
- 2 **ROBERTSON HEALTH (GARTNAVEL) LIMITED** 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").

**WHEREAS:**

- 1 Greater Glasgow Primary Care National Health Service Trust (the "Trust") proposed to develop facilities on the Site and to consolidate on to the Site services currently provided at other locations in order to improve the quality and efficiency of the services provided by the Trust.
- 2 Accordingly, the Trust invited tenders from interested persons for the financing, design, and construction of and the provision of certain services in connection with the operation of an acute psychiatric care hospital at the Site (the "Project").
- 3 Proposals were submitted on behalf of Project Co in response to the Trust's invitation.
- 4 Pursuant to an order made under paragraph 26 of Schedule 7A to the National Health Service (Scotland) Act 1978 dated 25 March 2004, all property (excluding heritable property) rights and liabilities of the Trust were transferred to the Board as at 1 April 2004
- 5 Following negotiations, it appears to the Board to be expedient for the purpose of, or in connection with, the discharge of its functions to enter into this Agreement, which sets out the terms and conditions upon which Project Co will carry out the Project.
- 6 The Project has been approved by the Scottish Executive Health Department Private Finance and Capital Unit on behalf of the Scottish Ministers.
- 7 The Agreement is entered into under the Government's Private Finance Initiative ("PFI").
- 8 The Agreement is excluded from the application of Part II of the Housing Grants, Construction and Regeneration Act 1996 by operation of Paragraph 4 of the Construction Contracts (Scotland) Exclusion Order 1998 (SI 1998/686).
- 9 The Board was established as a Health Board in Scotland by virtue of the National Health Service (Constitution of Health Boards) (Scotland) Order 1974 (SI 1974/267) as amended by the National Health Service (Constitution of Health Boards) (Scotland) Order 2003 (SSI 2003/217) pursuant to Section 2 of the National Health Service (Scotland) Act 1978 as amended by the National Health Service and Community Care Act 1990.

**NOW IT IS AGREED** as follows:

## **PART A: PRELIMINARY**

### **1 INTERPRETATION**

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

### **2 EXECUTION AND DELIVERY OF DOCUMENTS**

2.1 On or prior to execution of this Agreement:

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

2.1.2 the Board shall deliver to Project Co the documents referred to in Part 2 of Part 2 of the Schedule (Completion Documents) (unless the requirement to deliver any such document is waived by Project Co by written notice to the Board).

### **3 COMMENCEMENT AND DURATION**

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

### **4 PROJECT DOCUMENTS**

Ancillary Documents

4.1 Project Co shall perform its obligations under, and observe all of the provisions of, the Project Documents to which it is a party and shall not:

4.1.1 terminate or agree to the termination of all or part of any Ancillary Document;

4.1.2 make or agree to any material variation of any Ancillary Document;

4.1.3 in any material respect depart from its obligations (or waive or allow to lapse any rights it may have in a material respect), or procure that others in any material respect depart from their obligations (or waive or allow to lapse any rights they may have in a material respect), under any Ancillary Document; or

4.1.4 enter into (or permit the entry into by any other person of), any agreement replacing all or part of (or otherwise materially and adversely affecting the interpretation of) any Ancillary Document,

unless the proposed course of action (and any relevant documentation) has been submitted to the Board's Representative for review under Part 10 of the Schedule (Review Procedure) and there has been no objection in accordance with paragraph 3.2 of Part 10 of the Schedule (Review Procedure) within twenty (20) Business Days of receipt by the Board's Representative of the submission of the proposed course of action (and any relevant documentation), or such shorter period as may be agreed by the parties and, in

the circumstances specified in Clause 4.1.1 Project Co has complied with Clause 50 (Assignment, Sub-contracting and Changes in Control).

#### Changes to Funding Agreements and Refinancing

- 4.2 Subject to Clauses 4.3 and 4.4, Project Co shall be free, at any time, to enter into, terminate, amend, waive its rights and generally deal with its Funding Agreements on such terms and conditions as it sees fit provided that (at the time such action is contemplated and effected) the same will not materially and adversely affect the ability of Project Co to perform its obligations under the Project Documents or this Agreement.
- 4.3 No amendment, waiver or exercise of a right under any Funding Agreement shall have the effect of increasing the Board's liabilities on early termination of this Agreement unless:
- 4.3.1 Project Co has obtained the prior written consent of the Board; or
- 4.3.2 it is a Permitted Borrowing.
- 4.4 Any amendment or variation of any Funding Agreements which constitutes a Refinancing shall be carried out in accordance with the provisions of Part 29 of the Schedule (Refinancing).
- 4.5 Without prejudice to Clause 4.2 (Changes to Funding Agreements and Refinancing), Project Co shall liaise with the Board in accordance with the Liaison Procedure, and shall use all reasonable endeavours to provide the Board with a copy of the relevant agreement in settled draft form, not less than ten (10) Business Days before it enters into any Funding Agreement (other than the Initial Funding Agreements).

#### Delivery

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

## 5 THE PROJECT OPERATIONS

#### Scope

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

#### General standards

- 5.2 Project Co shall at its own cost be solely responsible for procuring that the Project Operations are at all times performed:

- 5.2.1 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;
- 5.2.2 in a manner that is not likely to be injurious to health or to cause damage to property;
- 5.2.3 in a manner consistent with the Quality Plans;
- 5.2.4 except to the extent expressly stated to the contrary in the Board's Construction Requirements or the Service Level Specifications, in compliance with all applicable NHS Requirements;
- 5.2.5 in a manner consistent with the Board discharging its statutory duties and other functions undertaken by it as the same may be notified to Project Co from time to time; and
- 5.2.6 in so far as not in conflict with an express obligation of Project Co under this Agreement, or where in relation to a matter there is no express obligation or standard imposed on Project Co under this Agreement, in accordance with Good Industry Practice;

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

#### Board's Undertaking

#### 5.3 The Board undertakes to Project Co that it shall:

- 5.3.1 subject to the provisions of this Agreement, comply with all Laws, NHS Requirements and Consents applicable to it which relate to the Project Operations and the requirements set out in paragraph 1.5 of the Board's Construction Requirements;
- 5.3.2 not wilfully impede Project Co in the performance of its obligations under this Agreement (having regard always to the interactive nature of the activities of the Board and of Project Co and to the Board's use of the Facilities to provide the Clinical Services and any other operations or activities carried out by the Board on or at the Site for the purposes contemplated by this Agreement or any other of the Board's statutory functions);
- 5.3.3 inform Project Co as soon as reasonably practicable if at any time it becomes unable to meet any of its financial obligations and in such case inform, and keep Project Co informed, of any course of action to remedy the situation recommended or required by the Scottish Executive, NHS Greater Glasgow or other competent authority; and
- 5.3.4 to the extent permitted by Law, supply to Project Co within sixty (60) Business Days of their publication, a copy of the Board's Annual Report and Accounts

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

#### Co-operation

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

## PART B: GENERAL PROVISIONS

### 6 GENERAL OBLIGATIONS AND RESPONSIBILITIES OF PROJECT CO

#### Other business

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

#### Project Co Parties

- 6.2 Subject to the provisions at Clause 42.1.7 (Relief Events) Project Co shall not be relieved or excused of any responsibility, liability or obligation under this Agreement by the appointment of any Project Co Party. Project Co shall, as between itself and the Board, be responsible for the selection, pricing, performance, acts, defaults, omissions, breaches and negligence of all Project Co Parties. All references in this Agreement to any act, default, omission, breach or negligence of Project Co shall be construed accordingly to include any such act, default, omission, breach or negligence of a Project Co Party.

#### Safety

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

### 7 WARRANTIES

#### ProjectCo Warranties

- 7.1 Project Co warrants to the Board that at the date of this Agreement:
- 7.1.1 Project Co is properly constituted and incorporated under the laws of Scotland and has all necessary authority, power and capacity to enter into this Agreement;
  - 7.1.2 Project Co has not traded at any time since its incorporation as a company pursuant to the Companies Act 1989 or incurred any liabilities other than in terms of the Agreement, the Project Documents and the Funding Agreements;
  - 7.1.3 save in respect of liabilities that have arisen in the ordinary course of the management of the affairs of Project Co in preparing to enter into this and all other agreements referred to herein Project Co has no material financial obligations;
  - 7.1.4 the information concerning Project Co set out at Part 27 of the Schedule (Project Co Information) is true and accurate and that there is not outstanding at the date hereof any offer or other arrangement whereby:

7.1.4.1 any person, firm or company is at the date hereof or at any time in the next 60 months entitled to or obliged to subscribe to or take by means of transfer or by conversion of any other form of investment or bond any share capital in Project Co (including any such entitlement or obligation that may arise in exercise of an option exercisable by or against Project Co or any sponsor); or

7.1.4.2 any alteration to the constitution of the board of directors of Project Co may take effect;

7.1.5 the copy of the memorandum of association and articles of association of Project Co initialled by appropriate officers of Project Co and delivered to the Board immediately prior to entering into this Agreement is true and accurate and that there are not outstanding any proposals to amend these said documents;

7.1.6 Project Co has satisfied itself as to the assets to which it will acquire rights and the nature and extent of the risks assumed by it in relation to the Project and has gathered all information necessary to perform its obligations under this Agreement, including information as to the nature, location and condition of the Site (including hydrological, geological, geotechnical and sub-surface conditions), archaeological finds, areas of archaeological, scientific or natural interest, local conditions and facilities, the quality of existing structures and obligations assumed;

7.1.7 there are no material facts or circumstances in relation to the financial position or operational constitution of Project Co which have not been fully and fairly disclosed to the Board and which if disclosed might reasonably have been expected to affect the decision of the Board to enter into this Agreement;

7.1.8 there are not in existence any other agreements or documents replacing or relating to any of the Project Documents which would materially affect the interpretation or application of any of the Project Documents.

7.1.9 Project Co is solvent and no litigation or other proceedings have (to the best of Project Co's knowledge and belief) been entered into against Project Co; and

7.1.10 no security interests exist over the assets, revenues or share capital of Project Co other than as created by the Funding Agreements, and the Funding Agreements set out the full basis on which Project Co will obtain Senior Debt and Junior Debt.

## 7.2 Board Warranties

The Board warrants to Project Co that:

7.2.1 during the period from the date of this Agreement, until the Prescriptive Date no third party is or shall be able to successfully assert a Property Right over the Board Site which would prevent, materially hinder or make materially more expensive the carrying out of Project Operations by Project Co or any Project Co Party. For the avoidance of doubt, successful assertion of a Property Right shall include the making of a court order or judgement of an interim nature pending the determination of the existence of such a Property Right; and

- 7.2.2 as at the date of this Agreement, the copies of the Standing Orders and Standing Financial Instructions dated 22 March 2005 and March 2004 respectively provided to ProjectCo at Financial Close are full, complete and up to date copies of those documents and that there are no other regulations, requirements or other provisions with which the Board is required to comply for the approval of the Project by the Board.

## 8 INDEMNITIES AND LIABILITY

### Project Co indemnities to Board

- 8.1 Project Co shall indemnify and keep the Board indemnified at all times from and against all Direct Losses sustained by the Board in consequence of:
- 8.1.1 any claim for, or in respect of, the death and/or personal injury of any employee of, or person engaged by, Project Co or any Project Co Party notwithstanding any act or omission of the Board or any Board Party;
  - 8.1.2 any claim for, or in respect of, the death and/or personal injury of any third party (other than a person referred to in Clause 8.2.1 (Board Party employees)) arising out of, or in the course of, the Project Operations, save to the extent caused (or contributed to) by any Unreasonable Act by the Board or any Board Party, breach of any express provision of this Agreement by the Board or any Board Party or any deliberate act or omission of the Board or any Board Party provided that the consent or agreement of the Board to the admission to the Facilities of any Unscreened Personnel shall not be considered to be a deliberate act or omission of the Board;
  - 8.1.3 any physical loss of or damage to Board Assets arising by reason of any act or omission of Project Co or any Project Co Party, save to the extent that such loss or damage arises out of the breach of any express provision of this Agreement by the Board or any Board Party or any deliberate act or omission of the Board or any Board Party; and
  - 8.1.4 any loss of or damage to property or assets of any third party arising by reason of any act or omission of Project Co or any Project Co Party, save to the extent that such loss or damage arises out of the breach of any express provision of this Agreement by the Board or any Board Party or any deliberate act or omission of the Board or any Board Party.

### Board indemnities to Project Co

- 8.2 The Board shall indemnify and keep Project Co indemnified at all times from and against all Direct Losses sustained by Project Co in consequence of:
- 8.2.1 any claim for, or in respect of, the death and/or personal injury of any employee of, or person engaged by, the Board or any Board Party notwithstanding any act or omission of Project Co or any Project Co Party;
  - 8.2.2 any claim for, or in respect of, the death and/or personal injury of any third party (other than a person referred to in Clause 8.1.1 (Project Co and Project Co Party

employees)) arising by reason of any act or omission of the Board or any Board Party in the course of the provision of the Clinical Services, any Unreasonable Act by the Board or any Board Party, breach of any express provision of this Agreement by the Board or any Board Party or any deliberate act or omission of the Board or any Board Party, save to the extent caused (or contributed to) by any act or omission of Project Co or any Project Co Party;

8.2.3 any physical damage to any part of the Facilities or any assets or other property of Project Co or any Project Co Party arising by reason of any breach of any express provision of this Agreement by the Board or any Board Party or any deliberate act or omission of the Board or any Board Party, save to the extent caused (or contributed to) by any act or omission of Project Co or any Project Co Party; and

8.2.4 any loss of or damage to property or assets of any third party arising by reason of any breach of any express provision of this Agreement by the Board or any Board Party or any deliberate act or omission of the Board or any Board Party, save to the extent caused (or contributed to) by any act or omission of Project Co or any Project Co Party.

Provided that in the case of Clause 8.2.3 and 8.2.4 there shall be excluded from the indemnity given by the Board any liability for the occurrence of risks against which and to the extent to which Project Co is bound to insure under this Agreement.

#### Conduct of claims

8.3 This Clause shall apply to the conduct, by a party from whom an indemnity is sought under this Agreement, of claims made by a third person against a party having (or claiming to have) the benefit of the indemnity. The party having, or claiming to have, the benefit of the indemnity is referred to as the "Beneficiary" and the party giving the indemnity is referred to as the "Indemnifier". Accordingly:

8.3.1 if the Beneficiary receives any notice, demand, letter or other document concerning any claim for which it appears that the Beneficiary is, or may become entitled to, indemnification under this Agreement, the Beneficiary shall give notice in writing to the Indemnifier as soon as reasonably practicable and in any event within twenty (20) Business Days of receipt of the same;

8.3.2 subject to Clauses 8.3.3, 8.3.4 and 8.3.5 below, on the giving of a notice by the Beneficiary pursuant to Clause 8.3.1 above, where it appears that the Beneficiary is or may be entitled to indemnification from the Indemnifier in respect of all (but not part only) of the liability arising out of the claim, the Indemnifier shall (subject to providing the Beneficiary with an indemnity to its reasonable satisfaction against all costs and expenses that it may incur by reason of such action) be entitled to dispute the claim in the name of the Beneficiary at the Indemnifier's own expense and take conduct of any defence, dispute, compromise, or appeal of the claim and of any incidental negotiations. The Beneficiary shall give the Indemnifier all reasonable co-operation, access and assistance for the purposes of considering and resisting such claim;

8.3.3 with respect to any claim conducted by the Indemnifier pursuant to Clause 8.3.2 above:

- 8.3.3.1 the Indemnifier shall keep the Beneficiary and any relevant insurer (if necessary) fully informed and consult with each of them about material elements of the conduct of the claim;
- 8.3.3.2 the Indemnifier shall not bring the name of the Beneficiary into disrepute; and
- 8.3.3.3 the Indemnifier shall not pay or settle such claims without the prior consent of the Beneficiary, such consent not to be unreasonably withheld or delayed;
- 8.3.4 the Beneficiary shall be free to pay or settle any claim on such terms as it thinks fit and without prejudice to its rights and remedies under this Agreement if:
  - 8.3.4.1 the Indemnifier is not entitled to take conduct of the claim in accordance with Clause 8.3.2 above; or
  - 8.3.4.2 the Indemnifier fails to notify the Beneficiary of its intention to take conduct of the relevant claim within twenty (20) Business Days of the notice from the Beneficiary under Clause 8.3.1 above or notifies the Beneficiary that it does not intend to take conduct of the claim; or
  - 8.3.4.3 the Indemnifier fails to comply in any material respect with the provisions of Clause 8.3.3 above;
- 8.3.5 the Beneficiary shall be free at any time to give notice to the Indemnifier that it is retaining or taking over (as the case may be) the conduct of any defence, dispute, compromise or appeal of any claim (or of any incidental negotiations) to which Clause 8.3.2 above applies. On receipt of such notice the Indemnifier shall promptly take all steps necessary to transfer the conduct of such claim to the Beneficiary, and shall provide to the Beneficiary all reasonable co-operation, access and assistance for the purposes of considering and resisting such claim. If the Beneficiary gives any notice pursuant to this Clause 8.3.5, then the Indemnifier shall be released from any liability under its indemnity under Clause 8.1 or Clause 8.2 (as the case may be) and, without prejudice to any accrued liabilities, any liability under its indemnity given pursuant to Clause 8.3.2 in respect of such claim;
- 8.3.6 if the Indemnifier pays to the Beneficiary an amount in respect of an indemnity and the Beneficiary subsequently recovers (whether by payment, discount, credit, saving, relief or other benefit or otherwise) a sum which is directly referable to the fact, matter, event or circumstances giving rise to the claim under the indemnity, the Beneficiary shall forthwith repay to the Indemnifier whichever is the lesser of:
  - 8.3.6.1 an amount equal to the sum recovered (or the value of the saving or benefit obtained) less any out-of-pocket costs and expenses properly incurred by the Beneficiary in recovering the same; and
  - 8.3.6.2 the amount paid to the Beneficiary by the Indemnifier in respect of the claim under the relevant indemnity,

provided that there shall be no obligation on the Beneficiary to pursue such recovery and that the Indemnifier is repaid only to the extent that the amount of such recovery aggregated with any sum recovered from the Indemnifier exceeds any loss sustained by the Beneficiary (including for this purpose indirect or consequential losses or claims for loss of profits which are excluded by this Agreement from being recovered from the Indemnifier); and

- 8.3.7 any person taking any of the steps contemplated by Clauses 8.3.1 to 8.3.5 shall comply with the requirements of any insurer who may have an obligation to provide an indemnity in respect of any liability arising under this Agreement.

#### Mitigation - indemnity claims

- 8.4 To avoid doubt the provisions of Clause 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 Beneficiary complying with the provisions of such Clause.

#### Taxation

- 8.5 If any payment by one party under an indemnity in this Agreement is subject to income tax or corporation tax (or any tax replacing them) in the hands of the recipient, the recipient may demand in writing to the party making the payment that the payment shall be increased by such amount as would ensure that, after taking into account any such tax payable in respect of such additional amount, the recipient receives and retains a net sum equal to the amount it would have otherwise received had the payment not been subject to such tax. In relation to any such additional amount payable to Project Co, Project Co and the Board shall have the same rights and obligations as would apply to a Relevant Tax Liability under Clause 48.7.3 and Clauses 48.6 to 48.11 (inclusive) shall apply mutatis mutandis to the payment of the additional amount. The party making the payment shall pay such additional amount within ten (10) Business Days of receipt of such demand.

#### Excusing Causes

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

8.6.1 such failure by Project Co to perform, and any poor performance of, any affected Service shall not constitute a breach of the provisions of this Agreement by Project Co;

8.6.2 such interference shall be taken account of in measuring the performance of any affected Service in accordance with the Service Level Specification (Part 14 of the Schedule), which shall be operated as though the relevant Service had been performed free from such adverse interference; and

8.6.3 any such Service Failure shall be deemed not to have occurred,

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

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

8.7.1 any breach of any express provision of this Agreement by the Board or any Board Party (unless, and to the extent, caused or contributed to by Project Co or any Project Co Party);

8.7.2 any deliberate act or omission of the Board or of any Board Party or any failure by the Board or Board Party (having regard always to the interactive nature of the activities of the Board and of Project Co) to take reasonable steps to carry out its activities in a manner which minimises undue interference with Project Co's performance of the Project Operations, save where (and to the extent):

8.7.2.1 caused or contributed to by Project Co or any Project Co Party;

8.7.2.2 the Board or any Board Party is acting in accordance with a recommendation or instruction of Project Co or any Project Co Party;

8.7.2.3 any such act or omission giving rise to such failure was within the contemplation of the parties or was otherwise provided for in this Agreement; or

8.7.2.4 the consequences of any such deliberate act or omission or other acts or omissions giving rise to such failure would have been prevented by the proper performance of Project Co's obligations under this Agreement.

8.7.3 the outbreak or the effects of any outbreak of any Medical Contamination unless and to the extent that the effects of such outbreak are caused (or contributed to) by any failure of Project Co or any Project Co Party to comply with procedures (or Board instructions) relating to control of infection or to take all reasonable steps to mitigate the effect of such Medical Contamination;

8.7.4 the implementation of any action taken by the Board or any Board Party, or any suspension of Project Co's obligation to deliver any or any part of the Services or the compliance by Project Co with instructions given by the Board, in each case in the circumstances referred to in Clauses 29.7 to 29.9 (inclusive);

8.7.5 the carrying out of any Small Works in accordance with the terms of this Agreement during the period of time agreed between the Board and Project Co; or

8.7.6 the carrying out of planned preventative maintenance in accordance with the Schedule of Programmed Maintenance;

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

#### Insured exposure

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

#### Mitigation of Excusing Cause

- 8.9 Project Co shall take all reasonable steps to mitigate the consequences of an Excusing Cause on Project Co's ability to perform its obligations under this Agreement. To the extent that Project Co does not take such steps, Project Co shall not be entitled to, and shall not receive, the relief specified in Clause 8.6 (Excusing Causes).
- 8.10 To avoid doubt, Clause 8.7.2 (Acts of the Board) shall not impose a general obligation on the Board to take (or to procure that any Board Party takes) such steps and shall apply (and be construed) solely for the purpose of establishing whether an Excusing Cause has occurred.

## 9 LIMITS ON LIABILITY

#### Exclusions

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

#### Sole remedy

- 9.3 Subject to:

9.3.1 any other express right of the Board pursuant to this Agreement; and

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

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

9.4 Nothing in Clause 9.3 shall prevent or restrict the right of the Board to seek interdict or a decree of specific implement or other discretionary remedies of the court.

9.5 Notwithstanding any other provision of this Agreement, neither party shall be entitled to recover compensation or make a claim under this Agreement, the Licence, or any other agreement in relation to the Project in respect of any loss that it has incurred (or any failure of the other party) to the extent that it has already been compensated in respect of that loss or failure pursuant to this Agreement, the Licence or otherwise.

## 10 BOARD'S DATA

No liability

10.1 Subject to Clause 7 (Warranties) the Board shall not be liable to Project Co for and Project Co shall not seek to recover from the Board (or from any Board Party) any damages, losses, costs, liabilities or expenses which may arise (whether in contract, delict or otherwise) from the adoption, use or application of the Disclosed Data by, or on behalf of, Project Co, the Independent Tester or any Project Co Party.

No warranty

10.2 Subject to Clause 7 (Warranties) the Board gives no warranty or undertaking of whatever nature in respect of the Disclosed Data and, specifically (but without limitation), the Board does not warrant that the Disclosed Data represents all of the information in its possession or power (either during the conduct of the tender process for the Project or at the time of execution of this Agreement) relevant or material to or in connection with the Project or the obligations of Project Co under this Agreement or under any of the Project Documents. Also, subject to Clause 7 (Warranties) the Board shall not be liable to Project Co in respect of any failure to disclose or make available to Project Co (whether before, on or after the execution of this Agreement) any information, documents or data, nor any failure to review or to update the Disclosed Data, nor any failure to inform Project Co (whether before, on or after execution of this Agreement) of any inaccuracy, error, omission, defects or inadequacy in the Disclosed Data.

Project Co investigation

10.3 Without prejudice to its rights and remedies under Clause 7 (Warranties) Project Co acknowledges and confirms that:

10.3.1 it has conducted its own analysis and review of the Disclosed Data and has, before the execution of this Agreement, satisfied itself as to the accuracy, completeness and fitness for purpose of any such Disclosed Data upon which it places reliance; and

10.3.2 it shall not be entitled to and shall not (and shall procure that no Project Co Party shall) make any claim against the Board or any Board Party whether in contract, delict or otherwise including, without limitation, any claim in damages, for extensions of time or for additional payments under this Agreement on the grounds:

10.3.2.1 of any misunderstanding or misapprehension in respect of the Disclosed Data; or

10.3.2.2 that incorrect or insufficient information relating to the Disclosed Data was given to it by any person, whether or not a Board Party,

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

## 11 REPRESENTATIVES

### Representatives of the Board

11.1 The Board's Representative shall be Anthony Curran, Head of Capital Planning or such other person appointed pursuant to this Clause. The Board's Representative shall exercise the functions and powers of the Board in relation to the Project Operations which are identified in this Agreement as functions or powers to be carried out by the Board's Representative. The Board's Representative shall also exercise such other functions and powers of the Board under this Agreement as may be notified to Project Co from time to time.

11.2 The Board's Representative shall be entitled at any time, by written notice to Project Co, to authorise any other person to exercise the functions and powers of the Board delegated to him pursuant to this Clause, either generally or specifically. Such notice shall state which functions and/or powers are to be delegated. Any act of any such person shall, for the purposes of this Agreement, constitute an act of the Board's Representative and all references to the "Board's Representative" in this Agreement (apart from this Clause) shall be taken as references to such person so far as they concern matters within the scope of such person's authority.

11.3 The Board may by written notice to Project Co change the Board's Representative. The Board shall (as far as practicable) consult with Project Co prior to the appointment of any replacement for the Board's Representative, taking account of the need for liaison and continuity in respect of the Project. Such change shall have effect on the date specified in the written notice (which date shall, other than in the case of emergency, be such date as will not cause material inconvenience to Project Co in the execution of its obligations under this Agreement).

11.4 During any period when no Board's Representative has been appointed (or when the Board's Representative is unable through illness, incapacity or any other reason

whatsoever to carry out or exercise his functions under this Agreement) the Board shall carry out the functions which would otherwise be performed by the Board's Representative.

11.5 No act or omission of the Board, the Board's Representative or any officer, employee or other person engaged by the Board shall, except as otherwise expressly provided in this Agreement:

11.5.1 in any way relieve or absolve Project Co from, modify, or act as a waiver or personal bar of, any liability, responsibility, obligation or duty under this Agreement; or

11.5.2 in the absence of an express order or authorisation under Part 22 of the Schedule (Variation Procedure), constitute or authorise a Variation.

11.6 Except as previously notified in writing before such act by the Board to Project Co, Project Co and Project Co's Representative shall be entitled to treat any act of the Board's Representative which is authorised by this Agreement as being expressly authorised by the Board and Project Co and Project Co's Representative shall not be required to determine whether an express authority has in fact been given.

#### Representative of Project Co

11.7 Project Co's Representative shall be Stephen Kelly or such other person appointed pursuant to this Clause. Project Co's Representative shall have full authority to act on behalf of Project Co for all purposes of this Agreement. Except as previously notified in writing before such act by Project Co to the Board, the Board and the Board's Representative shall be entitled to treat any act of Project Co's Representative in connection with this Agreement as being expressly authorised by Project Co and the Board and the Board's Representative shall not be required to determine whether any express authority has in fact been given.

11.8 Project Co may by written notice to the Board change Project Co's Representative. Where Project Co wishes to do so it shall by written notice to the Board propose a substitute for approval, taking account of the need for liaison and continuity in respect of the Project. Such appointment shall be subject to the approval of the Board (not to be unreasonably withheld or delayed).

11.9 Project Co's key Works personnel are identified in Part 4 of the Schedule (Key Works Personnel). Project Co shall, as far as it is within Project Co's control, ensure that such persons retain their involvement in the Works and, in particular, will not, for the duration of the Works require or request any of them to be involved in any other project on behalf of Project Co or any of the Shareholders or its or their Associated Companies if, in the reasonable opinion of the Board, this would adversely affect the Project.

## 12 LIAISON

### Liaison Committee

12.1 The Board and Project Co shall establish and maintain throughout the Project Term a joint liaison committee (the "Liaison Committee"), consisting of three (3) representatives of the

Board (one of whom shall be appointed Chairman) and three (3) representatives of Project Co which shall have the functions described below.

12.2 The functions of the Liaison Committee shall be:

12.2.1 to provide a means for the joint review of issues relating to all day to day aspects of the performance of this Agreement;

12.2.2 to provide a forum for joint strategic discussion, considering actual and anticipated changes in the market and business of the Board, and possible variations of this Agreement to reflect those changes or for the more efficient performance of this Agreement; and

12.2.3 in certain circumstances, pursuant to Part 26 of the Schedule (Dispute Resolution Procedure), to provide a means of resolving disputes or disagreements between the parties amicably.

12.3 The role of the Liaison Committee is to make recommendations to the parties, which they may accept or reject at their complete discretion. Neither the Liaison Committee itself, nor its members acting in that capacity, shall have any authority to vary any of the provisions of this Agreement or to make any decision which is binding on the parties (save as expressly provided in Part 26 of the Schedule (Dispute Resolution Procedure)). Neither party shall rely on any act or omission of the Liaison Committee, or any member of the Liaison Committee acting in that capacity, so as to give rise to any waiver or personal bar in respect of any right, benefit or obligation of either party.

12.4 The parties shall appoint and remove their representatives on the Liaison Committee by prior written notice delivered to the other at any time. A representative on the Liaison Committee may appoint and remove an alternate (who may be another representative of that party) in the same manner. If a representative is unavailable (and the other party's representatives may rely on the alternate's statement that the representative is unavailable) his alternate shall have the same rights and powers as the representative.

#### Procedures and practices

12.5 Subject to the provisions of this Agreement, the members of the Liaison Committee may adopt such procedures and practices for the conduct of the activities of the Liaison Committee as they consider appropriate from time to time and:

12.5.1 may invite to any meeting of the Liaison Committee such other persons as its members may agree (in accordance with Clause 12.6); and

12.5.2 receive and review a report from any person agreed by its members.

12.6 Recommendations and other decisions of the Liaison Committee must have the affirmative vote of all those voting on the matter, which must include not less than one (1) representative of the Board and not less than one (1) representative of Project Co.

12.7 Each member of the Liaison Committee shall have one (1) vote. The Chairman shall not have a right to a casting vote.

- 12.8 The Liaison Committee shall meet at least once each quarter (unless otherwise agreed by its members) and from time to time as necessary.
- 12.9 Any member of the Liaison Committee may convene a meeting of the Liaison Committee at any time subject to appropriate notice (in accordance with Clause 12.10 below) being given to the other members of the Liaison Committee.
- 12.10 Meetings of the Liaison Committee shall be convened on not less than ten (10) Business Days' notice (identifying the agenda items to be discussed at the meeting) provided that in emergencies a meeting may be called at any time on such notice as may be reasonable in the circumstances.
- 12.11 Where the Liaison Committee decides it is appropriate, meetings may also be held by telephone or another form of telecommunication, by which each participant can hear and speak to all other participants at the same time.
- 12.12 Minutes of all recommendations (including those made by telephone or other form of telecommunication) and meetings of the Liaison Committee shall be kept by Project Co and copies circulated promptly to the parties, normally within five (5) Business Days of the making of the recommendation or the holding of the meeting. A full set of minutes shall be open to inspection by either party at any time, upon request.

### 13 DISASTER PLAN

- 13.1 The parties shall comply with the provisions of the Disaster Plan.
- 13.2 The parties shall liaise with each other in accordance with the Liaison Procedure in order periodically to review and update the Disaster Plan.
- 13.3 The Disaster Plan is as follows:
  - 13.3.1 In the event of a disaster occurring, the Board shall be responsible for instructing all initial action. Project Co and all Project Co Parties shall provide all assistance to the Board wherever possible, subject to their competence and without endangering their own health and safety. Such assistance shall be provided as quickly as possible, unless otherwise instructed by the Board.
  - 13.3.2 Project Co and Project Co Parties shall comply with all Board requests, such as the cancelling of Programmed Maintenance. Board requests shall be routed through either the Helpdesk or Project Co's Representative. Project Co may also suggest appropriate actions. However, such actions shall only be carried out where expressly sanctioned by the Board. The Board may amend such proposed actions and Project Co shall respond accordingly.
  - 13.3.3 The Board shall reimburse any additional costs and losses reasonably and properly incurred by Project Co to the extent Project Co has had to provide additional services or vary its own service provision including, without prejudice to the foregoing generality, the cancellation of Programmed Maintenance. Deductions and/or Service Failure Points shall not apply to the extent that a Service Failure arises as a consequence of complying with Board instructions pursuant to this Clause 13.3 and such instructions shall constitute an Excusing Cause.

## PART C: LAND ISSUES

### 14 NATURE OF LAND INTERESTS

#### Access during Construction

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

14.1.1 exercise the Ancillary Rights; and

14.1.2 enter upon the Site,

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

#### Access following Construction

14.2 After the occurrence of the Actual Completion Date the Board shall procure the grant of the Licence from the Scottish Ministers to Project Co and Project Co Parties containing the right to enter upon the Site solely for the purposes of:

14.2.1 the carrying out of Project Operations (other than those Project Operations which Project Co is licensed to carry out pursuant to Clause 14.1);

14.2.2 the remedying of Defects and the carrying out of Snagging Matters, and

14.2.3 the exercising of the Ancillary Rights.

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

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

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

14.5 Project Co shall procure that:

14.5.1 all Project Operations carried out at the Site by or on behalf of Project Co (whether before, during or after the completion of the Works) shall be carried out in a manner which does not breach any provisions of the Title Deeds; and

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

- 14.6 The Board undertakes that in the event that any third party successfully asserts a Property Right which prevents Project Co or any Project Co Party obtaining access to the Site by the Agreed Access Route the Board shall 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.
- 14.7 The Board undertakes pursuant to the grant of the Licence in terms of Clauses 14.1 and 14.2 to liaise with and consult the Scottish Ministers as licensor in respect of any matters arising under the said licence and/or relating to exercise of the rights granted to Project Co thereunder and/or in terms of this Agreement.
- 14.8 For the avoidance of doubt, a breach by the Scottish Ministers or the then heritable proprietors of the Site of its obligations under the Licence shall be deemed to constitute a breach by the Board of this Agreement and in respect of such breach Project Co shall be entitled to exercise the rights and remedies available to Project Co in respect of a breach of this Agreement by the Board subject to and in accordance with the provisions of this Agreement. Furthermore, the Parties hereby acknowledge that each of Project Co and the Scottish Ministers have waived their respective rights to exercise rights and remedies under the Licence against the other on the basis that the Licence and rights and remedies available to the other parties thereunder are to be construed as if the Licence were part of this Agreement.

## 15 THE SITE

- 15.1 The condition of the Site shall be the sole responsibility of Project Co. Accordingly (without prejudice to any other obligation of Project Co under this Agreement), Project Co shall be deemed to have:
  - 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 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, Project Co accepts full responsibility for all matters referred to in Clause 15.1 and, subject to Clause 7 (Warranties), Project Co shall:

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

15.2.2 be responsible for, and hold the Board harmless from, cleaning up and otherwise dealing with any Contamination at the Site so that it shall at all times comply with its obligations under this Agreement including (without limitation) complying with, at its own cost, any applicable Laws and any Consents, orders, notices or directions of any regulatory body (whether made against the Board or Project Co).

## 16 CONSENTS AND PLANNING APPROVAL

16.1 Project Co shall be responsible for:

16.1.1 obtaining all Consents which may be required for the performance of the Project Operations; and

16.1.2 implementing each Consent within the period of its validity in accordance with its terms.

16.2 In relation to any application for a Consent Project Co will:

16.2.1 provide the Board with a copy of any such application and other appropriate documents relating to the application;

16.2.2 pursue any such applications with all due diligence and in a good and efficient manner;

16.2.3 provide the Board with such information regarding the progress of the application as the Board shall from time to time reasonably require;

16.2.4 fully consult with the Board in the running of any such application and have due regard to any wishes, representations and requirements of the Board; and

16.2.5 permit the Board to attend all meetings convened by or with Project Co by or with the local planning authority;

provided that where the Board requires to be the applicant for any particular Consent, the Board shall make the application for such Consent provided that Project Co shall be responsible for all costs associated with obtaining and complying with any such Consent (irrespective of whether such costs are incurred by the Board and/or ProjectCo) and provided further that Project Co shall provide all necessary assistance to the Board in relation to obtaining such Consent including, without limitation, the taking of any action reasonably required by the Board.

- 16.3 Project Co will notify the Board of the results of any such application under Clause 16.2 as soon as such results are known and provide the Board with a copy of any written decisions or decisions upon the application as soon as the same are received by Project Co.
- 16.4 Project Co will use reasonable endeavours to procure that none of the Consents are revoked and that all Consents continue in full force and effect.

## PART D: DESIGN AND CONSTRUCTION

### 17 THE DESIGN, CONSTRUCTION AND COMMISSIONING PROCESS

#### Overall Responsibility

#### 17.1 Project Co shall carry out and complete the Works:

17.1.1 so as to procure satisfaction of the Board's Construction Requirements;

17.1.2 in accordance with Project Co's Proposals; and

17.1.3 in accordance with the terms of this Agreement.

To avoid doubt, the obligations in Clauses 17.1.1, 17.1.2 and 17.1.3 are independent obligations. In particular:

17.1.4 the fact that Project Co has complied with Project Co's Proposals shall not be a defence to an allegation that Project Co has not satisfied the Board's Construction Requirements; and

17.1.5 the fact that Project Co has satisfied the Board's Construction Requirements shall not be a defence to an allegation that Project Co has failed to comply with Project Co's Proposals.

#### Design responsibility

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

#### Thermal and energy efficiency

17.3 For the purposes of this Clause 17.3, an average year means an "example weather year" ("EWY") as defined by the Chartered Institute of Building Services Engineers and including data for the Glasgow area. During the period of two (2) years following the Actual Completion Date, the parties shall monitor the Actual Energy Consumption at the Facilities in accordance with the procedure set out in Part 7 of Part 8 of the Schedule (Construction Matters), with a view to ascertaining whether and to what extent the thermal and energy efficiency of the Facilities meets the requirements of the Board's Construction Requirements and Project Co's Proposals. If either of the two years referred to above are not average years then such monitoring shall continue until the earlier of:

17.3.1 there being two complete average years; or

17.3.2 five years from the Actual Completion Date.

If as a result of the monitoring of Actual Energy Consumption over the periods described above there is any indication that the thermal and energy efficiency of the Facilities fails to meet the Board's Construction Requirements and/or Project Co's Proposals, the parties shall jointly investigate the matter to determine the cause of such failure either in the

manner agreed between them or in such manner as may be determined in accordance with Part 26 of the Schedule (Dispute Resolution Procedure).

- 17.4 If following any investigation pursuant to Clause 17.3, it is agreed between the parties or determined in accordance with Part 26 of the Schedule (Dispute Resolution Procedure) that such failure arises as a consequence of the design and construction of the Facilities by Project Co not complying with the applicable provisions of the Board's Construction Requirements and/or Project Co's Proposals, Project Co shall at its own expense procure that such additional work or other remedial work is carried out to remedy the relevant defect or otherwise compensate the Board in a manner approved by the Board (such approval not to be unreasonably withheld or delayed) but where the solution adopted is alternative compensation and the Board accepts such compensation, the Board should not as a consequence face any additional liability upon early termination of this Agreement and the provisions of Part 23 of the Schedule shall be amended as necessary to achieve this.

#### NHS Construction Projects - Corporate Identity and Signage

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

#### Board design approval

- 17.6 The Board confirms that, as at the date of this Agreement, it has reviewed such of Project Co's Proposals as have been initialled by the Board and that, subject to any qualifications and/or comments notified by the Board to Project Co in writing such proposals satisfy the Board's requirements in respect of Clinical Functionality, so far as can reasonably be determined given the level of detail of Design Data which has been disclosed to the Board.
- 17.7 Project Co shall develop and finalise the design and specification of the Works and the Board shall review the Reviewable Design Data in accordance with Part 10 of the Schedule (Review Procedure) and the provisions of this Clause:
- 17.7.1 Project Co shall submit the Reviewable Design Data and the design of any Variations developed in accordance with the procedure set out in Part 22 of the Schedule (Variation Procedure) to the Board's Representative for review under Part 10 of the Schedule (Review Procedure). Project Co shall not commence or

permit the commencement of construction of the part or parts of the Facilities to which such Reviewable Design Data relates until it has submitted the appropriate Reviewable Design Data and either it is confirmed by the Board's Representative that Project Co is entitled to proceed with construction in accordance with paragraph 4.3 of Part 10 of the Schedule (Review Procedure) or Project Co is disputing the status of such Reviewable Design Data pursuant to paragraph 4.3 of Part 10 of the Schedule (Review Procedure). If Project Co commences or permits the commencement of construction during such a dispute and it is subsequently determined in accordance with Part 26 of the Schedule (Dispute Resolution Procedure) that Project Co was not entitled to proceed with construction in accordance with paragraph 4 of Part 10 of the Schedule (Review Procedure) then Project Co shall forthwith, at its own cost, undo, remove from the Site and replace (in a manner complying with this Agreement) any parts of the works which it has been determined Project Co was not entitled to construct;

- 17.7.2 with effect from the date at which any item of Reviewable Design Data is or becomes an Approved RDD Item in accordance with Part 10 of the Schedule (Review Procedure), such Approved RDD Item shall for the purposes of this Agreement be deemed to have satisfied the requirements of the Board in the manner and to the extent set out in Appendix 1, Table A of Part 10 of the Schedule (Review Procedure);
- 17.7.3 Project Co shall allow the Board's Representative, at any time, a reasonable opportunity to view any items of Design Data, which shall be made available to the Board's Representative as soon as practicable following receipt of any written request from the Board's Representative; and
- 17.7.4 Project Co shall procure that the Contractor establishes and maintains a computerised design database which Project Co and the Board's Representative may access remotely by computer to view drawings comprised within the Design Data (including Reviewable Design Data) and electronically store and/or print copies of such Design Data. In the event of the Board's Representative being unable to access such design database, Project Co shall procure that it is made available for inspection by the Board's Representative, or any other person authorised by the Board's Representative.

#### Rectification of Project Co's Proposals

- 17.8 Without prejudice to Clause 17.1, if it should be found that Project Co's Proposals do not fulfil the Board's Construction Requirements, Project Co shall at its own expense amend Project Co's Proposals and rectify the Works or any part affected. Such amendment and rectification shall have the effect that:
  - 17.8.1 Project Co's Proposals shall satisfy the Board's Construction Requirements; and
  - 17.8.2 following the amendment or rectification, the structural, mechanical and electrical performance of the Facilities will be of an equivalent standard of performance to that set out in Project Co's Proposals prior to their amendment or rectification (for the purpose of this comparison disregarding the fault which required the amendment or rectification to be made).

18 RIGHT OF ACCESS OF BOARD'S REPRESENTATIVE

Access to Site

18.1 Project Co shall procure that:

18.1.1 subject to complying with all relevant safety procedures, which shall include any relevant health and safety plans for the construction of the Facilities, the Contractor's Site Rules from time to time and any reasonable directions with regard to site safety that may be issued by or on behalf of the Contractor's Site Manager from time to time, the Board's Representative shall have unrestricted access at all reasonable times during normal working hours to:

18.1.1.1 view the Works at the Site on reasonable prior notice appropriate to the circumstances, provided that the notice procedures in this Clause 18.1.1.1 shall not apply to the right of access for the Board's Representative and his staff and visitors to the office and other facilities provided at the Site for his use; and

18.1.1.2 subject to obtaining the consent of the relevant manufacturer or supplier (which Project Co agrees to use all reasonable endeavours to obtain), visit any site or workshop where materials, plant or equipment are being manufactured, prepared or stored for use in the Works for the purposes of general inspection and of attending any test or investigation being carried out in respect of the Works;

18.1.2 the Board's Representative shall have such rights of access to the Site in an emergency as he (acting reasonably) considers suitable in the circumstances; and

18.1.3 monthly progress meetings and site meetings are held and that the Board's Representative shall have the right to attend such monthly progress meetings and site meetings and to attend such other meetings as the Board's Representative may reasonably request.

Increased monitoring

18.2 If, following any viewing, visit or inspection made pursuant to Clause 18.1.1 (Access to Site), it is discovered that there are defects in the Works or that Project Co has failed to comply with the Board's Construction Requirements or Project Co's Proposals, the Board's Representative may (without prejudice to any other right or remedy available to the Board) by notice to Project Co increase the level of monitoring of Project Co until such time as Project Co shall have demonstrated to the satisfaction of the Board that it is capable of performing and will perform all its obligations to the Board under this Agreement. Project Co shall compensate the Board for any reasonable additional costs incurred as a result of such increased monitoring.

Right to Open Up

18.3 Subject to Clause 18.4, the Board's Representative shall have the right at any time prior to the Actual Completion Date to request Project Co to open up and inspect any part or parts of the Works where the Board's Representative reasonably believes that such part or parts of the Works is or are defective and Project Co shall comply with such request.

- 18.4 Prior to exercising his right pursuant to Clause 18.3 above, the Board's Representative shall notify Project Co of his intention to exercise such right, setting out detailed reasons.
- 18.5 If, following the exercise by the Board's Representative of his right pursuant to Clause 18.3, the inspection shows that the relevant part or parts of the Works are not defective any delay caused to the Works by the exercise of such rights shall, subject to (and in accordance with) the provisions of Clause 41 (Delay Events), be treated as a Delay Event.
- 18.6 If, following the exercise by the Board's Representative of his right pursuant to Clause 18.3, the inspection shows that the relevant part or parts of the Works is or are defective, Project Co shall rectify and make good such defect(s) and any consequence of such rectification and/or making good defect(s) shall be carried out by Project Co at no cost to the Board and Project Co shall not be entitled to any extension of time in relation to such rectification and making good of the Works.
- 18.7 If, following the exercise by the Board's Representative of his right pursuant to Clause 18.3, the Board's Representative is of the opinion that the inspection shows that the relevant part or parts of the Works is or are defective and Project Co does not agree with such opinion, the matter shall be determined in accordance with Part 26 of the Schedule (Dispute Resolution Procedure).
- 18.8 Without prejudice to the rights of the Board's Representative pursuant to this Clause 18 the parties acknowledge that the exercise of such rights shall not in any way affect the obligations of Project Co under this Agreement save as expressly set out in this Clause 18.

#### Safety during Construction

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

### 19 PROGRAMME AND DATES FOR COMPLETION

#### Dates for Completion

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

#### The Programme

- 19.2 Any Programme submitted in accordance with the provisions set out below shall be prepared in accordance with Good Industry Practice and shall be in sufficient detail so as to enable the Board's Representative to monitor the progress including all commissioning activities and likely future progress of the Works.
- 19.3 The initial Programme is set out at Part 9 of the Schedule (The Programme). Any change to the Programme shall only be made in accordance with this Clause and Part 10 of the Schedule (Review Procedure). Project Co shall promptly submit to the Board's

Representative a copy of any version of the Programme varied in accordance with this Clause and Part 10 of the Schedule (Review Procedure).

19.4 If it appears to the Board's Representative at any time that the actual progress of the Works has significantly fallen behind the Programme, then the Board's Representative shall be entitled to require Project Co to submit to the Board's Representative a report identifying the reasons for the delay and, unless the event causing the delay is still subsisting and it is not possible to predict with any certainty when the delay might come to an end, require Project Co (at the Board's option):

19.4.1 to produce and submit to the Board's Representative in accordance with Part 10 of the Schedule (Review Procedure) a revised Programme showing the manner and the periods in which the Works will be carried out to ensure completion; and/or

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

#### Notification of early completion

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

19.5.1 whether to agree an earlier date for completion; and

19.5.2 what modifications (if any) will be required to the Agreement in order to accommodate such earlier date for completion.

## 20 INDEPENDENT TESTER

### Appointment

20.1 The parties have prior to the date of this Agreement, appointed a suitably qualified and experienced consultant to act as the Independent Tester for the purposes of this Agreement upon the terms of the Independent Tester Contract.

### Changes to terms of appointment

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

20.2.1 terminate, repudiate or discharge the Independent Tester Contract or treat the same as having been terminated, repudiated or otherwise discharged;

20.2.2 waive, settle, compromise or otherwise prejudice any rights or claims which the other may from time to time have against the Independent Tester; or

20.2.3 vary the terms of the Independent Tester Contract or the service performed or to be performed by the Independent Tester.

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

#### Co-Operation

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

#### Replacement

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

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

## 21 EQUIPMENT

The provisions of Part 13 of the Schedule (Equipment) shall apply.

## 22 PRE-COMPLETION COMMISSIONING AND COMPLETION

#### Final Commissioning Programme

22.1 Not less than twelve (12) months before the Completion Date the Board shall provide Project Co with a draft of the Final Commissioning Programme as jointly developed by the Board and Project Co in accordance with the provisions of Clauses 22.2 and 22.3. Project Co shall provide the Board with comments on the draft Final Commissioning Programme submitted to it no later than six (6) months before the Completion Date. The parties shall, within twenty (20) Business Days of receipt by the Board of Project Co's comments agree the terms of the Final Commissioning Programme provided that the Board may by prior notice to Project Co change the scope and time of the Board's Commissioning and reimburse Project Co its reasonable costs incurred as a result of such change in scope or time. If the parties are unable to agree the Final Commissioning Programme or the change in scope or time of the Board's Commissioning three (3) months before the Completion Date the matter shall be referred for determination in accordance with Part 26 of the Schedule (Dispute Resolution Procedure).

- 22.2 The Final Commissioning Programme shall be in accordance with the Outline Commissioning Programme and shall impose no greater or more onerous obligations on the Board than those set out in the Outline Commissioning Programme (unless otherwise agreed by the Board in its absolute discretion). The Final Commissioning Programme shall then replace the Outline Commissioning Programme.
- 22.3 The Final Commissioning Programme shall describe the steps necessary, the party responsible for taking each of such steps and the timing and sequence of each of such steps to ensure:
- 22.3.1 that Project Co's Pre-Completion Commissioning and the Board's Commissioning will not delay the Actual Completion Date from occurring by the Completion Date; and
- 22.3.2 that Project Co's Post Completion Commissioning and the Board's Post Completion Commissioning is completed by the Commissioning End Date.
- 22.4 The parties shall procure that the steps that they are responsible for carrying out and completing pursuant to the Final Commissioning Programme include, in the case of Project Co's activities, the activities described at paragraph 3.5.18 of the Board's Construction Requirements.
- 22.5 Project Co shall notify the Independent Tester and the Board's Representative of the date when Project Co (acting reasonably) considers that the Works will be complete in accordance with the Board's Construction Requirements and this Agreement not less than four (4) months prior to such anticipated completion. Such notification shall trigger the activities of the Independent Tester under this Clause.
- 22.6 The parties each undertake to co-operate with the Independent Tester to ensure that the Independent Tester is familiar with all necessary aspects of the Project for the purposes of its role as described in this Clause.

#### Commissioning prior to Completion Date

- 22.7 Project Co shall:
- 22.7.1 undertake Project Co's Pre-Completion Commissioning in accordance with the Final Commissioning Programme; and
- 22.7.2 permit the Board to undertake the Board's Commissioning including permitting specialist contractors engaged by the Board to deliver and install equipment on such dates as agreed between the Board and Project Co, in accordance with the Final Commissioning Programme.
- 22.8 Project Co shall give written notice to the Independent Tester and the Board of the commencement of Project Co's Pre-Completion Commissioning and shall ensure that the Independent Tester and the Board's Representative are invited to witness all of, and are provided with all information they may reasonably require in relation to, Project Co's Pre-Completion Commissioning and that the Independent Tester is invited to comment on Project Co's Pre-Completion Commissioning.

- 22.9 Project Co shall (or shall procure that the Contractor shall) give the Board access to the Facilities at such times as may be set out in the Final Commissioning Programme to enable the Board to undertake the Board's Commissioning in accordance with the Final Commissioning Programme for the period prior to completion.

#### Pre-Completion inspection

- 22.10 Project Co shall give the Independent Tester and the Board's Representative not less than thirty (30) Business Days' notice and not more than fifty (50) Business Days' notice of the date upon which Project Co considers that the Works will be complete and the tests on completion to be performed in accordance with the Final Commissioning Programme will be carried out. Following receipt of the notice specified in this Clause 22.10 the Board's Representative and the Independent Tester shall be entitled to inspect the Works on the date or dates reasonably specified by Project Co in accordance with this Clause 22.10, and to attend any of the tests on completion. Project Co shall, if so requested, accompany the Board's Representative and the Independent Tester on any such inspection.

#### Pre-Completion matters

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

#### Completion certificate

- 22.12 Pursuant to the terms of the Independent Tester Contract, the parties shall procure that the Independent Tester shall, when satisfied that completion has occurred in accordance with this Agreement, issue a Certificate of Practical Completion to that effect stating the date upon which, in the Independent Tester's opinion, the Actual Completion Date occurred. Subject to Clause 22.14 (Snagging) and 22.16 (Defects), the issue of the Certificate of Practical Completion shall, in the absence of manifest error, bad faith or fraud, be conclusive evidence for the purpose only of ascertaining the Payment Commencement Date, that the Actual Completion Date has occurred on the date stated in such certificate.
- 22.13 The Independent Tester shall issue the Certificate of Practical Completion notwithstanding that there are Snagging Matters. Where there are Snagging Matters, the parties shall procure that the Independent Tester shall, within five (5) Business Days of the date of issue of the Certificate of Practical Completion, issue a Snagging Notice which shall specify the Snagging Matters and an estimate of the cost of rectifying such Snagging Matters.
- 22.14 Following the issue of a Snagging Notice, Project Co shall, in consultation with the Board's Representative and in such manner as to cause as little disruption as reasonably

practicable to the Board's Post Completion Commissioning and the Board's use of the Facilities, rectify all Snagging Matters within twenty (20) Business Days of the issue of the Snagging Notice.

- 22.15 If, within twenty (20) Business Days of the issue of the Snagging Notice Project Co has failed to rectify the Snagging Matters specified in the Snagging Notice the Board may by itself (or engage others to) carry out the works necessary to rectify the Snagging Matters, at the risk and cost of Project Co.
- 22.16 The issue of the Certificate of Practical Completion shall in no way affect the obligations of Project Co under this Agreement including in respect of any Defects.

As-built specification

- 22.17 As soon as it is available, after the issue of the Certificate of Practical Completion (and in any event not later than ten (10) Business Days after such issue), Project Co shall provide to the Board a copy of the as-built building specification, together with the Health and Safety File and all commissioning results, maintenance manuals and details of suppliers, guarantees and warranties.

## **23 POST COMPLETION COMMISSIONING**

Commissioning

- 23.1 Project Co and the Board shall, within ten (10) Business Days following the Actual Completion Date, in accordance with the Final Commissioning Programme, respectively undertake and complete Project Co's Post-Completion Commissioning and the Board's Post Completion Commissioning, in accordance with the Final Commissioning Programme. Both parties shall, at all times, and in particular in the period between the Actual Completion Date and the Commissioning End Date, use reasonable endeavours to assist the other party to ensure compliance with the Final Commissioning Programme.

Information

- 23.2 Project Co shall ensure that the Board's Representative is provided with all the information he may reasonably require in relation to Project Co's Post-Completion Commissioning and the Board shall ensure that Project Co is provided with all information Project Co may reasonably require in relation to the Board's Post Completion Commissioning.
- 23.3 If the Board's Representative, acting reasonably, makes any comment in relation to the carrying out of Project Co's Post-Completion Commissioning, such comments shall be taken into account by Project Co and if Project Co, acting reasonably, makes any comment in relation to the carrying out of the Board's Post Completion Commissioning, such comment shall be taken into account by the Board.
- 23.4 On the occurrence of the Commissioning End Date the Independent Tester shall issue the Commissioning Completion Certificate.

Operational Manuals

- 23.5 With effect from the Commissioning End Date and throughout the remainder of the Project Term, Project Co shall at all reasonable times make available on the Site to the Board's Representative all final form operation and maintenance manuals and any other manuals required by the Board.

24 **FOSSILS AND ANTIQUITIES**

Property

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

Discovery

- 24.2 Upon the discovery of any such item during the course of the Works, Project Co shall:

24.2.1 immediately inform the Board's Representative of such discovery;

24.2.2 take all steps not to disturb the object and, if necessary, cease any Works in so far as the carrying out of such Works would endanger the object or prevent or impede its excavation; and

24.2.3 take all necessary steps to preserve the object in the same position and condition in which it was found.

Action

- 24.3 The Board shall procure that the Board's Representative promptly, and in any event within ten (10) Business Days, issues an instruction to Project Co specifying what action the Board's Representative requires Project Co to take in relation to such discovery.

- 24.4 Project Co shall promptly and diligently comply with any instruction issued by the Board's Representative referred to in Clause 24.3 above (except and to the extent that such instruction constitutes a Board Works Variation pursuant to Clause 24.6 below in respect of which the provisions of Part 22 of the Schedule (Variation Procedure) shall apply), at its own cost.

- 24.5 If directed by the Board's Representative, Project Co shall allow representatives of the Board to enter the Site for the purposes of removal or disposal of such discovery provided that such entry shall be subject to the Board complying with all relevant safety procedures, which shall include any relevant health and safety plans for the construction of the Facilities, the Contractor's Site Rules from time to time and any reasonable directions with regard to site safety that may be issued by or on behalf of the Contractor's Site Manager from time to time.

- 24.6 If any instruction referred to in Clause 24.3 above includes a requirement for Project Co to carry out works (being any work of alteration, addition, demolition or extension or variation in the Facilities) which are not works which would be necessary for the purpose of compliance with Law or any Consents, such works shall be deemed to be a Board Works Variation and the provisions of Part 22 of the Schedule (Variation Procedure) shall apply

as if such instruction were a Variation Enquiry issued by the Board in accordance with the provisions of Part 1 of Part 22 of the Schedule (Variation Procedure).

## PART E: QUALITY ASSURANCE

### 25 QUALITY ASSURANCE

#### Quality Plans and Systems

- 25.1 Project Co shall procure that all aspects of the Project Operations are the subject of quality management systems in accordance with the provisions of this Clause 25.
- 25.2 The quality management systems referred to in Clause 25.1 above shall be reflected in appropriate quality plans, the standard of which shall be consistent with BS EN ISO 9001 or 9002 (as the case may be) or any equivalent standard which is generally recognised as having replaced them (or either of them).
- 25.3 Without limitation to the generality of Clause 25.2, there shall be:
- 25.3.1 a Design Quality Plan;
  - 25.3.2 a Construction Quality Plan; and
  - 25.3.3 a Services Quality Plan for each Service,
- provided that the Design Quality Plan and the Construction Quality Plan may be incorporated into one document.
- 25.4 Project Co shall procure that the Project Operations are carried out in compliance with the Quality Plans. All Quality Plans shall be submitted to the Board's Representative in accordance with Part 10 of the Schedule (Review Procedure) and Project Co shall not be entitled to implement or procure the implementation of any Quality Plan unless Project Co is entitled to proceed with such implementation pursuant to Part 10 of the Schedule (Review Procedure).
- 25.5 Project Co shall implement the quality management systems referred to in Clause 25.1 and shall procure that:
- 25.5.1 the Contractor implements the Design Quality Plan;
  - 25.5.2 the Contractor implements the Construction Quality Plan;
  - 25.5.3 each Service Provider implements the relevant Services Quality Plan for each Service being provided by that Service Provider.
- 25.6 Where any aspect of the Project Operations is performed by more than one contractor or subcontractor, then the provisions of this Clause 25 (in so far as relevant or appropriate to the activities to be performed by such contractor or subcontractor) shall apply in respect of each of such contractors or subcontractors, and references in this Clause 25 to the "Contractor" or the "Service Provider" shall be construed accordingly. To avoid doubt, this Clause shall not be construed as requiring subcontractors of the Contractor or the Service Provider to have their own quality plans but only to comply with the Design Quality Plan and the Construction Quality Plan or the relevant aspects of the Services Quality Plan (as the case may be).

- 25.7 Project Co shall from time to time submit to the Board's Representative in accordance with Part 10 of the Schedule (Review Procedure) any changes to any of the Quality Plans required for such Quality Plan to continue to comply with the requirements set out in Clause 25.2. The Board's Representative may raise comments on any such proposed change only on the grounds set out in paragraph 3.6 of Part 10 of the Schedule (Review Procedure).
- 25.8 In the event that any ambiguity, uncertainty, dispute or discrepancy arises in relation to the nature and scope of Project Co's obligations under this Clause, wherever possible, the provisions of this Clause shall be interpreted and construed in such a manner as to resolve the apparent ambiguity, uncertainty, dispute or discrepancy so that all the provisions of this Clause may be given meaning and effect but, if such interpretation or construction is not possible, the provisions of this Clause shall be given meaning and effect in the following order of precedence (in descending order):
- 25.8.1 the provisions and standards referred to in Clause 25.2;
- 25.8.2 the Quality Plans referred to in Clause 25.3;
- 25.8.3 Board's Construction Requirements and/or Board's Service Level Specifications (as the case may be);
- 25.8.4 Project Co's Proposals and/or the Method Statements (as the case may be);
- 25.8.5 Project Co's and/or the Contractor's and/or any Service Provider's quality manuals and procedures; and
- 25.8.6 Good Industry Practice.
- 25.9 If there is no objection under Part 10 of the Schedule (Review Procedure) to a change to any Quality Plan proposed pursuant to Clause 25.7, the Quality Plan shall be amended to incorporate such change.

#### Quality Manuals and Procedures

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

#### Quality Management

- 25.11 Project Co shall maintain a quality management system which shall:
- 25.11.1 ensure the effective operation of the quality systems described in this Clause;
- 25.11.2 cause an audit of the quality systems at regular intervals and the findings of such audit will be reported to the Board's Representative;

25.11.3 require review of all quality systems at intervals agreed with the Board's Representative to ensure their continued suitability and effectiveness;

25.11.4 require liaison with the Board's Representative on all matters relating to quality management; and

25.11.5 require production of reports and their delivery to Project Co.

#### Quality Monitoring

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

PART F: INFORMATION TECHNOLOGY

26 NOT USED

## **PART G: SERVICES**

### **27 THE SERVICES**

#### General obligations

27.1 Throughout the Operational Term, Project Co shall provide (or procure the provision by the Service Providers of) the Services:

27.1.1 in accordance with the terms of this Agreement;

27.1.2 in accordance with the Method Statements; and

27.1.3 as an obligation independent from, and in addition to, Clause 27.1.2, in such manner as ensures that the Service Level Specifications are met.

#### Commencement and phase in of Services

27.2 Project Co shall provide (or procure the provision by the Service Provider of) the Services with effect from the first Business Day following the Completion Date.

#### Project Co Services Changes

27.3 Project Co may at any time submit to the Board's Representative in accordance with Part 10 of the Schedule (Review Procedure) proposals for amendments to or substitution for the Method Statements or any part of them. If there is no comment on such proposed amendment or substitution (on the grounds set out in paragraph 3.7 of Part 10 of the Schedule (Review Procedure)), then the Method Statements as so amended or substituted shall be the Method Statements for the purposes of this Agreement, subject to any further amendment or substitution to which there has been no comment in accordance with Part 10 of the Schedule (Review Procedure).

27.4 To avoid doubt, an amendment to or substitution for the Method Statements proposed pursuant to Clause 27.3 shall not be a Qualifying Variation entitling Project Co to any payment (or other compensation) or to any relief from the performance of its obligations under this Agreement.

#### No disruption

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

### **28 MAINTENANCE**

#### Programmed Maintenance Works

28.1 No later than three (3) months prior to the Completion Date Project Co shall submit to the Board's Representative in accordance with Part 10 of the Schedule (Review Procedure) a Schedule of Programmed Maintenance for the period from the Completion Date to the expiry of that Contract Year.

- 28.2 Not later than three (3) months prior to the commencement of each subsequent anniversary of the Completion Date Project Co shall submit to the Board's Representative in accordance with Part 10 of the Schedule (Review Procedure) a Schedule of Programmed Maintenance for the next succeeding Contract Year.
- 28.3 Each Schedule of Programmed Maintenance shall contain the following information (the "Programmed Maintenance Information"):
- 28.3.1 details of the proposed start and end dates for each period of Programmed Maintenance, the works to be carried out and the proposed hours of work; and
- 28.3.2 details of any effect of the Programmed Maintenance on the delivery of any of the Services and/or the activities of the Board.
- 28.4 Not later than fifteen (15) Business Days prior to the commencement of any quarter (being a three month period commencing on 1 April, 1 July, 1 October or 1 January), Project Co may submit to the Board's Representative for approval in accordance with paragraph 1.2 of Part 10 of the Schedule (Review Procedure) a revision to the Schedule of Programmed Maintenance for the Contract Year in which the relevant quarter falls showing the effect of the proposed changes to the Programmed Maintenance Information. If the Board's Representative does not raise comments on such proposed revision in accordance with Part 10 of the Schedule (Review Procedure), the Schedule of Programmed Maintenance as revised shall become the Schedule of Programmed Maintenance in respect of that quarter.
- 28.5 Where the Board's Representative raises comments in respect of any Programmed Maintenance periods and/or hours of work shown in a Schedule of Programmed Maintenance in accordance with paragraph 3.8 of Part 10 of the Schedule (Review Procedure), he shall indicate whether, and if so when, the Programmed Maintenance can be re-scheduled and Project Co shall amend the relevant Schedule of Programmed Maintenance accordingly.

#### Programmed and Unprogrammed Maintenance

- 28.6 Project Co shall not carry out any Programmed Maintenance or Unprogrammed Maintenance Works save:
- 28.6.1 in accordance with a Schedule of Programmed Maintenance to which no objection has been made under Part 10 of the Schedule (Review Procedure) or, where comment has been raised in respect of the Programmed Maintenance periods and/or time, the Schedule of Programmed Maintenance has been amended pursuant to Clause 28.5;
- 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.
- 28.7 Notwithstanding that there has been no objection to a Schedule of Programmed Maintenance, the Board's Representative may, at any time, require Project Co to accelerate or defer any Programmed Maintenance by giving written notice to Project Co, (unless otherwise agreed) not less than fifteen (15) Business Days prior to the scheduled date for carrying out such Programmed Maintenance, which notice shall set out the time and/or periods at or during which the Board requires the Programmed Maintenance to be

performed. Project Co shall notify the Board of the amount of any additional reasonable costs which it will incur as a direct consequence of such acceleration or deferment (the "Estimated Increased Maintenance Costs") within five (5) Business Days of receipt of such notice from the Board. The Board shall, within a further period of five (5) Business Days following receipt by the Board of notification of the amount of the Estimated Increased Maintenance Costs, at the Board's option, either confirm or withdraw its request to accelerate or defer the Schedule of Programmed Maintenance. If the Board does not respond within this five (5) Business Day period, the request shall be deemed to have been confirmed. The Board shall reimburse Project Co the direct and reasonable costs actually incurred by Project Co as a consequence of such acceleration or deferment up to, but not exceeding, the amount of the Estimated Increased Maintenance Costs.

- 28.8 If, in circumstances other than an emergency, the need arises for Maintenance Works (excluding any works of a de minimis nature in respect of which the parties have agreed this Clause shall not apply) which are not scheduled to be carried out as part of the Programmed Maintenance ("Unprogrammed Maintenance Work"), Project Co shall not carry out any Unprogrammed Maintenance Work unless and until the Board's Representative has approved the proposed commencement date, the proposed hours of work and estimated duration of the requisite Unprogrammed Maintenance Works in accordance with the provisions of paragraph 3.8 of Part 10 of the Schedule (Review Procedure). Nothing in this Clause 28.8 (including any approval of the Board pursuant to Part 10 of the Schedule (Review Procedure)) shall prevent the Board from making any deductions from the Service Payments pursuant to the Payment Mechanism.
- 28.9 If, as a result of an emergency, the need arises for Unprogrammed Maintenance Works, Project Co may carry out such Unprogrammed Maintenance Works provided that Project Co shall notify the Board's Representative as soon as possible (and in any event within two (2) Business Days of the occurrence of the emergency) of the extent of the necessary Unprogrammed Maintenance Works and the reasons for them. Project Co shall take all reasonable steps to minimise the duration of such Unprogrammed Maintenance Works. Nothing in this Clause 28.9 shall prevent the Board from making any deductions from the Service Payments pursuant to the Payment Mechanism.
- 28.10 Where Programmed Maintenance scheduled to be carried out in accordance with the Schedule of Programmed Maintenance has been deferred by the Board's Representative under Clause 28.7, Project Co shall not be treated as having failed to perform the 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 Project Co shall not be relieved from the consequences of any failure to maintain the Facilities in respect of any period prior to the period for performing the particular work according to the Schedule of Programmed Maintenance.

#### 5 Year Maintenance Plan

- 28.11 Project Co shall deliver to the Board's Representative not less than twenty (20) Business Days prior to the commencement of each Contract Year the latest version of the 5 Year Maintenance Plan for the Estate Services.
- 28.12 The Board shall have a right to inspect the Facilities and the Maintenance Works to ensure that the Facilities are being maintained in accordance with the Service Level

Specifications and that the Facilities comply with the Board's Construction Requirements and Project Co's Proposals 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. The Board may appoint an independent third party for the purposes of carrying out any such inspection and shall make known the findings to Project Co and the Funders. The parties shall then meet to discuss any implications of such findings and any steps that are necessary to remedy any failure to comply with such obligations. Project Co shall (subject to Clause 40 (Variation Procedure)) take into account such discussions in the next Schedule of Programmed Maintenance so that any failure to comply with such obligations shall be remedied.

## 29 MONITORING OF PERFORMANCE

### Monitoring

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

### Service Failure Points

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

### Warning Notices

- 29.4 Without prejudice to the Board's rights under Clause 44 (Project Co Event of Default) and any other express rights under this Agreement, if at any time Project Co has:

29.4.1 committed any material breach of its obligations under this Agreement; or

29.4.2 in relation to any Service, accrued more than the specified number of Service Failure Points as set out in Table A of Appendix G to Part 18 of the Schedule for such Service in any one (1) month rolling period,

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

29.5 Without prejudice to the Board's rights under Clause 44 (Project Co Event of Default) and to any other express rights under this Agreement, if Project Co receives two (2) or more Warning Notices in any rolling six (6) month period in respect of any Service, the Board may by notice to Project Co increase the level of its monitoring of Project Co, or (at the Board's option) of Project Co's monitoring of its own performance of its obligations under this Agreement, in respect of the relevant Service, in which case, the following provisions shall apply until such time as Project Co shall have demonstrated to the reasonable satisfaction of the Board that it will perform (and is capable of performing) its obligations under this Agreement:

29.5.1 any such notice to Project Co shall specify in reasonable detail the additional measures to be taken by the Board or by Project Co (as the case may be) in monitoring the performance of Project Co;

29.5.2 if Project Co (acting reasonably) objects to any of the specified measures on the grounds that they are excessive it shall notify the Board in writing within two (2) Business Days of the receipt of the notice of the measures objected to (and of any changes necessary in order to prevent prejudice to Project Co's performance of its obligations under this Agreement);

29.5.3 the measures to be taken by the Board and Project Co (as the case may be) shall be agreed between the parties or, in the absence of agreement within three (3) Business Days of the Board's receipt of Project Co's objection, determined pursuant to Part 26 of the Schedule (Dispute Resolution Procedure); and

29.5.4 Project Co shall bear its own costs and indemnify and keep indemnified the Board at all times from and against all reasonable costs and expenses (if any) incurred by or on behalf of the Board in relation to such increased level of monitoring (including an appropriate sum in respect of general staff costs and overheads).

#### Board's remedial rights

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

29.6.1 the Board, acting reasonably, considers that a breach by Project Co of any obligation under this Agreement:

29.6.1.1 may create an immediate and serious threat to the health or safety of any user of the Facilities; or

29.6.1.2 may result in a material interruption in the provision of one or more of the Services; or

29.6.1.3 is prejudicial to the ability of the Board to provide Clinical Services to a material degree; or

29.6.2 Project Co has, in relation to any Service, accrued more than the specified number of Service Failure Points as set out in Table B of Appendix G to Part 18

of the Schedule for such Service in any one (1) month rolling period (to avoid doubt, comprising the then previous thirty (30) days); or

- 29.6.3 Project Co is not in breach of its obligations as described in Clause 29.6.1 and 29.6.2, but the Board considers the circumstances constitute an emergency.
- 29.7 In any of the circumstances set out in Clause 29.6, the Board, acting reasonably, may (without prejudice to its rights under Clause 44 (Project Co Event of Default) or any other express rights under this Agreement) either:
- 29.7.1 if it considers that there is sufficient time and that it is likely that Project Co will be willing and able to provide assistance, require Project Co by written notice to take such steps as the Board considers necessary or expedient to mitigate or rectify such state of affairs and Project Co shall use its best endeavours to comply with the Board's requirements as soon as reasonably practicable; or
- 29.7.2 if it considers there is not sufficient time, or that Project Co is not likely to be willing and able to take the necessary steps, take such steps as it considers to be appropriate (either itself or by engaging others to take any such steps) to ensure performance of the relevant Services to the standards required by this Agreement (or as close as possible to those standards as the circumstances permit and, in any event, in accordance with Good Industry Practice).
- 29.8 If:
- 29.8.1 Project Co does not confirm, within ten (10) Business Days of a notice served pursuant to Clause 29.7.1 (or such shorter period as is appropriate in the case of an emergency), that it is willing to take such steps as are referred to in Clause 29.7.1; or
- 29.8.2 Project Co fails to take the steps notified to it by the Board pursuant to Clause 29.7 within such time as the Board, acting reasonably, shall think fit,
- then (without prejudice to Clause 29.7.2) the Board, acting reasonably, may itself take or engage others to take such steps as it considers appropriate.
- 29.9 Where the Board considers it to be necessary or expedient to do so, the steps which the Board may take pursuant to this Clause shall include the partial or total suspension of the right and obligation of Project Co to provide the relevant Services to the Board but only for so long as the circumstances referred to in Clause 29.6.1 subsist or, in the circumstances set out in Clause 29.6.2, until such time as Project Co shall have demonstrated to the reasonable satisfaction of the Board that it will perform (and is capable of performing) its obligations in respect of the relevant Services to the required standard.
- 29.10 If the Board either takes steps itself or requires Project Co to take steps in accordance with this Clause as a result of the circumstance referred to in Clause 29.6.3:
- 29.10.1 the Board shall indemnify and keep indemnified Project Co at all times from and against all additional direct reasonable costs, losses, expenses or damages suffered or incurred in relation to undertaking such steps over and above those

that would otherwise have been incurred in the proper performance of Project Co's obligations under this Agreement; and

29.10.2 any costs incurred by the Board in taking such steps or requiring Project Co to take such steps shall be borne by the Board.

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

29.12 Subject to Clauses 29.10 and 29.11:

29.12.1 any costs or expenses incurred by Project Co in taking such steps as are required by the Board pursuant to Clause 29.7.1 shall be borne by Project Co;

29.12.2 Project Co shall reimburse the Board for all reasonable costs, losses, expenses or damages incurred by it in relation to taking the steps, or engaging others to take the steps, referred to in Clauses 29.7 and 29.8; and

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

## 30 EMPLOYMENT MATTERS

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

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

30.2.1 The Board shall within 40 Business Days of the date on which it was so agreed or determined have the opportunity to offer a position as an employee of the Board to some or all of the Transferring Staff;

30.2.2 Project Co shall procure that no person to whom the Board has offered a position in accordance with Clause 30.2.1 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, Project Co or any Service Provider shall be entitled to dismiss any or all of the Transferring Staff by reason of redundancy provided that Project Co shall carry out and shall procure that any Service Provider shall carry out in the required manner any obligation to consult with the Transferring Staff or any of them, or their respective representatives, and shall use all reasonable endeavours to mitigate the amount of any costs payable in respect of the Transferring Staff or their dismissal.
- 30.4 The Board shall indemnify Project Co against any costs referred to in Clause 30.3 reasonably incurred by Project Co (or by a relevant Service Provider and for which Project Co is responsible).

#### Compliance with legislation and Board Policies

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

#### *Project Co Indemnities*

- 30.7 Project Co shall indemnify and keep indemnified in full the Board 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 Project Co or a Service Provider to any person entitled to such payments from Project Co or a Service Provider who is or has been employed or engaged by Project Co or any Service Provider in connection with the provision of any of the Services which relate to any period of employment or engagement with Project Co or any Service Provider on or after the Relevant Service Transfer Date but 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 paragraph 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 Project Co or any Service Provider in connection with the provision of any of the Services, where

such claim arises as a result of any act or omission of Project Co or the Service Provider occurring after the Relevant Service Transfer Date and 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.

- 30.8 Clause 8.3 and 8.4 of this Agreement shall apply where any claim is made in respect of the indemnities given by Project Co under Clause 30.7.

#### Compliance with legislation and Board Policies

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

- 30.10 Project Co shall not and shall procure that no Service Provider shall make any material change to the terms and conditions of employment of any person employed in the provision of any Service, 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 the Board's consent (which shall not be unreasonably withheld), except such change as may be required by Law.

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

- 30.12 If an offer of employment is made in accordance with Clause 30.11 the employment shall be on the same terms and conditions as applied immediately before the expiry or earlier termination of this Agreement including full continuity of employment, except that the Board or other new service provider may at its absolute discretion not offer such terms and conditions if there has been any change to the terms and conditions of the persons concerned in breach of Clause 30.10.

## 32 SITE SECURITY AND PERSONNEL ISSUES

### Access

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

### Board Policies

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

### Resources and training

- 32.8 Project Co shall procure that:
- 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 Project Co (to the extent permitted by Law) 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 Project Co (who shall procure that the Service Provider shall 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 Project Co (who shall procure that the Service Provider shall be registered with Disclosure Scotland as the relevant person).

32.11 Project Co shall procure that no person who discloses any Convictions, or who is found to have any Convictions following receipt by Project Co of the Enhanced Disclosure Scotland Certificate or the Standard Disclosure Scotland Certificate as the case may be, is employed without the Board's prior written consent (such consent not to be unreasonably withheld or delayed).

32.12 Project Co shall procure that the Board is kept advised at all times of any person employed or engaged by Project Co or any Service Provider in the provision of any of the Services who, subsequent to his/her commencement of such employment or engagement as a member of staff, receives a Conviction of which Project Co or a Service Provider becomes aware or whose previous Convictions become known to Project Co or a Service Provider.

32.13 The Board's Representative (acting reasonably) may instruct Project Co to procure that appropriate disciplinary action is taken against any employee of Project Co or any Sub-Contractor (in accordance with the terms and conditions of employment of the employee concerned) who misconducts himself or is incompetent or negligent in his duties or whose presence or conduct on the Site or at work is otherwise considered by the Board's Representative (acting reasonably) to be undesirable. The Board shall co-operate with any such disciplinary proceedings and shall be advised in writing by Project Co of the outcome.

32.14 Project Co shall procure that there are set up and maintained, by it and by all Service Providers, personnel policies and procedures covering all relevant matters (including discipline, grievance, equal opportunities and health and safety). Project Co shall procure that the terms and the implementation of such policies and procedures comply with Law and Good Industry Practice and that they are published in written form and that copies of them (and any revisions and amendments to them) are forthwith issued to the Board.

#### Management

- 32.15 Project Co shall consult with the Board in relation to the selection procedure for Project Co's Hospital Manager and such person shall not be appointed (or replaced) without the prior written consent of the Board (such consent not to be unreasonably withheld or delayed).
- 32.16 Project Co shall provide, and shall procure that all Service Providers provide, to the Board upon request details of their respective management organisations.

#### Lists and Records

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

#### Health Requirements

- 32.18 Project Co shall procure that all potential employees or persons who may otherwise perform any of the Services (other than any transferring employees or employees of sub-contractors to the Service 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 Project Co is not required to procure compliance with an obligation which contravenes the Disability Discrimination Act 1995) and Project Co shall also procure (to the extent permitted by Law) that all persons employed or engaged in the provision of any Service shall undergo such medical screening examination or treatment and provide such information during the currency of this Agreement when reasonably requested to do so by the Board as required to ensure that the Board is able to comply with relevant legal obligations in respect of the health of Board staff, patients or visitors to Board premises.
- 32.19 To the extent permitted by Law records of all screenings, examinations or treatments referred to in this Clause 32 shall be held by Project Co on behalf of and agent for the Board and produced (subject to requirements under the Law) for inspection upon request by the Board's Representative provided that no such inspection shall take place unless each Staff member has given his or her written consent to such inspection.
- 32.20 Project Co shall (to the extent permitted by Law) procure that the Board shall be informed upon reasonable request by the Board of the outcome of each and every medical screening examination or treatment referred to in Clause 32.18 with reference to the purpose of the screening, examination or treatment concerned and shall receive all such other information referred to in Clause 32.18 subject to requirements under the Law.

- 32.21 The Board's Representative may (acting reasonably) refuse admittance to or order the removal from the Board's premises of any person employed or engaged in the provision of any Service whose presence poses or is reasonably believed to pose a risk to the health of Board staff, patients or visitors and such action which shall forthwith be confirmed in writing by the Board shall not relieve Project Co of any of its obligations under this Agreement.

### 33 STOCKS, CONSUMABLES, MATERIALS AND EQUIPMENT

#### Standards

- 33.1 All goods, equipment, consumables and materials which are to be used in the provision of the Services shall be of satisfactory quality.
- 33.2 Project Co shall ensure that the goods, equipment, consumables and materials used by it or any Sub-Contractor in connection with the provision of any of the Services (each as a distinct and separate obligation) are:
- 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 the Board's Representative, supply to the Board's Representative evidence to demonstrate its compliance with this Clause 33.2.
- 33.3 Project Co shall procure that sufficient stocks of goods, consumables, equipment and materials are held in order to comply with its obligations under this Agreement.

#### Hazardous substances and materials

- 33.4 Project Co shall not install, keep or use in or on the Facilities any materials, equipment or apparatus the installation, keeping or use of which is likely to cause (or in fact causes):
- 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, Project Co shall not bring in or on to (or keep or maintain in or on) the Facilities any hazardous materials or equipment without the prior written consent of the Board and unless Project Co has complied with all relevant Law.

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

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:

33.6.2.1 prevent or counteract the unlawful emission of any hazardous substance to the satisfaction of the Board's Representative;

33.6.2.2 avoid the unlawful discharge into any conducting media serving the Facilities of any hazardous substance;

33.6.2.3 prevent the unlawful generation, accumulation or migration of any hazardous substance at or from the Facilities; and

33.6.2.4 prevent any environmental claims arising or any circumstances arising likely to result in any environmental claims,

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

33.7 Not Used

34 NOT USED

## PART H: PAYMENT AND FINANCIAL MATTERS

### 35 PAYMENT

#### Service Payments

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

#### Invoicing and payment arrangements

35.2 Project Co shall issue invoices in respect of payments due under this Agreement as follows:

35.2.1 in respect of the Service Payments relating to each Contract Month (adjusted pro rata to reflect any part months) Project Co shall issue its invoice to the Board no earlier than the fifteenth day of the relevant Contract Month (the "Monthly Invoice"). The Monthly Invoice shall show:

- 35.2.1.1 the date of the invoice;
- 35.2.1.2 the date when payment is due;
- 35.2.1.3 the account to which payment is to be sent;
- 35.2.1.4 the Contract Month for which the Service Payment is being charged;
- 35.2.1.5 the calculation of the Service Payment for that Contract Month;
- 35.2.1.6 details of any Deductions to be made from the Service Payment for that Contract Month reflecting Service Failures from the previous Contract Month in accordance with Part 18 of the Schedule;
- 35.2.1.7 any adjustments to the Service Payment to reflect previous over-payments and/or under payments (each adjustment stated separately);
- 35.2.1.8 any amounts owed under Part 3 of Part 18 of the Schedule (Energy Payments);
- 35.2.1.9 any other amount due or payable by one party to the other under or in connection with this Agreement;
- 35.2.1.10 any interest payable in respect of any amounts outstanding and/or paid after their due date;
- 35.2.1.11 any VAT chargeable in respect of the relevant invoice.

The Monthly Invoice shall be accompanied by the Performance Monitoring Report in respect of the immediately preceding Contract Month and sufficient and clear working papers setting out the derivation and calculation of each of the amounts referred to in this Clause 35.2.1.

35.2.2 in respect of payments relating to Small Works in each Contract Month, Project Co shall issue its invoice to the Board in accordance with Part 4 of Part 22 of the Schedule, Part 4 (Small Works) no earlier than five (5) Business Days after the last day of the Contract Month to which it relates;

35.2.3 each invoice for Small Works shall be accompanied by a report detailing the work undertaken in that Contract Month and the cost for the Small Works as calculated in accordance with paragraph 2 of Part 4 of Part 22 of the Schedule (Small Works);

35.2.4 in respect of any other sums payable by the Board arising under this Agreement (whether pursuant to any indemnity or otherwise) Project Co shall issue any applicable invoice to the Board no earlier than the date when the amount has been agreed with the Board or determined under the Dispute Resolution Procedure;

35.2.5 Subject to clause 35.4 the amounts included in each invoice issued to the Board shall become due and payable by the later to occur of (i) the fifth day of the Contract Month following the issue of the relevant Monthly Invoice and (ii) the date falling twenty (20) days after receipt by the Board of the relevant Monthly Invoice;

*no earlier than the fifteenth day of the Contract Month*

35.2.6 in respect of the first Contract Month after the Payment Commencement Date, Project Co shall invoice the Board within ~~10 Business Days of the end of this Contract Month~~ in accordance with the provisions of clause 35.2.1 on the basis that no Deductions will apply to this first Monthly Service Payment;

*BN  
722  
AF*

35.2.7 in respect of the final Contract Month during the Project Term the Board shall be entitled to invoice Project Co for the Deductions in such period on the day which is one month and three days after expiry of the Project Term. Project Co shall pay the amounts included in such invoice on or before the twenty eighth day following receipt by Project Co of the Board Invoice.

#### Manner of payment

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

#### Disputes

35.4 If either party (acting in good faith) disputes all or any part of the Service Payments calculated in accordance with Clause 35.2 (Invoicing), the undisputed amount of the Service Payment shall be paid by the Board in accordance with Clause 35.2 (Invoicing) and the provisions of this Clause 35.4 shall apply. The parties shall use all reasonable endeavours to resolve the dispute in question within ten (10) Business Days of the dispute arising. If they fail so to resolve it, either party may refer the matter to the Fast Track

Dispute Resolution Procedure. Following resolution of the dispute, any amount agreed or determined to have been payable shall be paid forthwith by the Board to Project Co, together with interest on such amount calculated in accordance with Clause 35.5 (Late Payment).

#### Late Payments

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

#### Set-Off

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

#### VAT

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

### 36 INSURANCE

#### Project Co Insurances

- 36.1 Project Co shall, at its own cost, procure that the insurances, details of which are set out in Part 1 of Part 21 of the Schedule (Insurance Requirements), are taken out prior to the commencement of the Works and are maintained for the periods specified in Part 1 of Part 21 of the Schedule (Insurance Requirements).
- 36.2 Project Co shall, at its own cost, procure that the insurances, details of which are set out in Part 2 of Part 21 of the Schedule (Insurance Requirements), are taken out prior to the Actual Completion Date and are maintained for the periods specified in Part 2 of Part 21 of the Schedule (Insurance Requirements).
- 36.3 Without prejudice to the other provisions of this Clause, Project Co shall, at all relevant times, at its own cost, effect and maintain in full force those insurances which it is required to effect by any applicable Law.
- 36.4 All Insurances shall:

- 36.4.1 be maintained in the names of the parties specified in Part 21 of the Schedule (Insurance Requirements) and shall be composite policies of insurance (and not joint) unless stated otherwise in any case in Part 21 of the Schedule (Insurance Requirements);
- 36.4.2 be placed with insurers who are acceptable to the Board (such acceptance not to be unreasonably withheld or delayed);
- 36.4.3 provide that they shall continue in effect and unaltered for the benefit of the insured parties for at least twenty (20) Business Days after written notice by registered mail or fax of any cancellation, adverse change or lapse by reason of non-payment of premiums or instalment or otherwise has been received by the Board;
- 36.4.4 contain a provision that:
  - 36.4.4.1 other than in respect of losses arising as a result of any fraudulent act or omission no claim of any of the insured under the policy shall be defeated, prejudiced or otherwise affected by any act or omission on the part of any other insured and shall insure the interests of each insured regardless of any act or omission on the part of any other insured party; and
  - 36.4.4.2 each policy of insurance which insures the rights and interests of more than one party operates, save for limits of liability and/or amount, in the same manner as if there were a separate policy with and covering each insured and be without right of contribution from any other insurance which is carried by an insured;
- 36.4.5 in so far as they relate to damage to assets (including the Facilities), cover the same for the full reinstatement value; and
- 36.4.6 comply with the relevant provisions of Part 21 of the Schedule (Insurance Requirements).
- 36.5 Project Co shall ensure that its brokers give the Board a letter of undertaking in the Agreed Form as set out in Appendix 1 to Part 21 of the Schedule;

#### Subrogation and Vitiating

- 36.6 Project Co shall:
  - 36.6.1 procure that all policies of insurance to be effected by it pursuant to this Clause shall contain a provision to the effect that the insurers have agreed to waive all rights of subrogation against the Board (and all Board Parties to exclude the Board's agents, Contractors and Sub-contractors of any tier but to include any on site contractors of the Board providing Board Non-Clinical Services notified by the Board (acting reasonably) to Project Co; and
  - 36.6.2 where Project Co is obliged to effect insurance under this Clause, not bring any claim or action against the Board or any Board Party (to exclude the Board's

agents, Sub-contractors and contractors of any tier but to include any on site contractors of the Board providing Board Non-Clinical Services notified by the Board (acting reasonably) to Project Co in respect of any loss or damage in circumstances where Project Co could recover such loss or damage under such insurance (whether or not such insurance has in fact been effected or, if effected, has been vitiated as a result of any act or omission of Project Co (or any Project Co Party), including but not limited to non-disclosure or under-insurance),

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

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

#### Evidence of Project Co Insurance

- 36.8 Not less than ten (10) Business Days prior to the expiry or amendment of any relevant insurance policy, Project Co shall submit to the Board a request for approval from the Board of the insurer and the principal terms and conditions of such insurance policy (and any revision to such terms and conditions or change in identity of such insurer), such approval not to be unreasonably withheld or delayed.
- 36.9 Project Co shall supply the Board with copies of every policy of Insurance (or such other evidence of insurances as may be reasonably required) as soon as it is available, together with evidence of payment of the premiums. If Project Co defaults in insuring or continuing to maintain the Insurances, the Board may insure against any risk in respect of which such default has occurred and recover any premiums from Project Co as a debt.

#### Acceptance and compliance

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

#### Uninsurable Risks

- 36.12

36.12.1 If Project Co is unable to comply with its obligations under Clause 36.8 in respect of a public liability policy which is to expire, because it has been unable to obtain a quotation, Project Co shall promptly inform the Board and shall provide to the Board such information as the Board may reasonably require as to why it has been unable to obtain such quotation and what steps Project Co proposes to take to address the situation and Project Co shall keep the Board fully informed of relevant developments.

36.12.2 Without prejudice to the generality of Clause 36.12, Project Co shall promptly notify the Board if it has reasonable grounds for belief that an Uninsurable PL Risk (as defined in Clause 36.13) is likely to occur on expiry of the current insurance policy.

36.12.3 Project Co shall notify the Board of any risk becoming an Uninsurable Risk within five (5) Business Days of becoming aware of the same and, in any event, at least five (5) Business Days before the expiry of any existing insurance in respect of such risk.

36.13 Where there is an Uninsurable Risk:

36.13.1

36.13.1.1 Where the Uninsurable Risk relates to a risk under a public liability policy, (an "Uninsurable PL Risk") the Agreement shall continue or the Board may, at its option, elect to terminate the Agreement. If the Board elects to terminate the Agreement in accordance with this Clause 36.13.1.1, the Board shall make this decision (which shall have immediate effect) before the expiry of the existing insurance in respect of such risk that has become an Uninsurable Risk and notify this decision to Project Co immediately thereafter whereupon this Agreement shall terminate and the provisions of Clause 46.1 shall apply as though the period of six (6) months referred to therein had expired;

36.13.1.2 In respect of all other Uninsurable Risks, this Agreement shall continue.

36.13.2 Where pursuant to Clause 36.13.1 the Agreement continues then:

36.13.2.1 upon the existing cover lapsing Project Co shall be relieved of its obligation to maintain insurance in respect of the Uninsurable Risk;

36.13.2.2 the Service Payments shall be reduced in each year for which the relevant insurance is not maintained, by an amount equal to the premium paid by Project Co in respect of the relevant risk in the year prior to it becoming an Uninsurable Risk (index-linked). Where the risk is an Uninsurable Risk for part of a year only, the reduction in the Service Payments shall be pro rated to the number of months for which the risk was an Uninsurable Risk; and

36.13.2.3 on the occurrence of a relevant Uninsurable Risk then if the risk is an Uninsurable PL Risk the Board shall pay to the injured party an amount

equal to the payment that would have been payable in respect of the claim had the relevant insurance continued to be available or, in the case of other Uninsurable Risks the Board may (at its option) either:

(a) pay to Project Co within 6 calendar months of the date on which the risk occurs an amount equal to the insurance proceeds that would have been payable (save in the case of the insurances referred to at Part 1, paragraph 3 of Part 21 of the Schedule (Advance Loss of Profits) Part 2, paragraph 3 of Part 21 of the Schedule (Business Interruption) where (in either case) the amount payable shall equal proceeds for any Unavoidable Costs only) had the relevant insurance continued to be available and:

(aa) (in respect of insurance proceeds to be dealt with pursuant to Clause 36.18 (Application of Proceeds)) payment shall be made to the Insurance Proceeds Account;

(ab) in respect of Insurances not dealt with pursuant to Clause 36.18 (Application of Proceeds) payment shall be made as directed by Project Co; or

(b) terminate this Agreement.

36.13.3 Where the Agreement terminates, the provisions of Clause 46.1 (Non-Default Termination - Force Majeure) shall apply as though the period of six (6) months referred to therein had expired.

36.13.4 For the purposes of this Clause 36.13, "Unavoidable Costs" shall be the loss sustained by Project Co being:

36.13.4.1 any amount in respect of principal or interest under the Funding Agreements during the Indemnity Period; and

36.13.4.2 fixed costs for which Project Co is legally liable (including, to avoid doubt, pursuant to the Service Contracts) excluding payments:

(a) to the extent that the same do not reflect normal commercial market terms;

(b) which are due to the Shareholders and holders of Junior Debt in that capacity;

(c) which represent Indirect Losses suffered or allegedly suffered by any person (excluding, to avoid doubt, accrued profits); and

36.13.4.3 the additional expenditure necessarily and reasonably incurred in avoiding or diminishing clauses 36.13.4.1 and 36.13.4.2 above which but for the additional expenditure would have taken place during the Indemnity Period but not exceeding the amount of the reduction in fixed costs thereby avoided.

To avoid doubt, the Board will not be liable under Clause 36 for any loss which would not have been indemnified under the business interruption insurance which was effective prior to the risk becoming an Uninsurable Risk.

- 36.14 Where there is an Uninsurable Risk, Project Co shall approach the insurance market on a regular basis and in any event at intervals of not more than six (6) months to establish whether the relevant risk remains an Uninsurable Risk.
- 36.15 Where a risk which was previously an Uninsurable Risk ceases to be so and Project Co has become aware that this is the case, Project Co shall forthwith take out and maintain insurance in accordance with the requirements of this Agreement in respect of the risk and the provisions of Clauses 36.13 and 36.14 (Uninsurable Risks) shall no longer apply to the risk.

#### Risk Management

- 36.16 With effect from the date of this Agreement, the Board and Project Co shall each designate or appoint an insurance and risk manager and notify details of the same to the other parties. Such person shall:
- 36.16.1 be responsible for dealing with all risk management matters on behalf of its appointing or designating party including (without limitation) ensuring compliance by that party with this Clause;
- 36.16.2 advise and report to that party on such matters; and
- 36.16.3 ensure that any report or survey conducted by any insurer of any relevant procedures in relation to the Project is disclosed to the parties.
- 36.17 Without prejudice to the provisions of Clause 36.16, the parties shall notify one another, and in Project Co's case the relevant insurer, of any circumstances which may give rise to a claim of a value equal to or in excess of fifteen thousand pounds (£15,000) (index-linked) in respect of any third party personal injury claim and fifty thousand pounds (£50,000) (index-linked) in respect of any other claim) under the Insurances within five (5) Business Days of becoming aware of the same (or earlier, if so requested by the terms of the relevant insurance policy). If any insurer disputes any such claim, Project Co shall provide the Board with full details of any disputed claim and the parties shall liaise with one another to ensure that the relevant claim is preserved or pursued.

#### Application of Proceeds

- 36.18 All insurance proceeds received by Project Co under the insurances referred to in paragraph 1 of Part 1 and paragraph 1 of Part 2 of Part 21 of the Schedule (Insurance Requirements) shall be paid into the Insurance Proceeds Account and shall be held on trust for the purpose of and applied in accordance with this Agreement and in accordance with the Insurance Proceeds Accounts Agreement.
- 36.19 Subject to the provisions of the Funders' Direct Agreement and Clauses 36.18 and 36.20 (Reinstatement Plan), Project Co shall apply any proceeds of any policies of Insurance:

- 36.19.1 in the case of third party legal liability or employers' liability insurance, in satisfaction of the claim, demand, proceeding or liability in respect of which such proceeds are payable; and
- 36.19.2 in the case of any other insurance, so as to ensure the performance by Project Co of its obligations under this Agreement, including where necessary the reinstatement, restoration or replacement of the facilities, assets, materials or goods affected by the event giving rise to the insurance claim and consequent payment of proceeds.
- 36.19A Where reinstatement monies are required to be released from the Insurance Proceeds Account Project Co shall obtain the Board's consent in accordance with the Insurance Proceeds Account Agreement. The Board shall give its consent to the release of monies from the Insurance Proceeds Account within one (1) Business Day of a request from Project Co (such consent not to be unreasonably withheld).
- 36.19B If the proceeds of any insurance claim are insufficient to cover the settlement of such claims, Project Co will make good any deficiency forthwith.
- 36.20 Reinstatement Plan
- 36.20.1 For the purposes of this Clause 36.20, Material Damage of the Facilities shall mean damage to the Facilities which would give rise to repair and/or reinstatement costs of £1,000,000 or above (index linked).
- 36.20.2 In the event of damage to, or destruction of, any part of the Facilities which is or is likely to be Material Damage there shall be a meeting between the parties within three (3) Business Days of such damage to make a preliminary assessment of the nature and extent of the damage and in approximate terms the likely reinstatement cost and length of time required to reinstate.
- 36.20.3 In the event of Material Damage to the Facilities, Project Co shall deliver (as soon as reasonably practicable and in any event within one (1) month) to:
- 36.20.3.1 the Board; and
- 36.20.3.2 the Scottish Executive Health Department (or its replacement from time to time)
- a plan prepared by Project Co (the "Original Reinstatement Plan") for the carrying out of the works necessary (the "Reinstatement Works") to reinstate or replace the damaged or destroyed facilities or assets. Following receipt of the Original Reinstatement Plan, the Board may also, if it has decided that the relevant Facilities are not required to be reinstated in the same form as prior to the damage or destruction, issue a Variation Enquiry. The provisions of Part 22 of the Schedule (Variation Procedure) shall apply to such Variation Enquiry with such amendments as Project Co and the Board may agree to take account of the procedures set out in this Clause 36.20.3.
- 36.20.4 Any Original Reinstatement Plan shall set out in as much detail as is reasonable in the circumstances:

- 36.20.4.1 the identity of the person, or (if Project Co is seeking competitive tenders) persons intended, to effect the Reinstatement Works;
  - 36.20.4.2 the terms and timetable or (if not then established) the reasonably anticipated terms and timetable upon which the Reinstatement Works are to be effected (including the date upon which the Site is reasonably expected to become fully operational again);
  - 36.20.4.3 the impact that implementation of the Original Reinstatement Plan will have on the revenues of Project Co under the Project Agreement and on payment obligations of Project Co under the other Project Documents;
  - 36.20.4.4 the total cost or (if not then established) the reasonably anticipated total cost of the Reinstatement Works; and
  - 36.20.4.5 the impact of any Variation requested by the Board as part of the reinstatement in accordance with Clause 36.20.3.
- 36.20.5 The Board shall provide Project Co with any comments it may have on any Original Reinstatement Plan and any Variation Enquiry issued under Clause 36.20.3 as soon as reasonably practicable and in any event not less than five (5) Business Days prior to the required date for delivery of the Final Reinstatement Plan.
- 36.20.6 As soon as reasonably practicable and in any event within one (1) month of delivery of the Original Reinstatement Plan, Project Co will deliver to the Board and the Scottish Executive Health Department (or its replacement from time to time) a further reinstatement plan setting out the information required in Clause 36.20.4 (the "Final Reinstatement Plan") amending the Original Reinstatement Plan to incorporate the comments received from the Board in respect of the Original Reinstatement Plan, including (if relevant) any necessary changes to any person(s) and/or the terms and timetable proposed by Project Co to effect the Reinstatement Works in the Original Reinstatement Plan which were not approved by the Board (provided that if there is any conflict between the comments received, such parties shall use reasonable endeavours to remove such conflict(s) and if they are unable to do so the dispute will be resolved in accordance with Clause 56 (Dispute Resolution)) and those changes to the Original Reinstatement Plan necessary to reflect the contractual terms agreed (as negotiated and finalised) with the person effecting the Reinstatement Works.
- 36.20.7 Upon receipt of a Final Reinstatement Plan (complying with the requirements of and approved by the Board as contemplated in Clause 36.20.6), Project Co shall amend the Financial Model. For the purposes of such amendment to the Financial Model the following assumptions shall be used:
- 36.20.7.1 that the Final Reinstatement Plan shall be effected in accordance with its terms;
  - 36.20.7.2 that those moneys standing to the credit of the Life Cycle Reserve Account (as defined in the Senior Funder Agreement) which the Senior Funders confirm are no longer needed to meet the maintenance requirements of assets which are to be replaced as part of the

Reinstatement Works can be transferred out of the Life Cycle Reserve Account.

36.20.7.3 that the payments under the Funding Agreements to be paid during the period of the Reinstatement Plan shall be met in accordance with the Funding Agreements on the basis of no rescheduling of any payments under the Funding Agreements;

36.20.7.4 that payments in respect of any Variation comprised in the Reinstatement Plan will be determined in accordance with Part 22 of the Schedule (Variation Procedure).

Board election not to reinstate

36.21 In the event that the Facilities are destroyed or substantially destroyed, the Board may, at its option, serve a Viability Statement on Project Co within five (5) Business Days of:

36.21.1 completion of the Economic Reinstatement Test; or

36.21.2 if the Funders' Direct Agreement has ceased to apply, agreement or determination of the extent of the damage; or

36.21.3 receipt by the Board of the Original Reinstatement Plan.

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

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

36.23 Nothing in this Agreement shall oblige Project Co to take out and/or maintain insurance in respect of a risk which is not an Uninsurable Risk but for which after the date of this Agreement:

36.23.1 insurance is not available within the worldwide insurance market with reputable insurers of good standing in respect of that risk; or

36.23.2 the terms and/or conditions offered in respect of that risk are such that the risk is not generally being insured against in the worldwide insurance market with reputable insurers of good standing;

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

Insurance Premium Increase Risk Sharing Mechanism

- 36.24 In respect of increases in insurance premia the provisions of Part 3 of Part 21 of the Schedule shall apply.

**37 CUSTODY OF FINANCIAL MODEL**

- 37.1 Immediately after execution of this Agreement, Project Co shall deliver a copy of the Financial Model to the Board.
- 37.2 Either party shall have the right to inspect and audit the Financial Model at all reasonable times.
- 37.3 Unless otherwise agreed between the parties, any amendments to the Financial Model shall reflect, be consistent with and be made only in accordance with the provisions of this Agreement, and shall in all cases be subject to the prior written approval of the Board (such approval not to be unreasonably withheld or delayed). In the event that the parties fail to agree any proposed amendments to the Financial Model, the matter shall be referred for resolution in accordance with Part 26 of the Schedule (Dispute Resolution Procedure).
- 37.4 Following the approval of any amendment of the Financial Model by the Board, Project Co shall promptly deliver a copy of the revised Financial Model to the Board, in the same form as the original form (or such other form as may be agreed by the parties from time to time).

**38 INFORMATION AND AUDIT ACCESS**

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

- 38.2 For the purpose of:

38.2.1 the examination and certification of the Board's accounts; or

38.2.2 any examination pursuant to Section 23(1) of the Public Finance and Accountability (Scotland) Act 2000 of the economy, efficiency and effectiveness with which the Board has used its resources,

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

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

## PART I: CHANGES IN LAW AND VARIATIONS

### 39 CHANGES IN LAW

#### General

- 39.1 Project Co shall take all steps necessary to ensure that the Project Operations are performed in accordance with the terms of this Agreement (including, without limitation, Clause 5.2.1 (Compliance with applicable law)) following any Change in Law.

#### Relevant Changes in Law

- 39.2 Subject to Clauses 39.4.3.5 and 39.4.3.6 (Mitigation), on the occurrence of any Relevant Change in Law, the parties shall be entitled to seek adjustments to the Service Payments to compensate for any increase or decrease (as the case may be) in the net cost to Project Co of performing the Project Operations. Such adjustments (if any) will be calculated in accordance with (and subject to) Clauses 39.4 to 39.7 (inclusive).

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

- 39.3.1 the occurrence of any Discriminatory Change in Law having an impact on the cost of performance of the Project Operations;

- 39.3.2 the occurrence of any NHS Specific Change in Law having an impact on the cost of performance of the Project Operations; or

- 39.3.3 the occurrence, after the relevant date, of any Change in Law which requires Project Co to carry out works affecting the Facilities (being any work of alteration, addition, demolition or extension or variation in the quality or function of the Facilities) which are not Maintenance Works or work which Project Co would otherwise be required to undertake to comply with its obligations under this Agreement. For the purposes of this Clause 39.3.3, the relevant date shall be the later to occur of the Completion Date and the Actual Completion Date, save where the Actual Completion Date is delayed by a Compensation Event, a Delay Event referred to in Clause 41.3.1 (Works Change) or by a Delay Event referred to in Clause 41.3.7 (Discriminatory and NHS Specific Changes in Law), in which case the relevant date shall be the later to occur of the Completion Date and the date on which the Works would have been completed in accordance with this Agreement had the relevant Delay Event not occurred, provided that:

- 39.3.3.1 in the case of a Change in Law referred to in Clauses 39.3.1 and 39.3.2 above, the impact of such Relevant Change in Law (either singly or in aggregate with any other such Relevant Change in Law in any Contract Year) on the cost of performance of the Project Operations exceeds one thousand pounds (£1,000) (index linked). To avoid doubt, any such amount of one thousand pounds (£1,000) (index linked) shall always be borne by Project Co;

- 39.3.3.2 such Change in Law was not reasonably foreseeable at the date of this Agreement by an experienced contractor performing operations similar to the relevant Project Operations, on the basis of draft bills published in Government green or white papers or other Government

departmental consultation papers, bills, draft statutory instruments or draft instruments or proposals published in the Official Journal of the European Union, in each case published:

- (a) prior to the date of this Agreement; and
- (b) in substantially the same form or having substantially the same effect as the Relevant Change in Law; and

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

39.4 On the occurrence of a Relevant Change in Law:

39.4.1 either party may give notice to the other of the occurrence of the Relevant Change in Law;

39.4.2 the parties shall meet within fifteen (15) Business Days of the notice referred to in Clause 39.4.1 to consult and seek to agree the effect of the Relevant Change in Law. If the parties, within ten (10) Business Days of this meeting, have not agreed the occurrence or the effect of the Relevant Change in Law, either party may refer the question of whether a Relevant Change in Law has occurred or the effect of any Relevant Change in Law for resolution in accordance with Part 26 of the Schedule (Dispute Resolution Procedure); and

39.4.3 within five (5) Business Days of the agreement or determination referred to in Clause 39.4.2 above, the Board's Representative shall issue a Variation Enquiry and the relevant provisions of Part 22 of the Schedule (Variation Procedure) shall apply except that:

39.4.3.1 Project Co may give notice to the Board's Representative that it objects to such a Variation Enquiry only on the grounds that the implementation of the Variation would not give effect to or comply with the Relevant Change in Law;

39.4.3.2 the Board shall issue a Variation Confirmation in respect of the Variation in accordance with the relevant provisions of Part 22 of the Schedule (Variation Procedure);

39.4.3.3 the provisions of Clause 16 (Consents and Planning Approval) shall apply and, to avoid doubt, the provisions of paragraph 5 of Part 1 of Part 22 of the Schedule (Variation Procedure) shall not apply;

39.4.3.4 the Board shall not be entitled to withdraw any Variation Enquiry or Variation Confirmation issued in accordance with this Clause 39.4.3;

39.4.3.5 Project Co shall, without prejudice to its general obligation to comply with the terms of this Agreement:

39.4.3.5.1 use all reasonable endeavours to mitigate the adverse effects of any Relevant Change in Law and take all reasonable steps

to minimise any increase in costs arising from such Relevant Change in Law; and

39.4.3.5.2 use all reasonable endeavours to take advantage of any positive or beneficial effects of any Relevant Change in Law and take all reasonable steps to maximise any reduction in costs arising from such Relevant Change in Law; and

39.4.3.6 any compensation payable, or reduction to the Service Payments, shall be calculated in accordance with Clause 39.5 or Clause 39.6 (as appropriate) provided that:

39.4.3.6.1 the amount of any compensation payable; or

39.4.3.6.2 the amount by which the Services Payment is to be reduced,

shall not take into account any amounts incurred or to be incurred as a result of Project Co's failure to comply with Clause 39.4.3.5 above.

#### Discriminatory and NHS Specific

39.5 In relation to a Relevant Change in Law referred to in Clauses 39.3.1 (Discriminatory) or 39.3.2 (NHS Specific), any compensation payable, or reduction to the Service Payments, pursuant to this Clause shall be calculated on the basis that Project Co shall be placed in no better or worse position than it would have been in had the Relevant Change in Law not occurred, and any assessment of whether Project Co is in a better or worse position shall take account (inter alia) of the provisions of Clauses 39.4.3.5 and 39.4.3.6 (Failure to mitigate) and:

39.5.1 the extent to which Project Co has been (or will be) compensated as a result of any indexation of the Service Payments under this Agreement;

39.5.2 any decrease in its costs resulting from any Relevant Change in Law; and

39.5.3 any amount which Project Co will recover under any insurance policy (or would have recovered if it had complied with the requirements of this Agreement or of any policy of insurance required under this Agreement) which amount, to avoid doubt, shall not include the amount of any excess or deductibles or any amount above the maximum insured amount applicable to such insurance policy.

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

#### Works after Actual Completion Date

39.6 In relation to a Relevant Change in Law referred to in Clause 39.3.3 (Works after Actual Completion Date) (a "Relevant Works Change in Law"):

39.6.1 for which the Allowable Expenses amounts to less than 0.05% of the Capital Cost of the Facilities (a "De Minimis Amount"), Project Co shall not be entitled to receive any payment, compensation or, save as expressly provided otherwise in this Agreement, any other relief in respect of such Relevant Works Change in Law, save where in any one Contract Year there shall occur more than two (2) Relevant Works Change in Law which each give rise to a De Minimis Amount, in which case the third and each subsequent such De Minimis Amount resulting from a Relevant Works Change in Law in that Contract Year (each an "Additional De Minimis Amount") shall be taken into account for the purposes of:

39.6.1.1 calculating the Cumulative Allowable Expenses; and

39.6.1.2 calculating the Board's Cost Share of such Additional De Minimis Amounts; and

39.6.2 subject to Clause 39.6.1, Project Co shall be entitled to receive compensation from the Board of an amount equal to the Board's Cost Share in respect of such Relevant Works Change in Law. Project Co shall not be entitled to receive any other payment, compensation or (save as expressly provided otherwise in this Agreement) any other relief in respect of any such Relevant Works Change in Law or associated Variations (or the consequences of either) and the provisions of Clause 41.10 (Delay Events - Compensation) shall be construed accordingly. Project Co has accepted the risk of bearing the financial consequences which are not covered by (or exceed) the Board's Cost Share and has had the opportunity of assessing the risk when bidding and agreeing the Service Payments.

39.7 For the purposes of Clause 39.6:

39.7.1 "Capital Cost of the Facilities" means £16,885,570;

39.7.2 "Allowable Expenses" means the costs and expenses to be incurred by Project Co as a direct consequence of the Relevant Works Change in Law, which shall be calculated on the basis that Project Co shall be placed in no better or worse position than it would have been in had the Relevant Works Change in Law not occurred, taking into account (inter alia) the provisions of Clauses 39.4.3.5 and 39.4.3.6 (Failure to mitigate) and:

39.7.2.1 the extent to which Project Co has been (or will be) compensated as a result of any indexation of the Service Payments under this Agreement;

39.7.2.2 any decrease in its costs resulting from such Relevant Works Change in Law;

39.7.2.3 any amount which Project Co will recover under any insurance policy (or would have recovered if it had complied with the requirements of this Agreement or of any policy of insurance under this Agreement) which amount, to avoid doubt, shall not include the amount of any excess or deductibles or any amount above the maximum insured amount applicable to any such insurance policy.

39.7.3 For the purpose of calculating Allowable Expenses in Clause 39.6:

- 39.7.3.1 there shall be taken into account in addition to Capital Expenditure all the costs and expenses to be incurred by Project Co in performing Project Operations as a consequence of the Relevant Works Change in Law including the additional future capital expenditure, maintenance and lifecycle costs;
- 39.7.3.2 in taking these costs into account they shall be expressed in nominal terms; and
- 39.7.3.3 all future costs and expenses shall be discounted at the relevant cash balance deposit rates prevailing at the time Project Co makes its application for payment in relation to the Relevant Works Change in Law having regard to the expenditure profile of such costs and expenses.
- 39.7.4 "Cumulative Allowable Expenses" means the cumulative amount of the Allowable Expenses from time to time (excluding any De Minimis Amount but including any Additional De Minimis Amount); and
- 39.7.5 "Board's Cost Share" means an amount equal to the percentage share of the relevant Allowable Expenses that are to be borne by the Board as indicated in Column 3 in the Table B below and which is calculated by reference to the ratio that the Cumulative Allowable Expenses at that time bears to the Capital Cost of the Facilities:

**Table B**

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

#### General Change in Law

- 39.8 Either party may give notice to the other of the need for a Variation which is necessary in order to enable Project Co to comply with any Change in Law which is not a Relevant Change in Law, in which event:
- 39.8.1 the parties shall meet within fifteen (15) Business Days to consult in respect of the effect of the Change in Law and any Variation required as a consequence; and
- 39.8.2 within ten (10) Business Days of the meeting referred to in Clause 39.8.1 above the Board's Representative shall, if a Variation is required in order to comply with

the Change in Law, issue a Variation Enquiry and the relevant provisions of Part 22 of the Schedule (Variation Procedure) shall apply except that:

- 39.8.2.1 Project Co may give notice to the Board's Representative that it objects to such a Variation Enquiry only on the grounds that the implementation of the Variation would not implement the Change in Law;
- 39.8.2.2 the Board shall issue a Variation Confirmation in respect of the Variation in accordance with the relevant provisions of Part 22 of the Schedule (Variation Procedure);
- 39.8.2.3 the provisions of Clause 16 (Consents and Planning Approval) shall apply and, to avoid doubt, the provisions of paragraph 5 of Part 1 of Part 22 of the Schedule (Variation Procedure) shall not apply;
- 39.8.2.4 the Board shall not be entitled to withdraw any Variation Enquiry or Variation Confirmation issued in accordance with this Clause 39.8; and
- 39.8.2.5 Project Co shall not be entitled to any payment or other compensation or relief from any performance of its obligations under this Agreement in respect of such Change in Law or associated Variation (or the consequences of either).

#### 40 VARIATION PROCEDURE

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

## PART J: DELAY EVENTS, RELIEF EVENTS AND FORCE MAJEURE

### 41 DELAY EVENTS

- 41.1 If, at any time, Project Co becomes aware that there will be (or is likely to be) a delay in completion of the Works, Project Co shall forthwith give notice to the Board's Representative to that effect specifying the relevant delay or impediment. In relation to any such delay or impediment:
- 41.1.1 if the Board's Representative is satisfied, or it is determined in accordance with Part 26 of the Schedule (Dispute Resolution Procedure), that such delay or impediment has arisen as a result of the occurrence of a Delay Event, then, subject to Clause 41.2 the Board's Representative shall allow Project Co an extension of time equal to the delay or impediment caused by such Delay Event (taking into account reasonably foreseeable consequences of the Delay Event) and shall fix a new Completion Date which shall replace the existing Completion Date; but
- 41.1.2 to avoid doubt, there shall be no extension to the Project Term as a result of any such delay or impediment.
- 41.2 If Project Co is (or claims to be) affected by a Delay Event:
- 41.2.1 it shall (and shall procure that the Project Co Parties shall) take and continue to take all reasonable steps to eliminate or mitigate the consequences of such an event upon the performance of its obligations under this Agreement and, where relevant, resume performance of its obligations affected by the Delay Event as soon as practicable; and
- 41.2.2 it shall neither be relieved from liability under this Agreement nor entitled to any extension of time for the purpose of Clause 41.1 (Delay Event) to the extent that it is delayed or impeded due to its failure (if any) to comply with its obligations under Clause 41.2.1 above.
- 41.3 For the purposes of this Agreement, Delay Events means any of the following to the extent in each case that there will be (or is likely to be) a delay in completion of the Facilities:
- 41.3.1 a Board's Works Variation initiated by a Board's Works Variation Enquiry in accordance with paragraph 2 of Part 1 of Part 22 of the Schedule (Variation Procedure) in relation to which Project Co has issued a response pursuant to paragraph 3.2.2 of Part 1 of Part 22 of the Schedule (Variation Procedure) specifying and providing evidence that implementation of the Board's Works Variation would delay the completion of the Facilities if this has been agreed between the parties or determined to be the case in accordance with Part 26 of the Schedule (Dispute Resolution Procedure);
- 41.3.2 any breach by the Board and/or any Board Party of any of the Board's express obligations under this Agreement (including any delay in the Board procuring access to the Site pursuant to Clause 14 (Nature of Land Interests) or any breach by the Scottish Ministers or the then heritable proprietor of the Site of any of their express obligation under the Licence or any obstruction of the Ancillary Rights afforded to Project Co pursuant to Clause 14 (Nature of Land Interests) by the

Board or any Board Party to the extent in each case that any such breach is not caused, or contributed to, by Project Co or any Project Co Party;

- 41.3.3 the execution of works on the Site not forming part of this Agreement by the Board or any contractors employed by the Board;
  - 41.3.4 opening up of the Works pursuant to Clauses 18.3 to 18.7 (inclusive) (Right to open up) where such Works are not subsequently found to be defective (unless it is agreed or determined in accordance with Part 26 of the Schedule (Dispute Resolution Procedure) that the opening up of the Works was reasonable in the light of other defects previously discovered by the Board);
  - 41.3.5 Force Majeure;
  - 41.3.6 a Relief Event; or
  - 41.3.7 a Relevant Change in Law referred to in Clause 39.3.1 (Discriminatory) or 39.3.2 (NHS Specific).
- 41.4 Without prejudice to the generality of Clause 41.1, Project Co shall give notice in writing to the Board's Representative as soon as it (or the Contractor) can reasonably foresee a Delay Event occurring or, if the same is not reasonably foreseeable, as soon as it (or the Contractor) shall become aware of a Delay Event. Project Co shall within ten (10) Business Days after such notification, give further written details to the Board's Representative which shall include:
- 41.4.1 a statement of which Delay Event the claim is based upon;
  - 41.4.2 details of the circumstances from which the Delay Event arises;
  - 41.4.3 details of the contemporary records which Project Co will maintain to substantiate its claim for extra time;
  - 41.4.4 details of the consequences (whether direct or indirect, financial or non-financial) which such Delay Event may have upon completion of the Facilities; and
  - 41.4.5 details of any measures which Project Co proposes to adopt to mitigate the consequences of such Delay Event.
- 41.5 As soon as possible but in any event within five (5) Business Days of Project Co (or the Contractor) receiving, or becoming aware of, any supplemental information which may further substantiate or support Project Co's claim then Project Co shall submit further particulars based on such information to the Board's Representative.
- 41.6 The Board's Representative shall, after receipt of written details under Clause 41.4, or of further particulars under Clause 41.5, be entitled by notice in writing to require Project Co to provide such further supporting particulars as he may reasonably consider necessary. Project Co shall afford the Board's Representative reasonable facilities for investigating the validity of Project Co's claim including, without limitation, on-site inspection.

- 41.7 Subject to the provisions of this Clause, the Board's Representative shall fix a revised Completion Date in accordance with Clause 41.1 (New Completion Date) as soon as reasonably practicable and in any event within five (5) Business Days of the later of:
- 41.7.1 the date of receipt by the Board's Representative of Project Co's notice given in accordance with Clause 41.4 and the date of receipt of any further particulars (if such are required under Clause 41.6), whichever is the later; and
  - 41.7.2 the date of receipt by the Board's Representative of any supplemental information supplied by Project Co in accordance with Clause 41.5 and the date of receipt of any further particulars (if such are required under Clause 41.6), whichever is the later.
- 41.8 If Project Co has failed to comply with the requirements as to the giving of notice under Clause 41.4, or has failed to maintain records or afford facilities for inspection to the Board's Representative, then the following provisions shall apply:
- 41.8.1 the Board's Representative may require Project Co to submit details of the reasons for such failure. If the Board's Representative has not stated that he is satisfied with the reasons given within five (5) Business Days of their receipt, Project Co may refer the matter for resolution in accordance with Part 26 of the Schedule (Dispute Resolution Procedure);
  - 41.8.2 if either the Board's Representative is satisfied with the reasons given or the decision of the Dispute Resolution Procedure is that the failure is excusable, then the Board's Representative shall proceed to the evaluation of the request for an extension of time in accordance with Clause 41.7; or
  - 41.8.3 if the decision of the Board's Representative (or in the event that the decision is disputed, if the determination in accordance with Part 26 of the Schedule (Dispute Resolution Procedure)) is that the failure is not excusable, then Project Co shall not be entitled to a revised Completion Date in respect of the relevant Delay Event to the extent that the Board's Representative has, as a result of such failures, been prevented from assessing the consequences of the Delay Event.
- 41.9 If:
- 41.9.1 the Board's Representative declines to fix a revised Completion Date; or
  - 41.9.2 Project Co considers that a different Completion Date should be fixed; or
  - 41.9.3 there is a disagreement as to whether a Delay Event has occurred,
- then Project Co shall be entitled to refer the matter for determination in accordance with Part 26 of the Schedule (Dispute Resolution Procedure).

#### Compensation

- 41.10 If either the Delay Event is a Delay Event referred to in Clause 41.11.1 or there is an event referred to in Clause 41.11.2 (each a "Compensation Event"), Project Co's sole right to compensation shall be as provided for in this Clause. To avoid doubt, no other Delay Event (or event referred to in Clause 41.3 pursuant to which Project Co incurs a loss or

expense) shall entitle Project Co to receive any compensation save as otherwise expressly provided in:

41.10.1 Part 22 of the Schedule (Variation Procedure) in the case of a Delay Event referred to in Clause 41.3.1 (Works Change) (subject always to the provisions of Clause 39 (Changes in Law)); or

41.10.2 Clause 39 (Changes in Law) in the case of a Delay Event referred to in Clause 41.3.7 (Discriminatory and NHS Specific Changes in Law).

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

41.11.1 any Delay Event referred to in Clause 41.3.2 (Breach), 41.3.3 (Execution of non-project related works) or 41.3.4 (Opening up of Works) for which, in each case, it has been agreed or determined pursuant to this Clause that Project Co is entitled to an extension of time;

41.11.2 in the period prior to the Actual Completion Date, in circumstances where there is no delay in completion of the Facilities, any breach by the Board and/or any Board Party of any of the Board's express obligations under this Agreement (including any delay in the Board giving access to the Site pursuant to Clause 14.1 (Nature of Land Interests) or any obstruction of the Ancillary Rights afforded to Project Co pursuant to Clause 14.1 (Nature of Land Interests) by the Board or any Board Party) to the extent in each case that any such breach is not caused, or contributed to, by Project Co or any Project Co Party or the occurrence of the circumstances described in Clause 15.3 to the extent that such circumstances are not caused, or contributed to, by Project Co or any Project Co Party.

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

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

41.13.1 exclude any amounts incurred or to be incurred as a result of any failure of Project Co (or any Project Co Party) to comply with this Clause; and

41.13.2 be reduced by any amount which Project Co will recover under any insurance policy (or would have recovered if it had complied with the requirements of this Agreement or of any policy of insurance required under this Agreement) which amount, to avoid doubt, shall not include any excess or deductibles or any amount over the maximum amount insured applicable to any such insurance policy.

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

42 RELIEF EVENTS

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

42.1.1 fire, explosion, lightning, storm, tempest, flood, bursting or overflowing of water tanks, apparatus or pipes, ionising radiation (to the extent it does not constitute Force Majeure), earthquake, riot or civil commotion;

42.1.2 failure by any statutory undertaker, utility company, local authority or other like body to carry out works or provide services;

42.1.3 accidental loss or damage to the Works and/or Facilities or any roads servicing the same;

42.1.4 without prejudice to any obligation of Project Co to provide stand-by power facilities in accordance with the Board's Construction Requirements, the Service Level Specifications, failure or shortage of power, fuel or transport;

42.1.5 blockade or embargo falling short of Force Majeure;

42.1.6 the discovery of fossils, antiquities and human remains requiring action in accordance with Clause 24 (Fossils and Antiquities); or

42.1.7 official or unofficial strike, lockout, go slow or other dispute in each case generally affecting the construction, building maintenance or facilities management industry (or a significant sector of that industry),

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

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

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

Mitigation

42.4 Where a party is (or claims to be) affected by a Relief Event:

- 42.4.1 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 as soon as practicable and use all reasonable endeavours to remedy its failure to perform; and
- 42.4.2 it shall not be entitled to rely upon the relief afforded to it pursuant to Clause 42.2 of this Agreement to the extent that it is not able to perform, or has not in fact performed, its obligations under this Agreement due to its failure (if any) to comply with its obligations under Clause 42.4.1 above.
- 42.5 The party claiming relief shall serve written notice on the other party within five (5) Business Days of it becoming aware of the relevant Relief Event. Such initial notice shall give sufficient details to identify the particular event claimed to be a Relief Event.
- 42.6 A subsequent written notice shall be served by the party claiming relief on the other party within a further five (5) Business Days of the notice referred to in Clause 42.4 (Mitigation) which shall contain such relevant information relating to the failure to perform (or delay in performing) as is available, including (without limitation) the effect of the Relief Event on the ability of the party to perform, the action being taken in accordance with Clause 42.4 (Mitigation), the date of the occurrence of the Relief Event and an estimate of the period of time required to overcome it (and/or its effects).
- 42.7 The party claiming relief shall notify the other as soon as the consequences of the Relief Event have ceased and of when performance of its affected obligations can be resumed.
- 42.8 If, following the issue of any notice referred to in Clause 42.6, the party claiming relief receives or becomes aware of any further information relating to the Relief Event (and/or any failure to perform), it shall submit such further information to the other party as soon as reasonably possible.
- 42.9 To avoid doubt, the occurrence of a Relief Event shall not entitle Project Co to any compensation.

#### 43 **FORCE MAJEURE**

- 43.1 For the purposes of this Agreement, Force Majeure means any of the following events or circumstances:
    - 43.1.1 war, civil war, armed conflict or terrorism; or
    - 43.1.2 nuclear contamination unless in any case Project Co and/or any Project Co Party is the source or cause of the contamination; or
    - 43.1.3 chemical or biological contamination of the Works and/or the Facilities and/or the Site from any of the events referred to in Clause 43.1.1 above; or
    - 43.1.4 pressure waves caused by devices travelling at supersonic speeds,
- which directly causes either party to be unable to comply with all or a material part of its obligations under this Agreement.

- 43.2 Subject to Clauses 43.3 and 43.4 the party claiming relief shall be relieved from liability under this Agreement to the extent that by reason of the Force Majeure it is not able to perform its obligations under this Agreement.
- 43.3 Where a party is (or claims to be) affected by an event of Force Majeure:
- 43.3.1 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 event of Force Majeure as soon as practicable and use all reasonable endeavours to remedy its failure to perform; and
- 43.3.2 it shall not be relieved from liability under this Agreement to the extent that it is not able to perform, or has not in fact performed, its obligations under this Agreement due to its failure (if any) to comply with its obligations under Clause 43.3.1.
- 43.4 Without prejudice to Project Co's rights under Clause 41 (Delay Events), Project Co shall only be relieved from its obligations under Clauses 17 (The Design, Construction and Commissioning Process), 18 (Right of Access of Board's Representative), 19 (Programme and Dates for Completion) and 41 (Delay Events) by Delay Events in accordance with Clause 41 (Delay Events).
- 43.5 The party claiming relief shall serve written notice on the other party within five (5) Business Days of it becoming aware of the relevant event of Force Majeure. Such initial notice shall give sufficient details to identify the particular event claimed to be an event of Force Majeure.
- 43.6 A subsequent written notice shall be served by the party claiming relief on the other party within a further five (5) Business Days which shall contain such relevant information relating to the failure to perform (or delay in performing) as is available, including (without limitation) the effect of the event of Force Majeure on the ability of the party to perform, the action being taken in accordance with Clause 43.3 (Mitigation), the date of the occurrence of the event of Force Majeure and an estimate of the period of time required to overcome it (and/or its effects).
- 43.7 The party claiming relief shall notify the other as soon as the consequences of the event of Force Majeure have ceased and of when performance of its affected obligations can be resumed.
- 43.8 If, following the issue of any notice referred to in Clause 43.6, the party claiming relief receives or becomes aware of any further information relating to the event of Force Majeure (and/or any failure to perform), it shall submit such further information to the other party as soon as reasonably possible.

#### Compensation

- 43.9 If the event of Force Majeure occurs on or after the Actual Completion Date, the provisions of Part 4, Paragraph 1 of Part 18 of the Schedule (Payment Mechanism) shall apply to determine the payments to be made to Project Co during the existence of any event of Force Majeure.

- 43.10 If an event of Force Majeure occurs prior to the Actual Completion Date, Project Co shall not be entitled to receive any compensation other than as expressly provided in Clause 48.1 (Compensation on Termination).
- 43.11 Subject to Clause 48.1 (Compensation on Termination), Project Co's sole right to payment or otherwise in relation to the occurrence of an event of Force Majeure shall be as provided in this Clause.

#### Modifications

- 43.12 The parties shall endeavour to agree any modifications to the Agreement which may be equitable having regard to the nature of an event or events of Force Majeure. Part 26 of the Schedule (Dispute Resolution Procedure) shall not apply to a failure of the Board and Project Co to reach agreement pursuant to this Clause 43.12.

## PART K: TERMINATION

### 44 PROJECT CO EVENT OF DEFAULT

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

#### Insolvency

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

- 44.1.1.1 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;
- 44.1.1.2 a receiver, administrator, administrative receiver or other encumbrancer taking possession of or being appointed over, or any distress, execution or other process being levied or enforced (and not being discharged within ten (10) Business Days) upon, the whole or any material part of the assets of Project Co;
- 44.1.1.3 Project Co ceasing to carry on business;
- 44.1.1.4 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
- 44.1.1.5 if Project Co shall suffer any event analogous to the events set out in Clauses 44.1.1.1 to 44.1.1.4 in any jurisdiction in which it is incorporated or resident;

#### Long stop

44.1.2 Project Co failing to achieve the Actual Completion Date within a period of 12 months after the Completion Date;

#### Default

44.1.3 Project Co:

- 44.1.3.1 committing a material breach of its obligations under this Agreement which has a material and adverse effect on the delivery of Clinical Services or any other services at the Facilities for which Project Co is not responsible (other than as a consequence of a breach by the Board of its obligations under this Agreement);
- 44.1.3.2 wilfully breaches Part 29 of the Schedule (Refinancing);
- 44.1.3.3 abandoning the Works (other than as a consequence of a breach by the Board of its obligations under this Agreement);

- 44.1.3.4 ceasing to provide all or a substantial part of the Services to the Board in accordance with this Agreement (other than as a consequence of a breach by the Board of its obligations under this Agreement);

#### Health and safety

- 44.1.4 At any time after the Actual Completion Date Project Co committing a material breach of its obligations under this Agreement (other than as a consequence of a breach by the Board of its obligations under this Agreement) which results in the criminal investigation, prosecution and conviction of Project Co or any Project Co Party or the Board under the Health and Safety Regime (an "H&S Conviction") provided that an H&S Conviction of a Project Co Party or the Board shall not constitute a Project Co Event of Default if, within ninety (90) Business Days from the date of the H&S Conviction (whether or not the H&S Conviction is subject to an appeal or any further judicial process), the involvement in the Project Operations of each relevant Project Co Party (which in the case of an individual director, officer or employee shall be deemed to include the Project Co Party of which that person is a director, officer or employee) is terminated and a replacement is appointed by Project Co in accordance with Clause 50.5 (Sub-contracting). In determining whether to exercise any right of termination or right to require the termination of the engagement of a Project Co Party pursuant to this Clause 44.1.4, the Board shall:

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

#### Change in Control

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

#### Assignment

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

#### Service Failure Points

- 44.1.7 Project Co being awarded a total of 4,200 or more Service Failure Points in any rolling six (6) month period; or

#### Payment

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

#### Deductions

- 44.1.9 the total Deductions taken together, for any period of six Contract Months amount to more than 30% of the Service Payment for period of six Contract Months.

#### Notification

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

#### Board's options

- 44.3 On the occurrence of a Project Co Event of Default, or within a reasonable time after the Board becomes aware of the same, and while the same is subsisting, the Board may:

- 44.3.1 in the case of the Project Co Event of Default referred to in Clauses 44.1.1, 44.1.2, 44.1.3.2, 44.1.4 to 44.1.6 and 44.1.8, terminate this Agreement in its entirety by notice in writing having immediate effect;

- 44.3.2 in the case of any Project Co Event of Default referred to in Clause 44.1.3.1, 44.1.3.3 and 44.1.3.4, serve notice of default on Project Co requiring Project Co at Project Co's option either:

- 44.3.2.1 to remedy the Project Co Event of Default referred to in such notice of default (if the same is continuing) within twenty (20) Business Days of such notice of default; or

- 44.3.2.2 to put forward within twenty (20) Business Days of such notice of default a reasonable programme (set out, if appropriate, in stages) for remedying the Project Co Event of Default. The programme shall specify in reasonable detail the manner in, and the latest date by, which such Project Co Event of Default is proposed to be remedied (Project Co shall only have the option of putting forward a programme in accordance with this Clause 44.3.2.2 if it first notifies the Board within ten (10) Business Days of such notice of default that it proposes to do so); and

- 44.3.3 in the case of any Project Co Event of Default referred to in Clauses 44.1.7 (Service Failure Points) and 44.1.9 (Deductions), if Project Co is awarded 1800 or more Service Failure Points in the following four (4) months, terminate this Agreement in its entirety by notice in writing having immediate effect.

#### Remedy provisions

- 44.4 Where Project Co puts forward a programme in accordance with Clause 44.3.2.2, the Board shall have twenty (20) Business Days from receipt of the same within which to notify Project Co (acting reasonably) that it does not accept the programme, failing which the Board shall be deemed to have accepted the programme. Where the Board notifies Project Co that it does not accept the programme as being reasonable, the parties shall

endeavour within the following five (5) Business Days to agree any necessary amendments to the programme put forward. In the absence of agreement within five (5) Business Days, the question of whether the programme (as the same may have been amended by agreement) will remedy the Project Co Event of Default in a reasonable manner and within a reasonable time period (and, if not, what would be a reasonable programme) may be referred by either party for resolution in accordance with Part 26 of the Schedule (Dispute Resolution Procedure).

44.5 If:

44.5.1 the Project Co Event of Default notified in a notice of default served under Clause 44.3.2 is not remedied before the expiry of the period referred to in Clause 44.3.2.1; or

44.5.2 where Project Co puts forward a programme pursuant to Clause 44.3.2.2 which has been accepted by the Board or has been determined to be reasonable and Project Co fails to achieve any element of the programme or the end date for the programme (as the case may be); or

44.5.3 any programme put forward by Project Co pursuant to Clause 44.3.2.2 is rejected by the Board as not being reasonable, and the Dispute Resolution Procedure does not find against that rejection,

then the Board may terminate this Agreement in its entirety by written notice to Project Co with immediate effect. Provided that for the purposes of Clause 44.5.2 if Project Co's performance of the programme is adversely affected by the occurrence of Force Majeure, a Relief Event or an Excusing Cause then, subject to Project Co complying with the mitigation and other requirements in this Agreement concerning Force Majeure, a Relief Event or an Excusing Cause (as the case may be), the time for performance of the programme or any relevant element of it shall be deemed to be extended by a period equal to the delay caused by Force Majeure, the Relief Event or the Excusing Cause (as the case may be) which is agreed by the parties or determined in accordance with Part 26 of the Schedule (Dispute Resolution Procedure).

#### Replacement of a non-performing Sub-Contractor

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

44.7 If the Board exercises its rights under Clause 44.6, Project Co shall forthwith put forward proposals for the interim management or provision of the relevant Service performed pursuant to the previous Service Contract or Sub-Contract to the Board until such time as an alternative Service Provider or Sub-Contractor can be engaged by Project Co. If Project Co fails to do so (or its proposals if implemented are not reasonably likely to give adequate provision of the relevant Services) then without prejudice to the other rights of

the Board in this Clause, the Board may perform, or procure a third party to perform, such Services itself and the provisions of Clauses 29.6 to 29.12 (inclusive) (Monitoring of Performance) shall apply, changed according to context to such Service in those circumstances.

- 44.8 If Project Co fails to terminate the relevant Service (or procure the termination of the relevant Service) and to appoint a replacement Service Provider or procure the appointment of a replacement Sub-Contractor in accordance with the provisions of Clause 44.6 the Board shall be entitled at its option to exercise its rights in accordance with the provisions of Clause 44.5.

#### Board's costs

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

## 45 BOARD EVENT OF DEFAULT

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

#### Project Co's options

45.2 On the occurrence of a Board Event of Default, or within a reasonable time after Project Co becomes aware of the same, and while the same is still subsisting, Project Co may, at its option:

45.2.1 in respect of execution of the Works prior to the Actual Completion Date, suspend performance by it of its obligations under this Agreement until such time as the Board shall have demonstrated to the reasonable satisfaction of Project Co that it will perform and is capable of performing its obligations under this Agreement; or

45.2.2 serve notice on the Board and the Director of Performance Management and Finance, Scottish Executive Health Department (or such other substitute party as may be notified in advance in writing by the Board to Project Co) of the occurrence (and specifying details) of such Board Event of Default. If the relevant matter or circumstance has not been rectified or remedied by the Board (or otherwise) in respect of Clause 45.1.1 or 45.1.3 within sixty (60) Business Days of such notice, and in respect of Clause 45.1.2 within thirty (30) Business Days of such notice, Project Co may serve a further notice on the Board and the Director of Performance Management and Finance, Scottish Executive Health Department (or its substitute notified in accordance with this Clause 45.2.2) terminating this Agreement with immediate effect.

45.3 Project Co shall not exercise or purport to exercise any right to terminate this Agreement (or accept any repudiation of this Agreement) except as expressly set out in this Agreement.

#### 46 NON-DEFAULT TERMINATION

##### Force Majeure

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

##### Voluntary termination

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

##### Expiry

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

47 **EFFECT OF TERMINATION**

Termination

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

Continued effect - no waiver

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

Continued performance

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

Transfer to Board of Assets, Contracts etc.

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

- 47.4.1 if prior to the Actual Completion Date, in so far as any transfer shall be necessary fully and effectively to transfer property to the Board, Project Co shall transfer to, and there shall vest in, the Board, such part of the Works and/or the Facilities as shall have been constructed and such items of the Plant and Group 1 Equipment as shall have been procured by Project Co and if the Board so elects:

- 47.4.1.1 all goods and all materials on or near to the Site not yet incorporated in the Works shall remain available to the Board for the purposes of completing the Works and if the cost of such goods and materials has not been reflected in the payment of any compensation pursuant to Part 23 of the Schedule (Compensation on Termination), subject to the payment by the Board (as determined between a willing vendor and willing purchaser with any disputes determined pursuant to Clause 56 (Dispute Resolution Procedure)); and

- 47.4.1.2 the construction plant shall remain available to the Board for the purposes of completing the Works, subject to payment of the Contractor's reasonable charges;

- 47.4.2 Project Co shall hand over to, and there shall vest in, the Board, 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 Part 24 of the Schedule (Handback Procedure));

47.4.3 if the Board so elects, Project Co shall procure that any of the Construction Contract, the Service Contracts and/or the Independent Tester Contract shall be novated or assigned to the Board, provided that where termination occurs under Clause 45 (Board Event of Default) the consent of the Contractor, the Service Provider or the Independent Tester (as the case may be) shall be required;

47.4.4 Project Co shall, or shall procure that any Contracting Associate shall (as the case may be), offer to sell to the Board at a fair value (determined as between a willing vendor and willing purchaser, with any disputes as to such fair value being determined pursuant to Part 26 of the Schedule (Dispute Resolution Procedure)), free from any 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 Project Co or any of its Contracting Associates and reasonably required by the Board in connection with the operation of the Facilities or the provision of the Services;

47.4.5 Project Co shall deliver to the Board (as far as not already delivered to the Board) one complete set of:

47.4.5.1 "as built drawings" showing all alterations made to the Facilities since the commencement of operation of the Facilities; and

47.4.5.2 maintenance, operation and training manuals for the Facilities;

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

47.4.7 Project Co shall deliver 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 Project Co or its Contracting Associates (in which case complete copies shall be delivered to the Board).

47.5 Project Co shall ensure that provision is made in all contracts of any description whatsoever to ensure that the Board will be in a position to exercise its rights, and Project Co will be in a position to comply with its obligations, under Clause 47.4.

#### Termination

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

Transitional arrangements

- 47.7 On the termination of this Agreement for any reason, for a reasonable period both before and after any such termination, Project Co shall have the following duties:
- 47.7.1 Project Co shall co-operate fully with the Board and any successor providing to the Board services in the nature of any of the Services or any part of the Services in order to achieve a smooth transfer of the manner in which the Board obtains services in the nature of the Services and to avoid or mitigate in so far as reasonably practicable any inconvenience or any risk to the health and safety of the employees of the Board and members of the public;
  - 47.7.2 Project Co shall as soon as practicable remove from the Site all property not acquired by the Board pursuant to Clause 47.4 (or not belonging to the Board or any Board Party) and if it has not done so within forty (40) Business Days after any notice from the Board requiring it to do so the Board may (without being responsible for any loss, damage, costs or expenses) remove and sell any such property and shall hold any proceeds less all costs incurred to the credit of Project Co;
  - 47.7.3 Project Co shall forthwith deliver to the Board's Representative:
    - 47.7.3.1 any keys to the Facilities; and
    - 47.7.3.2 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 Project Co shall as soon as practicable vacate the Site and (without prejudice to Part 24 of the Schedule (Handback Procedure)) shall leave the Site and the Facilities in a safe, clean and orderly condition.
- 47.8 If the Board wishes to conduct a competition prior to the Expiry Date with a view to entering into an agreement for the provision of services (which may or may not be the same as, or similar to, the Services or any of them) following the expiry of this Agreement, Project Co shall co-operate with the Board fully in such competition process including (without limitation) by:
- 47.8.1 providing any information which the Board may reasonably require to conduct such competition but, to avoid doubt, information which is commercially sensitive to Project Co shall not be provided (and, for the purpose of this Clause 47.8 commercially sensitive shall mean information which would if disclosed to a competitor of Project Co give that competitor a competitive advantage over Project Co and thereby prejudice the business of Project Co but shall, to avoid doubt, exclude any information required to be disclosed in terms of Clause 30 (Employment matters)); and

- 47.8.2 assisting the Board by providing all (or any) participants in such competition process with access to the Site and the Facilities.

#### Continuing Obligations

- 47.9 Save as otherwise expressly provided in this Agreement:

- 47.9.1 termination of this Agreement shall be without prejudice to any accrued rights and obligations under this Agreement as at the date of termination; and
- 47.9.2 termination of this Agreement shall not affect the continuing rights and obligations of Project Co and the Board under Clauses 7 (Warranties), 8 (Indemnities and Liability), 9 (Limits on Liability), 14 (Nature of Land Interests), 30 (Employment Matters), 35 (Payment), 36 (Insurance), 43 (Force Majeure), 46 (Non-Default Termination), 47.7 and 47.8 (Transitional Arrangements), 48 (Compensation on Termination), 51 (Intellectual Property), 52 (Confidentiality), 53 (Taxation), 54 (Corrupt Gifts and Payments), 55 (Records and Reports), 56 (Dispute Resolution Procedure), 57 (Notices), 67 (Mitigation) and Clause 68 (Governing Law and Jurisdiction) or under any other provision of this Agreement which is expressed to survive termination or which is required to give effect to such termination or the consequences of such termination.

## 48 COMPENSATION ON TERMINATION

- 48.1 If this Agreement is terminated pursuant to Clause 46.1 (Force Majeure), then the Board shall pay compensation to Project Co in accordance with Part C of Part 23 of the Schedule (Compensation on Termination).
- 48.2 If this Agreement is terminated pursuant to Clause 44 (Project Co Event of Default) other than pursuant to Clause 44.1.3.2 (Refinancing), then the Board shall pay compensation to Project Co in accordance with Part B of Part 23 of the Schedule (Compensation on Termination).
- 48.3 If this Agreement is terminated pursuant to Clause 45 (Board Event of Default), then the Board shall pay compensation to Project Co in accordance with Part A of Part 23 of the Schedule (Compensation on Termination).
- 48.4 If this Agreement is terminated pursuant to Clause 46.2 (Voluntary Termination), then the Board shall pay compensation to Project Co in accordance with Part A of Part 23 of the Schedule (Compensation on Termination).
- 48.5 If this Agreement is terminated pursuant to Clause 54 (Corrupt Gifts and Payments) or Clause 44.1.3.2 (Refinancing), then the Board shall pay compensation to Project Co in accordance with Part D of Part 23 of the Schedule (Compensation on Termination).

#### Tax equalisation

- 48.6 Where a payment is to be made to Project Co pursuant to Clauses 48.1 (Force Majeure), 48.3 (Board Event of Default), 48.4 (Voluntary Termination) or 48.5 (Corrupt Gifts) (a "Compensation Payment") and Project Co has a Relevant Tax Liability in respect of such payment, then the amount of the Compensation Payment to be made by the Board to Project Co shall be increased so as to ensure that Project Co is in the same position (after

account is taken of the Relevant Tax Liability) as it would have been in had it not been for such Relevant Tax Liability.

48.7 For the purposes of this Clause 48:

48.7.1 "Relief" shall mean any relief, allowance or deduction in computing profits or tax or a credit against, or right to repayment of, tax granted by or pursuant to any legislation for tax purposes;

48.7.2 a "Relief derived from the Project" is a Relief which arises in connection with the Project and includes any Relief arising as a consequence of the distribution of any amount obtained in respect of the Project (other than a Compensation Payment) by Project Co (whether by way of interest, dividend or other distribution, repayment, reduction or redemption of capital or indebtedness or return of assets or otherwise); and

48.7.3 Project Co shall be regarded as having a "Relevant Tax Liability" in respect of a Compensation Payment to the extent that:

48.7.3.1 it has a liability for tax in consequence of or in respect of a Compensation Payment ("Actual Liability"); or

48.7.3.2 it would have had a liability for tax within paragraph 48.7.3.1 above but for the utilisation of a Relief other than a Relief derived from the Project ("Deemed Liability").

48.8 In determining whether Project Co has a Relevant Tax Liability by reason of a Compensation Payment, it should be assumed that any Reliefs derived from the Project which are available to Project Co (or would have been so available but for a surrender by Project Co of such Reliefs by way of group or consortium relief) for offset against the Compensation Payment, or against tax in relation to the same, have been so offset to the maximum extent possible.

48.9 Project Co shall keep the Board fully informed of all negotiations with the Inland Revenue in relation to any Relevant Tax Liability in respect of a Compensation Payment. Project Co shall not agree, accept or compromise any claim, issue or dispute relating to such Relevant Tax Liability without the prior written consent of the Board, which shall not be unreasonably withheld or delayed. The Board may, if it considers in good faith that such action is justified having regard to the likely costs and benefits, direct Project Co to resist, appeal, defend or otherwise dispute the Relevant Tax Liability in respect of the Compensation Payment, provided that the cost of any such dispute (including any interest or penalties incurred) shall be at the Board's expense. However, if Project Co obtains professional advice from an independent person with relevant expertise that any resistance, appeal, defence or other mode of dispute is not likely to result in any more beneficial position in relation to the Relevant Tax Liability, Project Co shall be entitled not to continue with such resistance, appeal, defence or other mode of dispute. Where any resistance, appeal, defence or other mode of dispute results in a more beneficial position in relation to the Relevant Tax Liability, an adjustment will be made to the amount payable under Clause 48.6 (Tax equalisation) to reflect such outcome.

48.10 Any increase in the amount of a Compensation Payment which is payable under Clause 48.6 (Tax equalisation) shall be paid on the later of five (5) Business Days after a

demand therefor (together with evidence in sufficient detail for the Board to satisfy itself of the Relevant Tax Liability and its calculation) is made by Project Co and:

48.10.1 in the case of an Actual Liability, five (5) Business Days before the date on which the relevant tax must be paid to the tax authority in order to avoid incurring interest and penalties; and

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

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

#### Rights of Set-Off

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

#### Full and final settlement

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

48.13.1 any compensation paid pursuant to this Clause shall be in full and final settlement of any claim, demand and/or proceedings of Project Co in relation to any termination of this Agreement, the Licence and/or any Project Document (and the circumstances leading to such termination) and Project Co shall be excluded from all other rights and remedies in respect of any such termination; and

48.13.2 the compensation payable (if any) pursuant to any of Clauses 48.1 to 48.5 above shall be the sole remedy of Project Co and Project Co shall not have any other right or remedy in respect of such termination.

## 49 HANDBACK PROCEDURE

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

PART L: MISCELLANEOUS

50 ASSIGNATION, SUB-CONTRACTING AND CHANGES IN CONTROL

Assignment

- 50.1 This Agreement, and any other agreement in connection with the Project to which both the Board and Project Co are a party shall be binding on, and shall enure to the benefit of, Project Co and the Board and their respective successors and permitted transferees and assignees. In the case of the Board, its successors shall include any person to whom the Scottish Ministers, in exercising their statutory powers to transfer property, rights and liabilities of the Board upon the Board ceasing to exist, transfers the property, rights and obligations of the Board under this Agreement, the Licence and such other agreements in connection with the Project to which the Board and Project Co are both a party. The Licence shall be binding upon and shall enure to the full benefit of Project Co and the Scottish Ministers and their respective successors and permitted transferees and assignees.
- 50.2 Subject to Clause 50.3, Project Co shall not, without the prior written consent of the Board, assign, transfer, sub-contract or otherwise dispose of any interest in this Agreement, the Licence, the Independent Tester Contract, the Construction Contract, the Service Contracts and any other contract entered into by Project Co for the purposes of performing its obligations under this Agreement.
- 50.3 The provisions of Clause 50.2 do not apply to the grant or enforcement of any security, in a form approved by the Board prior to its grant (such approval not to be unreasonably withheld or delayed), for any loan made to Project Co under the Initial Funding Agreements provided that any assignee shall enter into the Funders' Direct Agreement in relation to the exercise of its rights, if the Board so requires.
- 50.4 The Board shall not assign or otherwise dispose of the benefit of the whole or part of this Agreement or any agreement in connection with this Agreement to which Project Co and the Board are a party to any person, save:
- 50.4.1 to the Scottish Ministers, a Health Board or any other person or body replacing any of the foregoing (or to whom the Scottish Ministers exercising their statutory rights would be entitled to transfer such benefits) covered by the National Health Service (Residual Liabilities) Act 1996; or
- 50.4.2 with the prior written consent of Project Co (such approval not to be unreasonably withheld or delayed),
- provided that nothing in this Clause shall restrict the rights of the Scottish Ministers to effect a statutory transfer.

Sub-contractors

- 50.5 Project Co shall:
- 50.5.1 not terminate or agree to the termination of the engagement and/or employment of (or the replacement of) the Contractor or any Service Provider under the Ancillary Documents; and

50.5.2 without prejudice to Clause 50.1 (Assignment), procure that none of the persons listed below shall sub-contract all (or substantially all) of their obligations under or in the agreement set out next to its name:

Person	Contract
Contractor	Construction Contract
Service Provider	Service Contract

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

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

#### Changes in Control

- 50.8 Subject to Clause 50.9, prior to the expiry of a period of twelve (12) months commencing on the Actual Completion Date, no Change in Control in any or all of the shares in Project Co (or any company of which Project Co is a subsidiary excluding publicly quoted parent companies whose equity securities are listed on a recognised investment exchange as defined in Section 285 Financial Services and Markets Act 2000) shall be permitted without the prior written approval of the Board.
- 50.9 Subject to Clause 50.10, the conditions and restrictions in Clause 50.8 shall not apply to a Change in Control in any shares in Project Co (or any company of which Project Co is a wholly owned subsidiary) held by any Third Party Shareholder where such Change in Control is as a result of a transfer of such shares to another Third Party Shareholder.
- 50.10 No Change in Control (at any time) in any or all of the shares in Project Co (or any company (other than a public quoted company whose equity securities are listed on a recognised investment exchange, as defined in Section 285 of the Financial Services and Markets Act 2000) of which Project Co is a subsidiary) shall be permitted without the prior written approval of the Board where the person acquiring control is a Restricted Person.

## 51 INTELLECTUAL PROPERTY

### Project Data

- 51.1 Project Co shall make available to the Board free of charge (and hereby irrevocably licence the Board to use) all Project Data that might reasonably be required by the Board

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

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 Project Co:

51.2.1 hereby grants to the Board, free of charge, an irrevocable, non-exclusive and transferable (but only to any assignee or transferee of any rights or benefits under this Agreement or upon or at any time following termination of this Agreement) licence (carrying the right to grant sub-licences) to use the Intellectual Property Rights which are or become vested in Project Co; and

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 the Board,

in both cases, solely for the Approved Purposes.

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

#### Maintenance of data

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

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 for any relevant software to enable the Board or its nominee to access and otherwise use (subject to the payment by the Board of the relevant fee, if any) such data for the Approved Purposes. As an alternative, Project Co may provide such data, materials or documents in a format which may be read by software generally available in the market at the relevant time or in hard copy format;

- 51.4.2 allow the Board to have access (on a read-only basis) to such data pursuant to its rights to monitor Project Co's performance of its obligations under this Agreement in accordance with Clauses 25.12 and 29 of 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 Project Co shall ensure the back-up and storage in safe custody of the data, materials and documents referred to in Clause 51.4 in accordance with Good Industry Practice. Without prejudice to this obligation, Project Co shall submit to the Board's Representative for approval its proposals for the back-up and storage in safe custody of such data, materials and documents and the Board shall be entitled to object if the same is not in accordance with Good Industry Practice. Project Co shall comply, and shall cause all Project Co Parties to comply, with all procedures to which the Board's Representative has given its approval. Project Co may vary its procedures for such back-up and storage subject to submitting its proposals for change to the Board's Representative, who shall be entitled to object on the basis set out above.

#### Claims

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

#### Data Protection

- 51.7 For the purpose of the following Clauses, the term "personal data" shall have the meaning given to it in the Data Protection Act 1998.
- 51.8 Project Co undertakes to the Board that it shall comply with the obligations of a "data controller" under the provisions of the Seventh Data Protection Principle as set out in Schedule 1 of the Data Protection Act 1998. In addition, Project Co:
  - 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 Sub-Contractors (and their agents and sub-contractors of any tier have or will have at all material times) the appropriate technical and organisational measures in place against unauthorised or unlawful processing of personal data and against accidental loss or destruction of, or damage to, personal data held or processed by it and that it has taken, or will take at all material times, all reasonable steps to ensure the reliability of any of its staff which will have access to personal data processed as part of the Project Operations;
  - 51.8.2 undertakes that it will act only on the instructions of the Board in relation to the processing of any personal data made available by or on behalf of the Board as part of the Project Operations;

51.8.3 undertakes that it will only obtain, hold, process, use, store and disclose personal data as is necessary to perform its obligations under this Agreement and (without prejudice to Clause 5.2 (General standards)) that such data will be held, processed, used, stored and disclosed only in accordance with the Data Protection Act 1998 and any other applicable Law; and

51.8.4 undertakes to 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 In this Agreement, "Confidential Information" means all information relating to the other party which is supplied by or on behalf of the other party (whether before or after the date of this Agreement), either in writing, orally or in any other form, directly or indirectly from or pursuant to discussions with the other party or which is obtained through observations made by the receiving party. "Confidential Information" also includes all analyses, compilations, studies and other documents whether prepared by or on behalf of a party which contain or otherwise reflect or are derived from such information.

### Use and disclosure of Confidential Information

52.2 Each party shall hold in confidence any Confidential Information, provided that the provisions of this Clause shall not restrict either party from passing such information to its professional advisers, 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, and provided further that Project Co may, subject to obtaining appropriate confidentiality restrictions:

52.2.1 pass to the Funders such documents and other information as are reasonably required by the Funders in connection with the raising of finance for the Project Operations or which Project Co is obliged to supply by the terms of the Funding Agreements; and

52.2.2 pass to the Contractor and the Service Providers documents and other information which are necessary for Project Co'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 which the other party confirms in writing is not required to be treated as Confidential Information;

52.3.2 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 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 as the Board may require for the purpose of the Project Operations or for the operation, maintenance or improvement of the Facilities in the event of, or following, termination of this Agreement;
- 52.3.5 disclosed pursuant to Clause 52.5 (Scottish Executive Health Department Disclosure);
- 52.3.6 to the extent required to be disclosed pursuant to Clause 38.2 (Information and Audit Access); or
- 52.3.7 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 Board information, details of all matters relating to this Agreement, the Project Documents to which the Board 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 Project Co or the Board.

#### 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 Confidential Information or in the case of Project Co of its (or any Project Co Party's) interest in the Project or, in any such case, any matters relating thereto, without the prior written consent of the other party (which shall not be unreasonably withheld or delayed).

#### Scottish Executive Health Department Disclosure

- 52.5 Subject to Clause 52.6, the Board shall be free to disclose the terms of this Agreement, the Independent Tester Contract, the Funders' Direct Agreement and the Collateral Agreements to the Scottish Executive Health Department and the parties agree that the Board and the Scottish Executive Health Department shall be free to use and disclose and/or make public such information on such terms and in such manner as the Board and the Scottish Executive Health Department see fit.
- 52.6 The Board shall notify Project Co in writing not less than ten (10) Business Days prior to any intended disclosure of the terms of any of the documents referred to in Clause 52.5 to the Scottish Executive Health Department. Project Co shall notify the Board in writing of any terms of such documents (the "Sensitive Information") that Project Co objects to being disclosed within five (5) Business Days of any such notification by the Board (failing which Project Co shall be deemed to have notified the Board that it has no objection to any such disclosure). Without prejudice to the Board's right to disclose the Sensitive Information pursuant to Clause 52.5, the Board shall consult with Project Co following receipt of a notification from Project Co that it objects to disclosure of such Sensitive Information

with a view to agreeing whether or not part or all of the Sensitive Information can be removed from the information to be disclosed.

## 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, Project Co becomes unable to recover VAT attributable to supplies to be made to the Board by Project Co pursuant to this Agreement, the Board and Project Co shall co-operate in so far as is reasonable and practicable to ensure that Project Co is left in no better and no worse position than it would have been had such Change in Law not occurred (including but not limited to making such amendments to the Agreement as Project Co and the Board shall agree acting reasonably), provided that Project Co shall use all reasonable endeavours to mitigate the adverse effects of any such Change in Law.
- 53.9 The provisions of Clause 53.8 shall apply only if (and to the extent that) the Change in Law was not reasonably foreseeable at the date of this Agreement by an experienced contractor performing operations similar to the relevant Project Operations on the basis of

draft bills published in Government green or white papers or other Government departmental consultation papers, bills, draft statutory instruments or draft instruments or proposals published in the Official Journal of the European Union, in each case published:

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):

53.11.1.1 "the Act" means the Income and Corporation Taxes Act 1988;

53.11.1.2 "the Regulations" means the Income Tax (Sub-Contractors in the Construction Industry) Regulations 1993 (SI 1993/743);

53.11.1.3 "contractor" means a person who is a contractor for the purposes of the Act and the Regulations;

53.11.1.4 "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;

53.11.1.5 "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;

53.11.1.6 "sub-contractor" means a person who is a sub-contractor for the purposes of the Act and the Regulations; and

53.11.1.7 "tax certificate" is a certificate issued under Section 561 of the Act;

53.11.2 not later than fifteen (15) Business Days before the first payment under this Agreement is due to be made to Project Co or after this Clause applies for the first time and on each occasion when this Clause applies following a period when it has not so applied, Project Co shall either:

53.11.2.1 provide the Board with the evidence that Project Co is entitled to be paid without the statutory deduction; or

53.11.2.2 inform the Board in writing that it is not entitled to be paid without the statutory deduction;

53.11.3 if the Board is not satisfied with the validity of the evidence submitted in accordance with Clause 53.11.2, it shall within ten (10) Business Days of Project Co submitting such evidence notify Project Co in writing that it intends to make

the statutory deduction from payments due under this Agreement to Project Co and give its reasons for that decision, and thereupon Clause 53.11.7 below shall apply;

53.11.4 where Clause 53.11.2.2 applies, Project Co shall immediately inform the Board 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 Project Co expires before the final payment is made to Project Co under this Agreement and provided that this Clause applies at that time, Project Co shall not later than twenty (20) Business Days before the date of expiry either:

53.11.5.1 provide the Board with evidence that Project Co, from the said date of expiry, is entitled to be paid for a further period without the statutory deduction, in which case the provisions of this Clause shall apply if the Board is not satisfied with the evidence; or

53.11.5.2 inform the Board in writing that it will not be entitled to be paid without the statutory deduction after the said date of expiry;

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

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

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

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

53.11.9.1 in the case of an over deduction, the Board shall correct that error by repayment of the sum over deducted to Project Co; and

53.11.9.2 in the case of an under deduction, Project Co shall correct that error or omission by repayment of the sum over deducted to the Board;

53.11.10 Project Co shall at the request of the Board produce to the Board the original of any current tax certificate which it holds and shall permit the Board to

make a copy of such tax certificate and/or to record such details in respect of such tax certificate as the Board may consider appropriate; and

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

## 54 CORRUPT GIFTS AND PAYMENTS

### Prohibition on corruption

#### 54.1 The term "Prohibited Act" means:

- 54.1.1 offering, giving or agreeing to give to the Board or any other public body or to any person employed by or on behalf of the Board or any other public body any gift or consideration of any kind as an inducement or reward:

54.1.1.1 for doing or not doing (or for having done or not having done) any act in relation to the obtaining or performance of this Agreement or any other agreement with the Board or any other public body; or

54.1.1.2 for showing or not showing favour or disfavour to any person in relation to this Agreement or any other agreement with the Board or any other public body;

- 54.1.2 entering into this Agreement or any other agreement with the Board or any other public body in connection with which commission has been paid or has been agreed to be paid by Project Co or on its behalf, or to its knowledge, unless before the relevant agreement is entered into particulars of any such commission and of the terms and conditions of any such agreement for the payment of such commission have been disclosed in writing to the Board;

- 54.1.3 committing any offence:

54.1.3.1 under the Prevention of Corruption Acts 1889-1916;

54.1.3.2 under any Law creating offences in respect of fraudulent acts; or

54.1.3.3 at common law, in respect of fraudulent acts in relation to this Agreement or any other agreement with the Board or any other public body; or

- 54.1.4 defrauding or attempting to defraud or conspiring to defraud the Board or any other public body.

### Warranty

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

### Remedies

- 54.3 If Project Co or any Project Co Party (or anyone employed by or acting on behalf of them) commits any Prohibited Act, then the Board shall be entitled to act in accordance with Clauses 54.3.1 to 54.3.6 below:
- 54.3.1 if a Prohibited Act is committed by Project Co or by an employee not acting independently of Project Co, then the Board may terminate the Agreement with immediate effect by giving written notice to Project Co;
  - 54.3.2 if the Prohibited Act is committed by an employee of Project Co acting independently of Project Co, then the Board may give written notice to Project Co of termination and the Agreement will terminate, unless within twenty (20) Business Days of receipt of such notice Project Co terminates the employee's employment and (if necessary) procures the performance of the relevant part of the Services by another person;
  - 54.3.3 if the Prohibited Act is committed by a Contracting Associate or by an employee of that Contracting Associate not acting independently of that Contracting Associate then the Board may give written notice to Project Co of termination and the Agreement will terminate, unless within twenty (20) Business Days of receipt of such notice Project Co terminates the relevant Sub-Contract and procures the performance of the relevant part of the Services by another person, where relevant, in accordance with Clause 50 (Assignment, Sub-contracting and Change in Control);
  - 54.3.4 if the Prohibited Act is committed by an employee of a Contracting Associate acting independently of that Contracting Associate, then the Board may give notice to Project Co of termination and the Agreement will terminate, unless within twenty (20) Business Days of receipt of such notice Project Co procures the termination of the employee's employment and (if necessary) procures the performance of the relevant part of the Services by another person;
  - 54.3.5 if the Prohibited Act is committed by any other person not specified in Clauses 54.3.1 to 54.3.4 above, then the Board may give notice to Project Co of termination and the Agreement will terminate unless within twenty (20) Business Days Project Co procures the termination of such person's employment and of the appointment of their employer (where the employer is not the Board and such person is not employed by Project Co or the Contracting Associate) and (if necessary) procures the performance of the relevant part of the Services by another person; and
  - 54.3.6 any notice of termination under this Clause shall specify:
    - 54.3.6.1 the nature of the Prohibited Act;
    - 54.3.6.2 the identity of the party who the Board believes has committed the Prohibited Act; and
    - 54.3.6.3 the date on which the Agreement will terminate in accordance with the applicable provisions of this Clause.
- 54.4 Without prejudice to its other rights or remedies under this Clause, the Board shall be entitled to recover from Project Co:

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

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

#### Permitted payments

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

#### Notification

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

#### Interim management

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

### 55 RECORDS AND REPORTS

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

### 56 DISPUTE RESOLUTION PROCEDURE

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

### 57 NOTICES

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

If to Project Co	c/o The Finance Director Robertson Capital Projects Limited Lomond Court Castle Business Park Stirling FK9 4TU Fax No: 01786 431 650
------------------	--

If to the Board	Greater Glasgow Health Board Primary Care Division Gartnavel Royal Hospital 1055 Great Western Road Glasgow G12 0XH
-----------------	--

For the attention of: Mr Anthony Curran -  
Head of Capital Planning

Tel No: 0141 211 3585  
Fax No: 0141 211 3790

If to the Scottish Executive Health Department

Scottish Executive Health Department  
Private Finance and Capital Unit  
Basement Rear  
St Andrew's House  
Regent Road  
Edinburgh  
EH1 3DG  
Fax No: 0131 244 3993

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

If to Project Co's Representative

Mr Stephen Kelly  
Robertson Capital Projects Limited  
Lomond Court  
Castle Business Park  
Stirling  
FK9 4TU  
Fax No: 01786 431 650

If to the Board's Representative

Mr Anthony Curran  
Head of Capital Planning  
Greater Glasgow NHS Primary Care Division  
Gartnavel Royal Hospital  
1055 Great Western Road  
Glasgow  
G12 0XH  
Tel No: 0141 211 3585  
Fax No: 0141 211 3790

If to the Scottish Executive Health Department

Scottish Executive Health Department  
Private Finance and Capital Unit  
Basement Rear  
St Andrew's House  
Regent Road  
Edinburgh  
EH1 3DG  
Fax No: 0131 244 3993

(copied in each case to the Board)

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

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

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

57.4.2 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 the Board and Project Co.

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

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

## 61 **ENTIRE AGREEMENT**

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

61.2 Each of the parties acknowledges that:

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 CONFLICTS OF AGREEMENTS**

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

**63 SEVERABILITY**

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

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

**67 MITIGATION**

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

**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 pages together with the Schedule of 34 Parts annexed hereto are executed as follows:

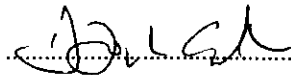
EXECUTED for and on behalf of

**GREATER GLASGOW HEALTH BOARD**

at 151 ST VINCENT ST, GLASGOW

on the 25<sup>TH</sup> day of NOVEMBER Two thousand and five

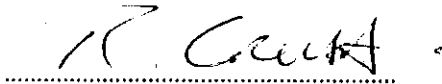
by



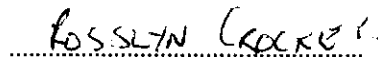
Authorised Signatory



Authorised Signatory Name



Authorised Signatory



Authorised Signatory Name

EXECUTED for and on behalf of

**ROBERTSON HEALTH (GARTNAVEL) LIMITED**


at 151 ST VINCENT ST, GLASGOW

on the 25<sup>TH</sup> day of NOVEMBER Two thousand and five

by



Director/Secretary/Authorised Signatory



Witness (Signature)



Witness (Full Name)





Witness (Full Address)